[Cite as *Tustin v. Tustin*, 2015-Ohio-3454.]

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

JULIA H. TUSTIN Appellee/Cross-Appellant v. MICHAEL K. TUSTIN Appellant/Cross-Appellee	C.A. No. 27164 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. 2011-07-2007

DECISION AND JOURNAL ENTRY

Dated: August 26, 2015

CARR, Judge.

{¶1} Appellant/cross-appellee Michael Tustin ("Husband") appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. Julia Tustin ("Wife") filed a cross-appeal. This Court affirms in part, reverses in part, and remands.

I.

{¶2} After nearly two decades of marriage, Wife filed a complaint for divorce from Husband who filed a counterclaim. One child was born during the course of the marriage. During the pendency of the divorce action, Husband filed a motion for a distributive award based on allegations that Wife engaged in financial misconduct during the marriage. Husband also sought an award of spousal support based on the disparity in the parties' incomes.

{¶3} Husband was represented by multiple attorneys during the course of the litigation, resulting in his motions to continue the trial date to allow recently retained counsel to become familiar with the case. After the trial court denied such a motion to continue the September 2012

trial date, it directed Wife's attorney to submit an affidavit of fees expended in preparation of that trial date, so that it could render an award to Wife.

{¶4} The matter ultimately proceeded to trial on April 25 and 26, and June 6, 2013, before the judge. The domestic relations court issued its final decree of divorce on October 22, 2013. Both parties appealed and now raise multiple assignments of error for review. Some assignments of error are rearranged or consolidated where necessary to facilitate review.

II.

WIFE'S ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED IN FINDING "DURATION OF THE MARRIAGE" CONTINUED UNTIL FIRST DATE OF TRIAL, RATHER THAN THE DATE WHEN THE PARTIES NO LONGER FUNCTIONED AS A MARITAL UNIT.

{¶5} Wife argues that the trial court erred in its finding as to the duration of the marriage. Specifically, Wife challenges the trial court's finding that the marriage ended on the first day of the three-day divorce trial instead of imposing a de facto termination date reflecting when the parties ceased functioning as Husband and Wife. This Court agrees.

{¶6} This Court reviews the trial court's determination as to the duration of the marriage, particularly as it relates to the termination date of the marriage, for an abuse of discretion. *Budd v. Budd*, 9th Dist. Summit No. 25469, 2011-Ohio-565, ¶ 8. Accordingly, this Court will not reverse the trial court's determination as to the duration of the marriage unless the finding is unreasonable, arbitrary, or unconscionable. *Id.*, citing *Schrader v. Schrader*, 9th Dist. Medina No. 2664-M, 1998 WL 46757, *3 (Jan. 21, 1998).

{¶7} R.C. 3105.171(A) states, in relevant part:

> (2) "During the marriage" means whichever of the following is applicable:

> (a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;
>
> (b) If the court determines that the use of either or both dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, "during the marriage" means the period of time between those dates selected and specified by the court.

{¶8} Accordingly, the statute "'creates a presumption that the proper date for termination of marriage is the date of the final divorce hearing.'" *Budd* at ¶ 8, quoting *Bowen v. Bowen*, 132 Ohio App.3d 616, 630 (9th Dist.1999). The trial court, however, may in its discretion impose a de facto termination date "where the evidence clearly and bilaterally shows that it is appropriate based on the totality of the circumstances." (Internal quotations omitted.) *Wells v. Wells*, 9th Dist. Summit No. 25557, 2012-Ohio-1392, ¶ 11, quoting *Boggs v. Boggs*, 5th Dist. Delaware No. 07 CAF 02 0014, 2008-Ohio-1411, ¶ 66.

{¶9} This Court has recognized various factors which reasonably support the use of a de facto termination date, including where the parties have not attempted reconciliation, and where they have maintained separate residences, bank accounts, and business activities. *E.g.*, *Wells* at ¶ 11, and *Budd* at ¶ 9. *See also Dill v. Dill*, 179 Ohio App.3d 14, 2008-Ohio-5310, ¶ 11 (3d Dist.). The *Dill* court set forth a more extensive, but non-exclusive, list of factors to guide the trial court in determining whether a de facto termination date is equitable. *Id*. These include whether: "(1) the parties separated on less than friendly terms, (2) the parties believed the marriage ended prior to the hearing, (3) either party cohabited with another person during the separation, (4) the parties were intimately involved during the separation, (5) the parties lived as husband and wife during the separation, (6) the parties maintained separate residences, (7) the parties utilized separate bank accounts or were/were not financially intertwined (with the

exception of temporary orders), (8) either party attempted to reconcile, (9) either party retained counsel, and (10) the parties attended social functions together or vacationed together." *Id*. Moreover, where a significant period of time had elapsed between the date the parties separated and the date of the divorce hearing, appellate courts have concluded that the trial court abused its discretion in using the date of the final hearing for purposes of the duration of the marriage. *Dill* at ¶ 12, citing *Crouso v. Crouso*, 3d Dist. No. 14-02-04, 2002-Ohio-3765, ¶ 9 ("the rare cases where an abuse of discretion was found, the facts indicated a significant lapse between separation and final hearing").

