[Cite as *Carpenter v. Davison*, 2023-Ohio-2284.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
BELMONT COUNTY

JAMES BRIAN CARPENTER,

Plaintiff-Appellee,

v.

KATHRYN DAVISON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 BE 0027

Domestic Relations Appeal from the
Court of Common Pleas of Belmont County, Ohio
Case No. 21 DR 0170

BEFORE:
Carol Ann Robb, David A. D'Apolito, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Rebbeca L. Bench, 23 Driggs Lane, Bridgeport, Ohio 43912 for Plaintiff-Appellee and

Atty. Michael J. Shaheen, Shaheen Law Group, 128 S. Marietta Street, P.O. Box 579, St. Clairsville, Ohio 43950 for Defendant-Appellant.

Dated: June 29, 2023

Robb, J.

{¶1} Appellant Kathryn Davison (the wife) appeals the decision entered by the Belmont County Common Pleas Court in the divorce action filed by Appellee James Brian Carpenter (the husband). The parties performed under an oral separation agreement prior to filing a dissolution action with a written form separation agreement essentially stating there was nothing to divide. The wife argues their agreement was inequitable and non-binding because they ended up proceeding with a divorce instead of a dissolution. She alternatively claims the agreement was invalid due to duress or related concepts. The wife also contests the date the court used for the marriage termination date and concludes the court abused its discretion in finding a loan she entered after that date was a non-marital debt or otherwise erred in allocating the debt to her. For the following reasons, the trial court's decision is affirmed.

STATEMENT OF THE CASE

{¶2} The parties were married on May 13, 2017, after years of dating. Before the marriage, the wife's parents purchased a house next to their own residence by using their home equity line of credit to pay for it. On March 20, 2017, the parties purchased the house from the parents, and it was transferred to both parties jointly and severally in a recorded deed. (Ex. A); (Tr. 139). The same day, a mortgage was recorded showing the parties owed the parents $225,000 for the property. (Ex. B).

{¶3} The wife's mother testified she and her husband sold the house to the parties for $50,000 less than what they paid their neighbors. (Tr. 61, 67).[1] She listed improvements she funded for the parties, including a new roof, a $6,000 fireplace, a $6,000 door, a new air conditioner, a garage heater, and a new washer and dryer. (Tr. 60). The wife's testimony did not say the down payment and improvement gifts from her parents were made separately to her; nor did her mother so testify. According to an affidavit of the wife's mother submitted as an exhibit by the husband without objection,

[1] The wife submitted an affidavit saying the parents purchased the house for $260,000 but later answered an interrogatory saying the parents purchased the house for $275,000 (putting $50,000 down), which was consisted with her mother's testimony.

the down payment and money for home improvements constituted “a joint gift to the two of them.” (Ex. 2).

{¶4} The wife’s mother testified the parties’ mortgage payments of $700 per month were sent directly to the parents’ home equity loan from her daughter’s trust (pre-marital assets received from her grandfather). (Tr. 7, 9, 59). The husband acknowledged the wife paid $700 per month toward the parties’ mortgage payment from her pre-marital trust account; he believed she paid an additional $500 per month toward the mortgage as well. (Tr. 154). According to the wife’s interrogatory answer submitted as an exhibit by the husband without objection, the remaining part of the payment came from her father’s account. (Ex. 6).

{¶5} During the first year of marriage, the parents gave the parties a 2013 Audi Q5, which was titled in the names of both parties. (Tr. 149, 153, 177). In February 2021, the parties decided to a buy a “dream truck” (with texts showing the wife encouraging the purchase). (Tr. 139-140). They bought the truck for $87,000, and both parties signed for the loan. In March 2021, the parties experienced issues when the wife decided she no longer wished to look for property or relocate to another county as they planned and she disclosed she was having an “emotional affair.” (Tr. 126, 142).

{¶6} The wife’s mother negotiated an agreement between the parties in order to secure a dissolution and avoid a divorce trial; they desired to avoid publicity and attorneys’ fees. (Tr. 168). Under this agreement, the wife would provide the husband with $85,000 while the husband agreed to release his interest in the house and in the 2013 Audi. (Tr. 101, 144, 150). The wife’s mother believed the settlement amount was associated with the new truck, noting she advised her daughter to ensure her name was removed from the loan. (Tr. 24-25). The wife’s testimony confirmed she wanted the husband to pay off the truck and refinance it in his own name so her name would be removed from the loan. (Tr. 99).

{¶7} On April 29, 2021, the husband signed a deed, jointly with the wife, granting the house to the wife’s parents, and the deed was recorded the next day. (Ex. D). At the same time, the parents recorded a release of the parties’ mortgage. (Ex. 4). These documents were prepared by the attorney who prepared the parties’ original deed and mortgage. The husband moved out on the day the deed was recorded. (Tr. 17).