{¶10} In this case, Husband left the marital home in early November 2010, after he was arrested based on what appears to have been a domestic dispute. Accordingly, the parties separated on less than friendly terms. Wife obtained a civil protection order against Husband in April 2011, and she testified that she filed for divorce in July 2011, because there was no chance for reconciliation. Husband asserted, however, that the parties had attempted to reconcile, although it is unclear how this was possible given the civil protection order. After Husband's 2010 arrest, the parties never again lived together, vacationed together, or engaged in intimate relations together. At one point, Husband moved out of state. Although a copy of the civil protection order is not in the record, neither party disputes its existence or asserts that Husband did not comply with its terms.

{¶11} Although Husband continued to have his paychecks deposited into the parties' joint bank account for a couple months after he left the marital home, he withdrew large sums of cash from the account for his own living expenses outside the marital home. Wife testified that the parties "basically separated [their] finances" after Husband left the home, although they filed joint tax returns through 2011. Wife testified that she did want to file a joint tax return for 2012,

because Husband was not cooperative, intimidated the tax preparer, and refused to consent to deposit any refund in the parties' joint account. Wife filed an extension to file the 2012 federal tax return on behalf of both Husband and herself, due in part to the timing of the divorce hearing and Husband's lack of cooperation. During the pendency of the divorce, Husband changed jobs several times with no indication that he consulted Wife to discuss the impact, financial or otherwise, on the family.

{¶12} Husband requested that the parties sell the marital home in April 2011, although he was ultimately not cooperative in facilitating the sale based on his disagreement with Wife regarding the sale price. The trial court ordered Wife alone to pay the mortgage and other costs associated with the marital home during the pendency of the divorce action. In addition, although Wife continued to pay for Husband's health insurance during the pendency of the action, the trial court ordered her to do so. Notwithstanding her continued payments, however, Husband obtained other health insurance without notifying Wife.

{¶13} Wife filed a complaint for divorce in July 2011, and both parties obtained counsel. Husband filed a counterclaim for divorce the same month. Two-and-a-half years elapsed between the time Husband left the marital home and the final divorce hearing.

{¶14} Wife argues that the trial court abused its discretion in finding that the parties' marriage terminated for purposes of property division on the first day of the three-day divorce trial. This Court agrees. Based on the plain language of R.C. 3105.171(A)(2)(a), the trial court maintained discretion to utilize the final hearing date or, alternatively if that date would be equitable, a de facto termination date in consideration of the totality of the circumstances. Here, the trial court offered no rationale for using the first hearing date rather than the last. Moreover, a review of the totality of the circumstances indicates that the parties had effectively terminated

their marital relationship long before the divorce hearing. The civil protection order precluded contact. Husband moved out of state at one point. Although they continued to maintain a joint checking account, Husband ceased contributing funds to the account and did not communicate with Wife regarding sums he withdrew. Accordingly, there was no joint accountability for the parties' finances. There was no evidence that the parties consulted with one another regarding decisions relevant to the family during the pendency of the divorce. Husband did not inform Wife regarding his cash withdrawals or use of credit cards, his relocation, his changes in employment, or his obtaining health insurance. Wife did not discuss her decisions regarding loan repayments or home repair with Husband.

{¶15} Wife does not argue in favor of a specific de facto termination date for the marriage. Nevertheless, this Court concludes that the trial court was unreasonable in utilizing the first date of the three-day divorce trial when determining the duration of the marriage. Based on the totality of the circumstances, the parties' marriage reasonably terminated on some date prior to the commencement of the trial. Accordingly, Wife's fourth assignment of error is sustained and this matter is remanded to the domestic relations court for determination of the de facto termination date of the marriage.

WIFE'S ASSIGNMENT OF ERROR I

> THE TRIAL COURT ERRED IN ITS PROPERTY DIVISION WHEN IT (1) FAILED TO AWARD A JUDGMENT TO [WIFE] FOR ONE-HALF OF THE EXPENSE INCURRED IN PREPARING THE HOME FOR SALE, (2) OMITTED A DEFINED CONTRIBUTION RETIREMENT PLAN EARNED BY [HUSBAND], (3) FAILED TO EQUALLY DIVIDE THE BANK ACCOUNTS, (4) IN ITS VALUATION OF THE PARTIES' VEHICLES, AND (5) BY FAILING TO ALLOCATE CREDIT CARD DEBT FOUND TO BE MARITAL.

WIFE'S ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED IN ITS DIVISION OF FIRST ENERGY DEFINED BENEFIT PLAN BY (1) REFERRING TO A NON-EXISTENT SEPARATION AGREEMENT; (2) FAILING TO ALLOCATE RESPONSIBILITY FOR PREPARATION OF A QUALIFIED DOMESTIC RELATIONS ORDER IN ACCORDANCE WITH ITS DIRECTIVES, (3) FAILING TO ALLOCATE THE EXPENSE OF QDRO PREPARATION, AND (4) INCLUDING ACCUMULATIONS IN THE FIRST ENERGY PENSION PLAN THROUGH APRIL 25, 2013 AS MARITAL PROPERTY.

WIFE'S ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED WHEN IT FAILED TO AWARD A JUDGMENT IN FAVOR OF [WIFE] FOR AMOUNTS SHE EXPENDED ON HEALTH INSURANCE FOR THE BENEFIT OF [HUSBAND] AFTER HE OBTAINED HIS OWN POLICY AND FAILED TO INFORM THE COURT OR HIS WIFE, AND AFTER THE DATE WHEN THE TRIAL COURT DETERMINED THE MARRIAGE TERMINATED.

HUSBAND'S ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING ALL OF THE NET PROCEEDS FROM THE SALE OF THE MARITAL HOME TO WIFE, WHERE (1) HUSBAND CONTRIBUTED HIS INCOME TO THE MAKING OF THE HOME MORTGAGE PAYMENTS DURING THE NEARLY 18-YEAR MARRIAGE, AND (2) WIFE LISTED AND SOLD THE MARITAL HOME BELOW THE APPRAISED MARKET VALUE.

HUSBAND'S ASSIGNMENT OF ERROR VI

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO SPECIFICALLY ADDRESS THE CONTESTED ISSUE AND ORDER THE PARTIES TO FILE THEIR 2012 TAX RETURNS JOINTLY AS A MARRIED COUPLE, WHERE (1) 2012 WAS THE LAST COMPLETE CALENDAR YEAR OF THE PARTIES' MARRIAGE; (2) THE MARITAL HOME WAS SOLD IN 2012; (3) FILING EXTENSIONS HAD BEEN OBTAINED FOR THE PARTIE[S]' 2012 TAX RETURNS TO ALLOW THE COURT TO DECIDE THAT ISSUE; AND (4) THE FINAL DIVORCE DECREE WAS NOT FILED UNTIL OCTOBER OF 2013.

HUSBAND'S ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DENYING HUSBAND'S PRAYER AND MOTION FOR AN AWARD OF SPOUSAL SUPPORT, WHERE WIFE'S ANNUAL INCOME GREATLY

EXCEED[ED] HUSBAND'S ANNUAL INCOME DURING THEIR MARRIAGE.

{¶16} Husband and Wife both assign as error the domestic relations court's division of marital property on various bases. In addition, Husband challenges the trial court's determination regarding spousal support.

{¶17} "In 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 duration of the marriage * * *." R.C. 3105.171(F)(1). Accordingly, the trial court must determine the duration of the marriage prior to dividing marital assets. *See, e.g., Alexander v. Alexander*, 10th Dist. Franklin No. 09AP-262, 2009-Ohio-5856, ¶ 37 ("It is the duration of marriage that determines the valuation of the marital estate. Therefore, once the duration of marriage is established, assets and liabilities are determined in accordance with those dates."); *Hookway v. Hookway*, 9th Dist. Wayne No. 2829, 1994 WL 162343, *1 (May 4, 1994). Because we have determined that the domestic relations court erred in its determination regarding the duration of the marriage, it must revisit its determination regarding the equitable division of marital property. Therefore, all assignments of error challenging the division of marital property are not ripe for consideration. Accordingly, this Court declines to address Wife's first, second, and third assignments of error, and Husband's third and sixth assignments of error.

{¶18} Moreover, prior to making an award of spousal support, the trial court must first equitably divide the marital property. This Court has written:

> R.C. 3105.171(C)(3) dictates that the domestic relations court "shall provide for an equitable division of marital property under this section prior to making any award of spousal support * * *." In addition, the trial court "may award reasonable spousal support to either party * * * upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 of the Revised Code[.]" R.C. 3105.18(B). * * * "Thus, the trial court was required to make an equitable division of the marital property under

> R.C. 3105.171 before it could make an award of spousal support." *Wells*, 2012-Ohio-1392, at ¶ 24.

Uphouse v. Uphouse, 9th Dist. Summit No. 27057, 2014-Ohio-2514, ¶ 9.

{¶19} As we have determined that the domestic relations court must revisit its determinations regarding the division of marital property after revisiting its determination regarding the duration of the marriage, any issues regarding spousal support are not ripe for consideration. Accordingly, this Court declines to address Husband's first assignment of error.

WIFE'S ASSIGNMENT OF ERROR V

> THE TRIAL COURT ERRED IN ITS CALCULATION OF FATHER'S INCOME FOR CHILD SUPPORT PURPOSES, AS IT SHOULD HAVE INCLUDED HIS FULL TIME AND PART TIME INCOME AND EARNING ABILITIES, AND BONUSES.

{¶20} Wife argues that the trial court erred in calculating Husband's income for purposes of determining child support. This Court disagrees.

{¶21} This Court reviews a trial court's determination regarding child support matters for an abuse of discretion. *Arnott v. Arnott*, 9th Dist. Summit No. 21291, 2003-Ohio-2152, ¶ 9, citing *Pauly v. Pauly*, 80 Ohio St.3d 386, 390 (1997). "A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by evidence, or grossly unsound." *Menke v. Menke*, 9th Dist. Summit No. 27330, 2015-Ohio-2507, ¶ 8, quoting *Tretola v. Tretola*, 3d Dist. Logan No. 8-14-24, 2015-Ohio-1999, ¶ 25.