{¶8} Soon thereafter, the parties texted about the husband's poor living conditions and the high payment on his truck, and the wife noted how the upcoming $85,000 payment would help his situation. She offered additional money, suggested he sell the truck for a less expensive vehicle, and recommended he invest some of the money to make interest. His text declined her offer of additional money while noting she was already giving him $85,000. (Ex. 9 at 314); (Tr. 109-110, 117-118, 147, 206).

{¶9} On June 11, 2011, the parties filed a petition for dissolution with an attached separation agreement on the standard court forms. The wife completed the forms (and signed them on June 8). (Tr. 179-180). The form questions were answered by stating no party has any financial interests (such as in real estate, financial accounts, or debts), the household goods were already divided, and the wife shall receive a 2013 Audi and a 2002 Audi (with no mention of the truck).[2] The wife asked the husband to stop at the courthouse to sign the petition after she left it there, and he did so on the date of filing. (Tr. 122). The husband testified the parties made approximately the same amount of money during the marriage and he believed their retirement accounts "would essentially cancel each other out" during their four-year marriage. (Tr. 155).

{¶10} On June 22, 2021, the wife gave the husband a check for $84,860. (Ex. O). She obtained this amount by borrowing $85,000 (after the $140 origination fee) through a line of credit secured by her trust at Wesbanco. (Ex. P). On June 24, 2021, as the wife previously suggested, the husband traded in the 2021 truck to pay off the parties' loan on it, purchased a somewhat less expensive 2019 truck he financed in part ($20,500 down with a nearly $39,000 loan), and saved the remaining money in an account. (Ex. 10); (Tr. 160).

{¶11} From conversations with the wife's mother, the husband believed the parents assisted their daughter with the divorce payment. The wife's mother wrote a letter telling her daughter to break it off with the person she was seeing or move out of their residence; the wife's mother claimed she did not personally send the letter but acknowledged she intended her daughter to receive it. (Ex. 1); (Tr. 12). The wife testified

[2] The form separation agreement states they reviewed each other's financial disclosure affidavits ("which fully and accurately lists and values all marital property, separate property, and any other assets, debts, income, and expenses") and those affidavits "shall be filed in the Court's Family File" by the date the agreement is filed.

her mother talked about disowning her around June 2021, had no intent to return the real estate to her, and never "offered to pay the $85,000 to me directly." (Tr. 196-197). At some point, the wife moved out of the house, eventually moving to another state. The wife still used the house as her address when the October 2021 trust paperwork was printed. (Ex. C). The wife began regretting her agreement to pay the husband $85,000 and hired an attorney.

{¶12} On August 3, 2021, her attorney filed a notice of appearance and a motion to continue the scheduled hearing on grounds of an inequitable and unfair settlement agreement (stating a divorce action would be filed if the parties could not resolve the situation). As the wife's attorney advised the wife would not be agreeing with the dissolution and separation agreement, the husband filed a motion to convert the dissolution action to a divorce action on August 23, 2021. He then filed a divorce complaint and a motion to enforce the written and oral agreement. The wife filed a counterclaim for divorce. The divorce trial proceeded before a visiting judge on April 28, 2022.

{¶13} At trial, the wife's mother indicated her daughter might have believed she would reimburse her for the $85,000 divorce settlement but she did not and "never intended" to do so. (Tr. 24). She previously made a statement indicating otherwise in a text to the husband where she said she thought her daughter's attorney would contact her and disclosed the following: "We will give her the money when she remarries anyone but that piece of shit. There is no reason to give these lawyers money. Maybe you could call Kate and tell her to talk to us instead of throwing us out before she heard what we had to say. I truly believe that idiot she is with is behind the whole thing." (Ex. 3 at 35). The wife's mother also acknowledged, "Brian felt comfortable taking the money from her, knowing it would be replaced so he didn't have to feel guilty." (Tr. 41). She then claimed she merely told the husband what he wanted to hear in order to appease him. (Tr. 40, 45-46). She also testified her daughter was still an heir in her estate (along with a sibling). (Tr. 222).

{¶14} The wife's mother further disclosed her personal decision to gift the husband $15,000 for a "fresh start" since he agreed "not to go through a divorce." (Tr. 48, 188). At trial, the wife's mother complained the husband ended up converting the

dissolution action to a divorce action; she also complained he did not use her money for rent (claiming he found a place to live rent-free). She suggested he should return the money to her (while noting she never asked him to do so). (Tr. 47-49, 69). The wife's mother also seemed offended the husband did not keep the truck. (Tr. 65).