{¶22} Wife argues that the trial court erred by failing to include Husband's potential bonus income when it averaged three years' income for purposes of determining his income relevant to the child support calculation. Significantly, Wife only argues that there is a bonus structure in place, not that Husband has always received bonuses. In this case, although Husband

had the potential to receive bonuses, Wife has not demonstrated that Husband has consistently received any minimum bonuses.

{¶23} In essence, Wife argues that the trial court erred by failing to impute speculative bonus income (based on 25%, 50%, 75%, or 100% of potential earned bonuses) to Husband. However, as this Court has consistently held, "for purposes of calculating child support, the trial court cannot impute income to either party without first making a finding that the party is voluntarily unemployed or underemployed." *Musci v. Musci*, 9th Dist. Summit No. 23088, 2006-Ohio-5882, ¶ 11.

{¶24} In this case, Wife does not argue that Husband is voluntarily unemployed or underemployed.[1] Moreover, she does not argue that the trial court erred in failing to find Husband voluntarily unemployed or underemployed. As Wife has failed to make any argument in support of this threshold issue, we decline to create one for her. *Ward v. Ward*, 9th Dist. Summit No. 26372, 2012-Ohio-5658, ¶ 15, citing *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934 (May 6, 1998) (holding that "if an argument exists that can support [an] assignment of error, it is not this court's duty to root it out.").

{¶25} In the absence of a determination by the trial court that Husband was voluntarily unemployed or underemployed, it did not err in failing to impute potential bonus income to Husband for purposes of calculating child support. Wife's fifth assignment of error is overruled.

WIFE'S ASSIGNMENT OF ERROR VI

> THE TRIAL COURT ERRED BY FAILING TO INCLUDE EXPENSES FOR CHILDCARE AND SUMMER CAMPS IN ITS CALCULATION OF CHILD SUPPORT.

[1] This Court takes no position regarding whether Husband's failure to receive potential bonuses may constitute voluntary underemployment.

{¶26} Wife argues that the domestic relations court abused its discretion by failing to include childcare and summer camp expenses when calculating child support. Specifically, Wife argues that because the parties jointly claimed childcare expenses for tax purposes in the past, the trial court was unreasonable in failing to include such expenses when it calculated Husband's child support obligation. This Court disagrees.

{¶27} "The purpose of child support is to meet the needs of the minor children * * * includ[ing] shelter, food, clothing and ordinary medical care." (Internal citations omitted) *Irish v. Irish*, 9th Dist. Lorain No. 10CA009810, 2011-Ohio-3111, ¶ 13. In this case, the child was younger when the parties assumed substantial childcare expenses. At the time of trial, however, the child was almost 13 years old with no evidence of special needs. Husband makes a compelling argument that the child was of an age to be a babysitter, rather than need one. Although this Court understands that, while the child does not need a fulltime babysitter at the age of thirteen, she would need occasional transportation. However, Wife is not arguing for additional child support to help pay for those limited expenses. Rather, she is arguing for additional child support to cover what she deems to be necessary fulltime childcare expenses. Moreover, there was no evidence in the record that the parties agreed that the child would participate in multiple summer camps. Instead, the evidence indicated that Wife unilaterally decided that the child would participate in such camps. Under these circumstances, this Court concludes that the trial court was not unreasonable in refusing to include childcare and summer camp expenses in its child support calculation. Wife's sixth assignment of error is overruled.

WIFE'S ASSIGNMENT OF ERROR VII

THE TRIAL COURT ERRED IN FAILING TO ORDER FATHER TO SHARE IN ANY EXPENSE FOR THE CHILD'S PRIVATE SCHOOL TUITION AND EXTRACURRICULAR ACTIVITIES.

{¶28} Wife argues that the trial court abused its discretion by failing to include costs for the child's private school tuition and extracurricular activities in its child support calculation. This Court disagrees.

{¶29} This Court will not reverse a trial court's order regarding child support absent an abuse of discretion. *Homler v. Homler*, 9th Dist. Lorain No. 05CA008752, 2006-Ohio-2556, ¶ 27.

{¶30} Husband and Wife had a combined gross income of more than $150,000. R.C. 3119.04(B) provides, in relevant part: "If the combined gross income of both parents is greater than one hundred fifty thousand dollars per year, the court, with respect to a court child support order, * * * shall determine the amount of the obligor's child support obligation on a case-by-case basis and shall consider the needs and the standard of living of the children who are the subject of the child support order and of the parents." In determining the child support obligation, this Court has recognized the propriety of considering "the expenses of the parents and the standard of living the parents and children enjoyed prior to the separation and divorce, as well as the current standard of living of the parents." *Wells v. Wells*, 9th Dist. Summit No. 27097, 2014-Ohio-5646, ¶ 14. Moreover, "a trial court should tread carefully when determining to award a child support amount that is greater than that necessary to cover the current needs of the children; awarding a higher amount [] could encroach on [the obligee parent's] own common law duty to support the children." *Ohlemacher v. Ohlemacher*, 9th Dist. Lorain No. 04CA008488, 2005-Ohio-474, ¶ 36.