{¶15} At trial, the wife testified she changed her mind about the agreement to pay the husband $85,000, noting she decided to stand up for herself after realizing she felt coerced because she wanted a quiet dissolution. She admitted she did not think her new loan would be considered a marital debt when she obtained it. (Tr. 105). She also said her offer of more money (after the $85,000 agreement was made and the house was transferred) shows how irrational she was at the time. (Tr. 119). She opined the situation was unfair because she no longer owned the residence and owed $85,000 on the loan she obtained to pay the husband. She observed her mother was very domineering. (Tr. 113-114). She also described the husband as domineering and said he regularly got upset. She testified he told her he hired investigators and would ruin her reputation; she feared being dragged through a public divorce as she had a morality clause at work at the time. (Tr. 98, 200). The husband testified he did not threaten his wife's career and did not know what a morality clause was while acknowledging he mentioned hiring a team and letting people know the truth. (Tr. 152, 172-173).

{¶16} The wife also said the husband intimidated her when he "blocked" her in a "closet area" of a room. (Tr. 203). When the wife's attorney asked the husband if he "locked her in the closet," he said he did not. (Tr. 173-174). It was noted the wife's April 4, 2021 text said she took her ring off because "you literally blocked me in multiple rooms" (not locked); it was also noted he did not agree with her by responding, "Ok. Your right. And wrong." (Ex. N); (Tr. 175). Her next text said he could return to the home, noting they were both adults and could be in the same house without arguing and questioning each other.

{¶17} On June 10, 2022, the court issued the divorce decree with findings of fact and conclusions of law. The court found both parties were gifted the 2013 Audi and the parties' real estate was disbursed pursuant to their settlement agreement and transferred on April 30, 2021. The court noted the marital equity would have been the difference between the price paid for the house by the wife's parents and the parties' recorded

mortgage plus any increase in value between 2017 and 2021. The court acknowledged the testimony about mortgage payments coming from the wife's trust account but also observed the parties had similar incomes and there was no claim the husband did not use his income in furtherance of marital expenses.

{¶18} The court cited law holding a separation agreement is a binding contract, which cannot be unilaterally repudiated for a mere change of heart, while pointing out the agreement was performed by both sides. The court found the agreement was not procured by fraud, duress, overreaching, or undue influence and the wife was not coerced into securing the $85,000 individual line of credit. The court observed her payment of $84,860 to the husband on June 22, 2021 was in accordance with the agreement, was not in furtherance of the marriage (but was to facilitate the filing of a dissolution as agreed), and was not a marital debt. Based on the agreement and the evidence, the court declared the duration of the marriage was May 13, 2017 to April 30, 2021.

{¶19} As agreed, spousal support was not ordered. The court ordered the parties to be responsible for all debt and retain all funds in their individual names. The court distributed to the wife two fused wedding rings (as agreed to by the husband at trial) and distributed to the husband two dressers (which he received from his grandfather) plus a tote of childhood items (which was in the basement of the house). The wife filed a timel y notice of appeal.

ASSIGNMENT OF ERROR 1

{¶20} The wife sets forth four assignments of error, the first of which alleges:

"THE TRIAL COURT ERRED BY FINDING THAT THE SEPARATION AGREEMENT CONSTITUTED A BINDING CONTRACT."

{¶21} Pursuant to R.C. 3105.63(A), a petition for dissolution of marriage shall have attached and incorporated a separation agreement signed by both spouses, which shall provide for the division of all property. An amended separation agreement may be filed at any time before the end of the hearing on the petition for dissolution. R.C. 3105.63(B). The filing of a petition for dissolution triggers a hearing where the parties must appear before the court for each "to acknowledge under oath that that spouse voluntarily entered into the separation agreement appended to the petition, that that spouse is satisfied with its terms, and that that spouse seeks dissolution of the marriage."

R.C. 3105.64(A). At that time, if either spouse is not satisfied with the separation agreement or does not wish a dissolution and if neither files a motion to convert the case to a divorce action, then the court shall dismiss the petition and refuse to validate the proposed separation agreement. R.C. 3105.65(A). If the court approves the separation agreement after the hearing, then the court grants a dissolution decree incorporating the separation agreement. R.C. 3105.65(B). Before a decree of dissolution is granted, a party may file a motion to convert the dissolution action into a divorce action and "[t]he divorce action then shall proceed in accordance with the Rules of Civil Procedure in the same manner as if the motion had been the original complaint in the action * * *." R.C. 3105.65(C).

{¶22} The wife initially argues these provisions mean a separation agreement is not valid if it was repudiated before it was incorporated into a court decree. She is also concerned the court did not attach the separation agreement to the divorce decree while pointing out the written agreement incorrectly stated the parties had no liabilities or assets (except two Audis to be retained by the wife).

{¶23} Initially, we note the separation agreement form attached to the dissolution petition and submitted as an exhibit by the wife (Ex. Q) said the parties had no accounts and debts to split, in apparent reliance on their oral agreement. Notably, the husband's subsequent divorce complaint additionally sought to enforce the parties' completed oral settlement agreement, the terms of which were placed on the record, not disputed by the wife, and recited in the court's judgment. Although the agreement was completed prior to the wife deciding she no longer agreed with it, she claims there was a lack of mutual consent because the statute allowed her to withdraw her agreement prior to finalization into a court decree.