{¶31} "'Private school tuition is a form of child support.'" *Pearlstein v. Pearlstein*, 11th Dist. Geauga No. 2008-G-2837, 2009-Ohio-2191, ¶ 71, quoting *Roberts v. Roberts*, 12th Dist. Butler Nos. CA2004-04-081, CA2004-04-087, 2005-Ohio-2792, ¶ 21. "'In contemplating a

child support deviation, a court may consider the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen.'" *Pearlstein* at ¶ 71, quoting *Roberts* at ¶ 21; R.C. 3119.23(N). The trial court "may order a parent to pay for private school tuition if the court determines that '1) it is in the best interest of the child to have private schooling; 2) the payor(s) can afford to pay the tuition; 3) the children have been in private schooling; and 4) private schooling would have continued if not for the ending of the marriage.'" *Ungerleider v. Ungerleider*, 12th Dist. Clermont Nos. CA2010-09-069, CA2010-09-074, 2011-Ohio-2600, ¶ 27, quoting *Kaminski v. Kaminski*, 12th Dist. Clermont No. CA96-09-073, 1997 WL 89156, *3 (Mar. 3, 1997).

{¶32} In this case, Husband testified that he and Wife did not agree to continue the child in private school once she began high school. Husband testified that the child lives in the Hudson public school district, where the child would receive a very good education. The child had attended a private school through middle school. Wife testified that the child's tuition was $5300 per year through middle school until the 2012-2013 school year when she was able to obtain financial aid which reduced the tuition to $250,[2] that Wife had been absorbing the entire cost of tuition after Husband left, and that tuition at a private high school would cost approximately $10,000 per year. Wife admitted that she had made personal sacrifices to allow the child to continue activities in which she was involved. Wife further testified that ensuring the child's continued involvement in private school and other activities led to Wife's credit card debt and some of her financial troubles. The evidence adduced at trial established that the parties

[2] Wife is not arguing that she is entitled to reimbursement for past tuition; rather, she is arguing that the trial court erred in failing to calculate child support to include sums for future tuition costs at a private high school.

had amassed great debt during the course of their marriage and after they separated and that they had been living well beyond their financial means for some time.

{¶33} The evidence demonstrated that neither parent could reasonably afford to pay the increased cost of a private high school education for the child. Moreover, it is not at all clear that the child would have been able to attend a private high school had the parents remained married, given the snowball effect of the debt they continued to accrue. In addition, the child was residing in an excellent public school district, and she had not yet started high school. Under these circumstances, we cannot say that the domestic relations court was unreasonable in refusing to order Husband as part of his child support obligation to pay a portion of the costs associated with a private high school education and concomitant extracurricular activities for the child. Wife's seventh assignment of error is overruled.

WIFE'S ASSIGNMENT OF ERROR VIII

> THE TRIAL COURT ERRED BY FAILING TO AWARD A JUDGMENT AGAINST FATHER AND IN FAVOR OF MOTHER FOR ARREARAGES IN CHILD SUPPORT UNDER TEMPORARY ORDERS, AND IN FAILING TO ORDER CSEA TO PERFORM AN AUDIT OF THE ACCOUNT TO REMOVE CREDIT FOR MOTHER'S SHARE OF A JOINTLY-FILED INCOME TAX REFUND FROM FATHER'S CHILD SUPPORT ARREARAGES.

{¶34} Wife argues that the trial court erred by failing to issue any orders regarding Husband's previously determined child support arrearages, resulting in the merger of prior such orders into the decree and effectively erasing Husband's arrearages. This Court disagrees.

{¶35} As this Court has acknowledged, "[t]he Supreme Court of Ohio has held that '[i]n a domestic relations action, interlocutory orders are merged within the final decree, and the right to enforce such interlocutory orders does not extend beyond the decree, unless they have been reduced to a separate judgment or they have been considered by the trial court and specifically referred to within the decree.'" *Ward*, 2012-Ohio-5658, at ¶ 21, quoting *Colom v. Colom*, 58

Ohio St.2d 245, syllabus (1979). In this case, the domestic relations court expressly referred to prior orders regarding matters of support arrearages, ordering: "All prior Orders *except* child and spousal support arrearages or overpayments are merged into this Final Entry." (Emphasis added). Accordingly, Wife is incorrect in asserting that the trial court effectively erased Husband's arrearages by allowing the prior orders addressing support arrearages to merge into the final decree. Wife's eighth assignment of error is overruled.

WIFE'S ASSIGNMENT OF ERROR IX

> THE TRIAL COURT ERRED WHEN IT REQUIRED JOINT DECISION-MAKING AFTER DETERMINING SOLE RESIDENTIAL PARENTING WAS IN THE CHILD'S BEST INTERESTS.

{¶36} Wife argues that the domestic relations court misapplied the law by ordering the parties jointly to make certain decisions regarding the child notwithstanding Wife's status as residential parent and legal custodian of the child. This Court agrees.

{¶37} Although the domestic relations court retains broad discretion regarding the determination of parental rights and responsibilities, *Sejka v. Sejka*, 195 Ohio App.3d 335, 2011-Ohio-4711, ¶ 9 (9th Dist.), "'[a]n appellate court's review of the interpretation and application of a statute is de novo [and we may] not give deference to a trial court's determination [in that regard.]'" *Curran v. Kelly*, 9th Dist. Medina No. 10CA0139-M, 2012-Ohio-218, ¶ 6 (challenging the domestic relations court's application of R.C. 3123.14, addressing child support arrearages), quoting *In re Barberton-Norton Mosquito Abatement Dist.*, 191 Ohio App.3d 763, 2010-Ohio-6494, ¶ 11 (9th Dist.).

{¶38} Prior to trial, the parties agreed as to parenting issues, specifically with regard to Husband's parenting time with the child who would reside in Wife's custody. The parties further agreed to a modification of the ongoing long-term civil protection order to allow the parties to

communicate via a Family Wizard website account or, in case of emergency during the transportation of the child for visitation, by text message. The parties further agreed to modify the civil protection order for the limited purpose of allowing both parents to attend the child's activities as long as each remained at opposite ends of the activity forum.

{¶39} The domestic relations court considered R.C. 3109.04 in allocating parental rights and responsibilities for the care of the child, and designated Wife as the residential parent and legal custodian of the child. The trial court further ordered that "[t]he parties shall jointly make decisions which concern the health and safety of their child except in the case of an emergency."

{¶40} R.C. 3109.04(A) states in relevant part:

> In any * * * proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, * * * the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage [and] may allocate the parental rights and responsibilities for the care of the children in either of the following ways:
>
> (1) If neither parent files a pleading or motion [for shared parenting], if at least one parent files a pleading or motion [for shared parenting] but no parent who filed [such] also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan * * * but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.
>
> (2) If at least one parent files a pleading or motion [for shared parenting] and a plan for shared parenting * * * and if a plan for shared parenting is in the best interest of the children and is approved by the court * * *, the court may allocate the parental rights and responsibilities for the care of the children to both parents and issue a shared parenting order requiring the parents to share all or some of the aspects of the physical and legal care of the children in accordance with the approved plan for shared parenting. * * *

{¶41} By designating Wife as the residential parent and legal custodian of the child, yet ordering that Husband shall have the right to share in some aspects of the physical and legal care of the child, the trial court effectively created a hybrid allocation of parental rights and responsibilities in contravention of the language of the statute. This Court can find no authority to support such an allocation of parental rights and responsibilities. In fact, the Ohio Supreme Court has recognized that "parental rights and responsibilities reside in the party or parties who have the right to the ultimate legal and physical control of a child." *Fisher v. Hasenjager*, 116 Ohio St.3d 53, 2007-Ohio-5589, ¶ 22. As the trial court designated Wife as the residential parent and legal custodian of the child, necessarily granting her the physical and legal control of the child, it erred in contravention of R.C. 3109.04 by also awarding Husband joint authority over some aspects of the physical and legal care of the child. Wife's ninth assignment of error is sustained.

HUSBAND'S ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED BY DETERMINING THAT WIFE HAD NOT COMMITTED FINANCIAL MISCONDUCT.

{¶42} Husband argues that the domestic relations court erred by finding that Wife did not commit financial misconduct regarding the loan the parties received from Wife's parents, money Wife borrowed from her 401(K) account, and stock options Wife exercised shortly before filing her complaint for divorce. This Court disagrees.

{¶43} This Court reviews to determine whether the trial court's finding regarding financial misconduct by a spouse was against the manifest weight of the evidence. *Smith v. Smith*, 9th Dist. Summit 26013, 2012-Ohio-1716, ¶ 15, citing *Bucalo v. Bucalo*, 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, ¶ 22. "[T]he civil manifest weight of the evidence standard of review * * * mirrors the criminal standard." *Pelmar USA, L.L.C. v. Mach. Exchange Corp.*,

9th Dist. Summit No. 25947, 2012-Ohio-3787, ¶ 10. Therefore, we act as an additional trier of fact and review the record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the trier of fact "'clearly lost its way and created a manifest miscarriage of justice * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 20, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). "In weighing the evidence, however, we are always mindful of the presumption in favor of the trial court's factual findings." *Lundin v. Niepsuj*, 9th Dist. Summit No. 26015, 2014-Ohio-1212, ¶ 12, citing *Eastley* at ¶ 21. "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." (Internal quotations and citations omitted.) *Donovan v. Donovan*, 9th Dist. Lorain No. 11CA010072, 2012-Ohio-3521, ¶ 18.

{¶44} The domestic relations court may compensate one spouse by making either a distributive award or a greater award of marital property where it has found that the other spouse has engaged in financial misconduct. R.C. 3105.171(E)(4). Financial misconduct includes, inter alia, "the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets[.]" *Id*. This Court has recognized that financial misconduct necessarily implicates wrongdoing such as one spouse's interference with the other's property rights or the offending spouse's profiting from the misconduct. *Bucalo* at ¶ 23-24. The complaining spouse maintains the burden of proving financial misconduct by the other. *Id.*, citing *Gallo v. Gallo*, 11th Dist. Lake No. 2000-L-208, 2002-Ohio-2815, ¶ 43.

{¶45} With regard to the loan from Wife's parents, the evidence showed that both Husband and Wife signed the loan documents. Husband admitted reading the loan documents, including a mortgage to Wife's parents to secure the loan, before he signed. He was further aware that the proceeds were to be used to pay off the couple's debt. The evidence established

that the loan proceeds were in fact used to pay marital debt and obligations like the mortgage, as found by the trial court.