{¶24} The trial court cited case law supporting a conclusion the completed oral agreement was valid notwithstanding the conversion of the dissolution to a divorce. For instance, the Eighth District explained a separation agreement entered into for the "sole purpose" of filing a dissolution petition is not a valid and binding contract when the dissolution petition is dismissed. *Greiner v. Greiner*, 61 Ohio App.2d 88, 399 N.E.2d 571 (8th Dist.1979), paragraph one of the syllabus. However, the court then held the separation agreement survives the dissolution dismissal and remains a valid and binding

contract thereafter if the agreement contains "language evidencing the intent of the parties that the separation agreement will survive dismissal of a dissolution of marriage petition" or if "the actions and conduct of the parties evidence an intention that the separation agreement will survive dismissal of a dissolution of marriage petition * * *. *Id.*

{¶25} "An intent to make a separation agreement valid and binding only upon the granting of a dissolution may * * * be evidenced if the agreement is silent as to its duration and no action is taken by the parties under the terms of the agreement." *Id.* at 97. The Eighth District concluded a separation agreement silent on duration survived the dismissal of the dissolution petition where "[m]any of the terms of the separation agreement were completed by the parties upon its execution" even though a deed to the house had not yet been transferred, a small ($250) credit debt was owed, and future payments were outstanding. *Id.* at 98.

{¶26} Here, the wife argues the parties' conduct does not evince their intention to enter a binding separation agreement (or their conduct shows the agreement was for the sole purpose of the dissolution petition and thus able to be withdrawn at will before a decree). However, the trial court reasonably concluded the parties mutually agreed to be permanently bound by the agreement.

{¶27} In April 2021, the husband agreed to accept $85,000 and committed to performing the following acts: signing a deed transferring ownership of the marital residence jointly titled in his name, signing the title of the 2013 Audi Q5 to remove his name as an owner, and cooperating with a dissolution action. The wife also testified the husband was to replace the loan on the truck so she was no longer a responsible party. In accordance with the agreement, the husband signed over the house. He signed over the title to a car. He signed the petition for dissolution, which the wife completed and left at the courthouse for him to sign. He received the promised $85,000 and paid off the truck loan, removing the wife as an obligor (while downgrading vehicles as she suggested).

{¶28} The agreement was completed. The wife's intent to be bound by the agreement when entered was clear and confirmed by her completion of the agreement. Thereafter, the wife essentially caused the planned dissolution proceedings to fail by

instructing an attorney to file a motion claiming the agreement was invalid and threatening to file a divorce action if it was not successfully renegotiated.

{¶29} Moreover, another statute applicable to a court *in a divorce action* specifically states: "A separation agreement that was voluntarily entered into by the parties may be enforceable by the court of common pleas upon the motion of either party to the agreement, if the court determines that it would be in the interests of justice and equity to require enforcement of the separation agreement." R.C. 3105.10(B)(2). Accordingly, a separation agreement need not be eliminated under the dissolution statutes merely because a party changed their mind. It was reasonable to conclude the interests of justice and equity were served by acknowledging and enforcing the completed agreement between the husband and the wife.

{¶30} The deed transferring the house to the parties jointly was executed and recorded prior to the parties' marriage. The evidence indicated the down payment for the jointly titled marital residence and the improvements to the residence were gifted to the parties jointly. The court did not believe the wife's use of her trust income instead of her job income to pay the mortgage necessarily meant a portion of the house was separate property, noting the parties had similar total incomes and there was no indication the husband did not pay other marital expenses. It was reasonable to find the wife did not meet her burden of showing the residence he transferred to her parents was her separate property. *See* R.C. 3105.171(A)(3)(b) (real property "acquired by one spouse" before a marriage is separate property). The court also pointed out any appreciation to the value of the house during the four-year marriage (2017 to 2021) was marital property. As the court pointed out and in reliance on the agreement, the husband transferred and "vacated the marital abode and at present has no legal rights to the real estate" due to his agreement with the wife. Furthermore, the wife did not testify the jointly titled 2013 Audi given to the parties in 2018 was a separate gift made solely to her, and testimony on the matter indicated otherwise. The court reasonably found the car was gifted to them both.

{¶31} These conclusions demonstrate the trial court considered the agreement to be equitable under the circumstances. The agreement to pay the husband $85,000 in return for him relinquishing the deed to the house and car and refinancing their car loan (which had zero percent interest) can reasonably be viewed as fair at the time it was made

(while the parties were anticipating an easy dissolution with no trial and no attorneys' fees); the agreement remained enforceable where the house and car titles were already signed away and the husband received his payment in exchange for such transfers. The wife's understanding or agreement with her mother as to the future of the house or the $85,000 payment was a different matter, and the mother was not a party to this action. Additionally, the credibility of the wife and her mother were matters best left to the trial court, who viewed their demeanor, attitude, voice inflection, and the various other indicators of truthfulness. *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 674 N.E.2d 1159 (1997). Merely because a person testifies on a topic does not make it an established fact in the case; the trial court had the task of collecting the factual claims and assigning weight to them or even rejecting them.

{¶32} The wife additionally argues the agreement was the product of duress or undue influence. Part of the wife's argument relies on the unfairness of her final position, pointing out she too signed the deed transferring the property to her parents, she no longer lives in the marital residence, and she has a loan for the settlement payment she made to the husband. She argues she was coerced by the threat to hire a "team" and engage in a public divorce, claiming this could have ruined her career. She also points to her testimony that the husband "blocked" her when she went to leave a room.

{¶33} Duress involves the following elements: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) the circumstances were the result of the other party's coercive acts (not a result of the alleged necessities of the duress claimant). *Blodgett v. Blodgett*, 49 Ohio St.3d 243, 246, 551 N.E.2d 1249 (1990). "To avoid a contract on the basis of duress, a party must prove coercion by the other party to the contract. It is not enough to show that one assented merely because of difficult circumstances that are not the fault of the other party." *Id.* "Dissatisfaction with or general remorse about consenting to a settlement agreement does not constitute duress." *Croxton v. Maggiore*, 2017-Ohio-1535, 88 N.E.3d 1236, ¶ 36 (5th Dist.).

{¶34} The wife also cites the doctrine of undue influence, defined as "any improper or wrongful constraint, machination, or urgency of persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not do or would

do if left to act freely." *Citing Ross v. Barker*, 101 Ohio App.3d 611, 618, 656 N.E.2d 363 (2d Dist.1995), quoting *Marich v. Knox Cty. Dept. of Human Serv.*, 45 Ohio St.3d 163, 543 N.E.2d 776 (1989). In general, the person claiming undue influence must show: (1) the subject was susceptible to influence; (2) the other had the opportunity to exert the influence; (3) the improper influence was in fact exerted or attempted; and (4) the effect of such influence is evidenced in the results. *Id.*, citing *West v. Henry*, 173 Ohio St. 498, 501, 184 N.E.2d 200 (1962) (a will contest). The conduct "must so overpower and subjugate the mind of the [person said to be unduly influenced] as to destroy his free agency and make him express the will of another rather than his own, and the mere presence of influence is not sufficient." *West*, 173 Ohio St. at 501.

{¶35} The issue of unfairness was addressed above and could reasonably be viewed as the product of a breach of an agreement by her mother rather than an unfair and coerced agreement with her husband. The wife said her mother was very domineering and negotiated the agreement. Yet, the wife's mother testified she was not the architect of the scenario, she had no influence over her daughter, and her daughter would do what she wanted. (Tr. 14-15, 78-79). The wife acknowledged she offered to give the husband additional money after the agreement (although she claimed this showed how "irrational" she was at the time). A spouse does not automatically invalidate a future agreement by having expressed outrage at certain discoveries or a wish to disclose the marital breakdown was not his fault. The wife and her mother wished to ensure the marriage was terminated quietly and quickly. The wife may have had a morality clause at work, which she wished to avoid testing by proceeding through a divorce trial; however, the husband testified he was unaware of the clause. Contrary to her contention, a trial court need not find a spouse coerced the other spouse into an agreement by mentioning hiring a lawyer with a team to assist in a divorce action (which the wife and her mother viewed as a public airing of grievances). In addition, the wife's vague testimony about once being "blocked" during a discussion was not an item the trial court had to believe was serious or even related to the agreement. The trial court pointed out the text history did not show a fearful relationship.

{¶36} On these topics, credibility and weight were central. There may have been much evident in the demeanor of the witnesses as they testified. *Davis*, 77 Ohio St.3d at

418. The trial court could rationally conclude the wife voluntarily entered the agreement and her situation involved "difficult circumstances that are not the fault of the other party." *See Blodgett*, 49 Ohio St.3d at 246. The court was not required to find the wife was "susceptible" to an influence that "so overpower[ed] [her] mind * * * as to destroy [her] free agency and make her express the will of another rather than [her] own * * *." *See West*, 173 Ohio St. 498, 501. The trial court did not abuse its discretion in maintaining the parties' agreement. This assignment of error is overruled.

ASSIGNMENT OF ERROR 2

{¶37} The wife's second assignment of error contends:

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY ORDERING A DE FACTO TERMINATION OF MARRIAGE INCONSISTENT WITH THE EVIDENCE PRESENTED AT TRIAL AND IN ACCORDANCE WITH R.C. 3105.171(A)(2) RESULTING IN THE COURT FASHIONING AN UNEQUAL AND INEQUITABLE DIVISION OF PROPERTY IN VIOLATION OF R.C. 3105.171."

{¶38} The duration of the marriage is ascertained prior to the division of marital assets as it influences the valuation of the marital estate. *Dimmerling v. Dimmerling*, 7th Dist. Noble No. 18 NO 0460, 2019-Ohio-2710, ¶ 21. The phrase "during the marriage" for purposes of dividing marital property is encompassed in the following statutory provisions:

> (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 of the 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.