{¶46} With respect to the two loans Wife took against her 401(K) account, the evidence showed that Wife used the first loan to help pay off marital credit card debt prior to filing for divorce. The second loan against her 401(K) account occurred during the pendency of the divorce after the magistrate ordered that Wife was allowed to borrow from that account to allow her to pay the mortgage on the marital home which had fallen into arrears. The evidence demonstrated that Wife used those loan proceeds to pay off other loans from her parents which she had used to stave off a foreclosure action. Wife had earlier been ordered by the court to assume full financial responsibility for matters relating to the marital home. Accordingly, the weight of the evidence supports the trial court's finding that Wife used the 401(K) loan proceeds to meet her financial obligations arising out of the marriage and court orders.

{¶47} Moreover, despite Wife's motion that Husband repay one-half of her 401(K) loans, the trial court refused to impose any liability on Husband for those two loans. Wife, therefore, has been solely responsible for repaying the two 401(K) loans. Accordingly, to the extent that Wife may have used any 401(K) loan proceeds for her sole benefit, she is solely obligated to repay those loans which negates any diminution in value of the marital asset.

{¶48} Finally, with respect to the stock options proceeds Wife obtained immediately prior to filing for divorce, Wife testified that she used the proceeds to make mortgage payments and payments towards the child's school tuition costs. Husband does not challenge Wife's use of the stock options proceeds; rather, he argues that she wasted a marital asset worth $129,173 by cashing in the stock for only $8,592.56. This Court agrees with Wife that Husband misunderstands the concept of "stock option." Wife did not own $129,173 worth of stock and

cashed it in for a fraction of its value. Instead, she had the option to purchase a certain number of shares of stock at a certain price. Rather than purchase the shares for later sale at an unknown price, she cashed in the option to purchase shares which may or may not increase in value.

{¶49} Based on this Court's review of the record, the weight of the evidence supports the conclusion that Husband did not meet his burden of establishing that Wife engaged in financial misconduct. Accordingly, we conclude that the trial court's finding that Wife did not engage in financial misconduct was not against the manifest weight of the evidence. Husband's second assignment of error is overruled.

HUSBAND'S ASSIGNMENT OF ERROR IV

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY DETERMINING THAT THE PARTIES' PERSONAL MARITAL PROPERTY HAD ALREADY BEEN EQUITABLY DIVIDED, WHERE (1) A DISPUTE BETWEEN THE PARTIES OVER THE DIVISION OF CERTAIN PERSONAL MARITAL PROPERTY NOT LISTED IN THE FINAL ENTRY AND DECREE STILL EXISTED; AND (2) HUSBAND HAD BEEN UNABLE TO CONDUCT AN INDEPENDENT INVENTORY OF THE PERSONAL MARITAL PROPERTY DUE TO THE CPO AND WIFE'S CONDUCT.

{¶50} Husband argues that the trial court erred by finding that the parties had already equitably divided all personal property except for the family piano because he was precluded by both the terms of the civil protection order and Wife's boxing up property from taking inventory and participating in the division of personal property. This Court disagrees.

{¶51} The substance of Husband's argument is that the trial court's finding that the parties equitably divided all personal property, except the piano, was against the manifest weight of the evidence. He argues that he was precluded from taking inventory of the personal property because of the civil protection order and because Wife thwarted his ability by boxing up the property. The trial court found that Husband had the opportunity to remove personal property from the marital home on three separate occasions after he left the home. In considering whether

a judgment is against the manifest weight of the evidence, we assume the role of an additional trier of fact and review the record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether the trier of fact "'clearly lost its way and created a manifest miscarriage of justice * * *.'" *Eastley* at ¶ 20, quoting *Martin*, 20 Ohio App.3d at 175.

{¶52} Three-and-a-half months after Wife filed for divorce, the magistrate issued temporary orders after a hearing. Relevant to this assignment of error, the magistrate ordered that "Husband shall provide counsel with a detailed list of items/documents he would like to retrieve from the marital residence." Although Husband moved to set aside certain other temporary orders, he did not challenge the quoted order. Eight months later, in June 2012, Husband filed a motion to "enter the marital residence one final time before moving and ownership is completely transferred to the buyer." Accordingly, his motion indicates that he had had the ability to enter the residence on at least one prior occasion to retrieve items of personal property. In response to Husband's motion, Wife asserted that Husband failed to arrange a walk-through of the residence to inventory property items until immediately before the sale of the home was completed and all items were boxed up in anticipation of the arrival of movers the next day.

{¶53} At trial, Wife testified that on the night Husband was released from jail, she gave him a carload of items from the home, including the family computer. She testified that Husband returned prior to the sale of the home and took three large pallets of items, filling a U-Haul trailer measuring 12' long X 4' wide X 8' high with personal and marital property. In addition, Wife testified that she drafted a list of marital items and asked Husband whether he wanted any of the items. Husband asserted he wanted them all and brought two attorneys who had been

representing him to the residence to retrieve the items. Wife testified that it took Husband and the two other men 4-5 hours and numerous trips to transfer the items he wanted away by truck. Moreover, Husband conceded at trial that Wife's personal property inventory list was "pretty thorough," although he believed that some items he did not identify were omitted. Husband complained that, when he entered the marital residence immediately before possession was to transfer to the buyer, Wife had boxed up all the property, precluding him from determining which items to take.