R.C. 3105.171(A)(2). Accordingly, the end date is the date of the final divorce hearing unless the trial court considers this date inequitable.

{¶39} "In order to do equity, a trial court must be permitted to utilize alternative valuation dates, such as the time of permanent separation or de facto termination of the marriage, where reasonable under the facts and circumstances presented in a particular case." *Berish v. Berish*, 69 Ohio St.2d 318, 321, 432 N.E.2d 183 (1982). "In this fashion, the trial court will have the necessary flexibility to exercise its discretion in making truly equitable awards consistent with legitimate expectations of the parties." *Id.* As the court has broad discretion in determining the equities when dividing marital property, the court's discretion in assigning the end date cannot be reversed absent an abuse of discretion. *Id.* at 319. An abuse of discretion connotes more than an error in judgment but requires a finding that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "[W]hen applying this standard, an appellate court is not free to substitute its judgment for that of the trial judge." *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

{¶40} The parties both cite law stating, "a trial court may use a de facto termination of marriage date when the evidence clearly and bilaterally shows that it is appropriate based upon the totality of the circumstances." *Harris v. Harris*, 11th Dist. Ashtabula No. 2002 A 81, 2003-Ohio-5350, ¶ 11 (opining the court "should be reluctant to use a de facto termination of marriage date solely because one spouse vacates the marital home"), citing *Day v. Day*, 40 Ohio App.3d 155, 158, 532 N.E.2d 201 (10th Dist.1988), fn. 2 (finding the date the husband vacated residence was an insufficient unilateral action where a divorce was not instituted for over a year and financial support was provided during the separation). It has been observed a de facto termination of marriage date is often employed when the parties separate, make no attempt at reconciliation, and continually maintain separate residences and finances. *Id.*, citing *Gullia v. Gullia*, 93 Ohio App.3d 653, 666, 639 N.E.2d 822 (8th Dist.1994). We have recognized this guidance as well. *Dimmerling*, 7th Dist. No. 18 NO 0460 at ¶ 35.

{¶41} However, it should be pointed out that the Ohio Supreme Court warned against creating per se tests in evaluating the trial court's decision on marriage duration. *Berish*, 69 Ohio St.2d at 320 ("the precise date upon which any marriage irretrievably breaks down is extremely difficult to determine, and this court will avoid promulgating any unworkable rules with regard to this determination"). Moreover, with reference to the use

of the word “clearly” in the cited appellate court cases offering guidance, we emphasize the statute does not place a distinct burden on a party regarding the duration of marriage or a test approaching the level of clear and convincing evidence. *See generally* R.C. 3105.171(A)(2).

{¶42} Here, the court assigned a marriage termination date of April 30, 2021. This was essentially an alternative method for enforcing the parties’ agreement, as it places the wife’s loan and payment to the husband after the marriage end date. The wife argues the court should have used the final hearing date of April 28, 2022 for the marriage end date. She claims the husband’s move from the house was unilateral and notes the parties continued to communicate after the husband moved out and one of the parties voiced a desire to reconcile in July 2021.

{¶43} However, the trial court’s decision is supported by the record. First, there is no indication the husband made a unilateral decision to move from the house. He moved out on April 30, 2021 after deeding away his interest in the house as part of their settlement agreement, in a deed also signed by the wife. In the days before this contractual act, the wife asked him to come with her to sign away the house and car and to let her know what day he was moving out. They signed the deed on April 29, 2021, and it was recorded on April 30, 2021. As part of that agreement, they planned for the husband to obtain individual debt in order to release the wife from the large joint debt secured by the vehicle he drove (with a mere $2,000 in equity). (Ex. 10 at 3). Furthermore, they divided their accounts. For example, when the husband took his name off the joint financial accounts, the wife went to the bank to complete her portion of the account paperwork while asking if she could withdraw the remaining money, and he consented (all on April 28, 2021).

{¶44} The mere fact of continued civil communications after a party moves out is not necessarily a weighty consideration against selecting a marital termination date that is earlier than the date of the final divorce hearing. The husband testified they personally met to see the dogs after he moved out, and much of the parties’ communications after the husband vacated the marital residence focused on the facilitation of marriage termination. For instance, the wife gave advice on what the husband should do about keeping or selling the expensive truck and what he should do with the settlement money

she would be giving him. The wife emphasizes the husband acknowledged a July 2021 telephone conversation where one of them asked if the termination of the marriage was really going to happen; he was not asked to place the specifics on the record while testifying (with counsel generally referring him to deposition testimony that is not in the record). The wife testified they expressed second thoughts about the divorce in the phone conversation, but she also acknowledged one or both of them felt too much had happened to reconcile.

{¶45} The vague references to one phone conversation do not require the court to find the parties attempted reconciliation. Moreover, evidence of voiced regrets or wishes is not akin to reconciliation or a fact disallowing a trial court from selecting an earlier marriage end date. *See Pariano v. Pariano*, 7th Dist. Carroll No. 15 CA 904, 2016-Ohio-560, ¶ 13, 15 (attending a marriage counseling session after moving out does not bar the use of an earlier marriage end date).

{¶46} As for the court's initial decision to reject the date of the final divorce hearing as an equitable marriage termination date, the court considered the various relevant dates. The dissolution action was filed on June 11, 2021, and the wife provided the settlement money to the husband on June 22, 2021. Within two days, he used the money to eliminate their joint vehicle loan in order to release the wife as a joint obligor. The settlement obligations were complete, and the assets had been previously detangled. By the time of the August 3, 2021 notice of appearance by the wife's counsel and motion to continue the August 23, 2021 dissolution hearing, there were no further indications of civility or personal communication. At some point between then and the hearing, the wife moved to the Washington D.C. area. It was entirely reasonable to find it would be inequitable to use the April 28, 2022 date of the final divorce hearing as the marriage end date.

{¶47} The trial court was then required to select the date "that it considers equitable in determining marital property." R.C. 3105.171(A)(2)(b). "The choice of a date as of which assets available for equitable distribution should be identified and valued must be dictated largely by pragmatic considerations. * * * It is the equitableness of the result reached that must stand the test of fairness on review." *Berish*, 69 Ohio St.2d at 319-20. Considering the totality of the circumstances reviewed supra, the trial court's selection of

April 30, 2021 as a marriage end date was not unreasonable, unconscionable, or arbitrary. Among other occurrences, this was the date the husband moved out (as planned), which corresponded to the date the property deed was recorded wherein he transferred the marital residence away as part of the parties' agreement (trusting the wife would pay him as promised, which she did once she obtained the money and the dissolution paperwork was complete). We cannot substitute our judgment for the discretion exercised by the trial court. This assignment of error is overruled.

ASSIGNMENTS OF ERROR 3 & 4

{¶48} The wife's third and fourth assignments of error, which both involve the $85,000 loan the wife obtained to pay the husband, provide:

"THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT'S LINE OF CREDIT FROM WESBANCO BANK, INC. IS NOT A MARITAL DEBT."

"THE TRIAL COURT ERRED IN DETERMINING IT IS EQUITABLE TO ALLOCATE THE LINE OF CREDIT FROM WESBANCO BANK, INC. TO DEFENDANT ALONE."

{¶49} The wife argues it was against the manifest weight of the evidence for the trial court to find the loan was a non-marital debt and refuse to equitably divide the obligation between both parties. *Citing Smith v. Smith*, 9th Dist. Summit No. 26013, 2012-Ohio-1716, ¶ 8 ("the division of property also includes marital debt * * * although equal division may be a starting point for the division of debt, a trial court may divide debt unequally if an equal division would be inequitable"). The wife alternatively claims it was otherwise inequitable to ignore her poor financial situation and allocate the loan obligation to her alone. She concludes by asking this court to "equitably divide the line of credit with Wesbanco or sell the 2019 Ford F150" (which was the less expensive replacement vehicle the husband purchased to remove her name from the loan).

{¶50} In general, the division of marital property shall be equal unless it would be inequitable. R.C. 3105.171(C)(1). The court shall determine what constitutes marital property and what constitutes separate property and divide the marital and separate property equitably; the separate property shall be disbursed to the owner unless otherwise provided or the court constructs a distributive award to facilitate the distribution of marital property. R.C. 3105.171(B),(D),(E). The "division of property" is equated to the

"division of marital assets and liabilities." *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 95, 518 N.E.2d 1197 (1988).

{¶51} When dividing marital property, the court shall consider various factors, including "[t]he assets and liabilities of the spouses" and "[a]ny division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses" (along with any other factor the court expresses as relevant and equitable). R.C. 3105.171 (F)(2),(8),(10). In general, "marital debt is any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose." *Ketchum v. Ketchum*, 7th Dist. Columbiana No. 2001 CO 60, 2003-Ohio-2559, ¶ 47. Like assets, debts acquired "during the marriage" are presumed to be marital, unless the spouse claiming the debt is separate proves this status. *Vergitz v. Vergitz*, 7th Dist. Jefferson No. 05 JE 52, 2007-Ohio-1395, ¶ 12 (stating the rules for assets are consistently applied to debts).

{¶52} The husband cites a case where, after divorce proceedings were initiated, one spouse unilaterally decided to take out a loan to pay the final quarter of college for the parties' adult son. Pointing out the unilateral loan was taken out *after the marriage end date selected by the trial court*, the decision to allocate the loan solely to the obligor spouse was affirmed. *Gallo v. Gallo*, 11th Dist. Lake No. 2000-L-208, 2002-Ohio-2815, ¶ 30-34 (and no express agreement to help pay the loan). In deciding whether a marital presumption applies, "[t]he determinative factor is whether the debt was incurred during the marriage." *Kaletta v. Kaletta*, 8th Dist. Cuyahoga No. 98821, 2013-Ohio-1667, ¶ 65 (finding a loan entered for an adult child's college was marital where it was entered after the divorce action was instituted but *prior to the marriage end date* assigned by the trial court).