{¶54} Based on a review of the record, this Court concludes that the domestic relations court did not lose its way by finding that Husband had on multiple occasions been able to return to the marital residence to take inventory and retrieve personal property. The trial court ordered Husband to create a list of items he wanted, but he failed to create such a list for the attorneys. Nevertheless, he took multiple truckloads of property from the residence on numerous occasions, and there was no evidence that the civil protection order stood as a bar to his ability to retrieve any items he desired. Accordingly, the trial court's finding that the parties had equitably divided all personal property with the exception of the piano was not against the manifest weight of the evidence. Husband's fourth assignment of error is overruled.

HUSBAND'S ASSIGNMENT OF ERROR V

> THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING ATTORNEY FEES OF $3,000 TO WIFE ARISING FROM THE TRIAL COURT'S LAST MINUTE CONTINUANCE OF THE EARLIER-SCHEDULED SEPTEMBER 27, 2012 TRIAL DATE, WHERE HUSBAND'S NEW TRIAL COUNSEL HAD FILED A MOTION TO CONTINUE THAT TRIAL DATE THREE WEEKS IN ADVANCE THEREOF DUE TO HAVING ANOTHER DIVORCE TRIAL IN A DIFFERENT COUNTY COMMENCING THE DAY BEFORE THAT SCHEDULED TRIAL DATE.

{¶55} Husband argues that the trial court erred by awarding attorney fees[3] to Wife "as a result of [Husband's] last minute request for a continuance of the trial scheduled for September 27, 2012." This Court disagrees.

{¶56} R.C. 3105.73(A) provides:

> In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, 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.

{¶57} This Court reviews the domestic relations court's decision to award attorney fees pursuant to R.C. 3105.73(A) for an abuse of discretion. *Downey v. Downey*, 9th Dist. Summit No. 23687, 2007-Ohio-6294, ¶ 28. An abuse of discretion is found when the trial court is unreasonable or acts in a manner contrary to law or without evidentiary support. *Menke*, 2015-Ohio-2507, at ¶ 8.

{¶58} The trial court initially scheduled the divorce trial for May 11, 2012, but continued it upon Wife's motion, premised in part upon Husband's failure to respond to a request for production of documents. The trial court rescheduled the trial for September 27, 2012. Husband was represented by multiple attorneys during the course of the proceedings. Husband's third attorney withdrew six weeks prior to the rescheduled trial. He retained alternate counsel

[3] Husband asserts that the trial court awarded $3000 to Wife for attorney fees arising out of the continuance. Wife had requested $3645.60 for fees. Although the trial court found that Husband owed Wife $3000, it subsequently found that Husband owed Wife $3600 for "Attorney fees for continuing of September, 2012 trial" and included that amount, rather than $3000, in the total amount of various "arrearages" to be "deducted from the amount due to Husband for a division of assets." As Husband does not challenge the higher amount of the award of attorney fees arising out of the September 2012 trial, this Court does not address that issue.

who moved to continue the trial date three weeks before trial due to a scheduling conflict. The trial court initially denied Husband's motion for a continuance, but orally granted it on the day of trial. The trial court then rescheduled the matter for December 27, 2012. Six days before the December trial date, the parties filed a joint motion to continue the trial, due in part to Husband's "perce[ption] that deposing [Wife] is necessary[,]" and because Husband had not received all information he subpoenaed from non-parties by that time. The trial court continued the trial to April 23, 2013, at which time it commenced with Husband being represented by his fifth retained counsel.

{¶59} Wife moved for attorney fees because of Husband's motion to continue the September 27, 2012 trial. The trial court awarded attorney fees to Wife which were commensurate with the time spent by Wife's counsel solely in preparation of the September 27, 2012 trial date. Specifically, those services were rendered by Wife's counsel from September 18, 2012, through September 27, 2012, and totaled 17.36 hours. A review of the record indicates that Husband's repeated changes in attorney representation, as well as his ongoing lack of cooperation particularly with regard to the sale of the marital home, prior to the September 27, 2012 trial date caused unnecessary delays and impacted his ability to proceed to trial, notwithstanding Wife's preparation. Under these circumstances, this Court concludes that the domestic relations court was not unreasonable in awarding Wife attorney fees solely related to Wife's counsel's preparation for the September 27, 2012 scheduled trial after Husband's fourth attorney in fourteen months moved for a continuance shortly before trial. Husband's fifth assignment of error is overruled.

III.

{¶60} Wife's fifth, sixth, seventh, and eighth assignments of error are overruled. Husband's second, fourth, and fifth assignments of error are overruled. Wife's fourth assignment of error is sustained. Therefore, this Court declines to address Wife's first, second, and third assignments of error; and Husband's first, third, and sixth assignments of error, as they are not ripe for consideration. Wife's ninth assignment of error is sustained. Accordingly, the judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part, and the cause 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(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.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

JOSEPH F. SALZGEBER, Attorney at Law, for Appellant/Cross-Appellee.

MELISSA GRAHAM-HURD, Attorney at Law, for Appellee/Cross-Appellant.