{¶53} Here, the trial court selected a marriage end date of April 30, 2021 (as discussed in the second assignment of error) and made the following findings: "the line of credit signed for individually by the [wife] is not a marital debt. It was not created in furtherance of the marriage between parties, but rather was obtained to procure the dissolution of the marriage as agreed to by the parties."

{¶54} The wife states the parties were still married when she obtained the loan on June 22, 2021 and thus it is presumed to be a marital debt. However, where the court

selects a marriage end date as permitted by statute, this date defines the assets and liabilities acquired "during the marriage." *See* R.C. 3105.171(A)(2)(b); *Berish*, 69 Ohio St.2d at 321 (broad discretion in choosing the termination date of a marriage for purposes of valuing property). The wife signed for the loan individually and issued the check on her line of credit after the dissolution petition was filed. This was *after the marriage end date selected by the trial court*. The loan was not taken out "during the marriage" as defined by the trial court. *See Pariano*, 7th Dist. No. 15 CA 904 (affirming where the trial court allocated all credit card balances to spouse who incurred the debt after the separation date, which the court selected as the marriage termination date).

{¶55} Notably, as the trial court pointed out, the wife obtained this loan to fulfill her obligation under a separation agreement. The decision to issue a check to the husband on a new line of credit on the wife's trust after the filing of the dissolution was the wife's decision; she (not the husband) chose how she would pay the property settlement she agreed to enter. Her testimony acknowledged she did not view the loan as marital debt when she obtained it. The law cited does not support the conclusion that a loan taken by spouse A to pay spouse B as a property settlement on marriage termination should be split evenly as a marital debt or otherwise allocated to spouse B under principles of equity. We discussed the equity of the agreement under the first assignment of error and pointed out the trial court occupied the best position to assign weight to the various pieces of evidence and available inferences while tracking credibility indicators. *See Davis*, 77 Ohio St.3d at 418. The trial court's decision finding the loan was not marital property and allocating the loan solely to the wife was supported by competent, credible evidence and was not unreasonable, arbitrary, or unconscionable under the circumstances existing in this case. These assignments of error are overruled.

{¶56} For the foregoing reasons, the trial court's decision is affirmed.

D'Apolito, P. J., concurs.

Hanni, J. dissents with dissenting opinion .

Hanni, J., dissenting.

{¶57} I respectfully dissent from the majority's decision to affirm the trial court's use of April 30, 2021 as the parties' *de facto* end of marriage date.

{¶58} The date of the final divorce hearing is the presumptive end date for the marriage pursuant to R.C. 3105.17(A)(2)(a). *See also Dimmerling v. Dimmerling*, 7th Dist. Noble No. 18 NO 0460, 2019-Ohio-2710, ¶ 26. However, the court may use an alternative date if using the date of the final divorce hearing is inequitable. R.C. 3105.17(A)(2)(b). Courts have determined that a de facto marriage end date should be used when:

{¶59} "the parties separate, make no attempt at reconciliation, continually maintain separate residences, separate business activities and/or separate bank accounts. * * * Courts should be reluctant to use a de facto termination of marriage date solely because one spouse vacates the marital home. * * * Rather, a trial court may use a de facto termination of marriage date when the evidence clearly and bilaterally shows that it is appropriate based upon the totality of the circumstances."

{¶60} *Dimmerling, supra*, at ¶ 35, citing *Marini v. Marini*, 11th Dist. Trumbull No. 2005-T-0012, 2006-Ohio-3775, ¶ 13.

{¶61} I would find that the trial court's de facto termination of marriage date is unreasonable. It appears that the court used April 30, 2021 because this is when the husband moved out and the deed was recorded releasing the marital residence back to the wife's parents. However, this is not the only factor to consider in determining a de facto termination of marriage date. Both parties testified that they continued to communicate and discussed reconciliation after April 30, 2021 and up to at least July 2021. Tr. at 126, 156-157, 207-208. Moreover, the petition for dissolution was not filed until June 11, 2021 and the petition for divorce was filed on August 23, 2021.

{¶62} In addition, the undersigned notes a coarse approach taken by the court towards the wife's counsel during his questioning of the wife's mother. Tr. at 72-76. The court's frustration during this questioning was understandable due to confusion over questions presented and the interjections of the wife's mother about wanting to read a statement to the court. However, the court should have resolved any confusion or admonished counsel outside of the hearing of the parties.

{¶63} Accordingly, I would find that the end of marriage date is the April 28, 2022 divorce hearing.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Belmont County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.