[Cite as *Adams v. Adams*, 2009-Ohio-6257.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Karen Adams — Court of Appeals No. WD-09-022

Appellee — Trial Court No. 2007DR0004

v.

Barry Adams — **DECISION AND JUDGMENT**

Appellant — Decided: November 20, 2009

* * * * *

Mark A. Robinson, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of the Wood County Court of Common Pleas, Domestic Relations Division, in which the trial court granted a divorce to appellee, Karen Adams, from appellant, Barry Adams. For the reasons that follow, we affirm in part and reverse in part.

{¶ 2} Appellant sets forth the following assignments of error:

{¶ 3} "I. The trial court abused its discretion in its award of spousal support pursuant to R.C.310(C)(1). As the statutorily mandated factors lead to the conclusion that a lesser amount of spousal support is warranted for a lesser period of time.

{¶ 4} "II. The trial court erred in its determination of child support by failing to impute income to appellee and failing to determine the proper day care expenses to be used in calculating child support.

{¶ 5} "III. The trial court abused its discretion and erred in its determination that appellant's IRA and stock fund were marital property.

{¶ 6} "IV. The trial court abused its discretion by failing to credit appellant for items previously agreed to by the parties and incorporated into a consent judgment entry.

{¶ 7} "V. The trial court erred in ordering appellant to obtain life insurance to secure the payment of spousal support and child support.

{¶ 8} "VI. The trial court abused its discretion and erred in ordering inconsistent payment ordering inconsistent payment orders for and outstanding medical bill of $500."

{¶ 9} The undisputed facts are as follows. The parties were married in October 1999. They have twin daughters born in 2001. Appellee worked briefly as a dental assistant during the marriage and then later, she worked part-time in a gift store. At the time of the divorce in 2008, she was again working full-time as an administrative assistant for $11.50 an hour. During the marriage, appellant worked as a financial advisor. The judgment entry of divorce ordered appellant to pay appellee spousal support

in the amount of $900 per month for 30 months and child support in the amount of $983.17 per month.

{¶ 10} In his first assignment of error, appellant disputes the amount of spousal support he was ordered to pay. He contends that the amount should be less and that it should be paid for a shorter period of time.

{¶ 11} Appellate review of a court's decision to grant or deny requested spousal support is limited to a determination of whether the court abused its discretion. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 626. A trial court's broad discretion in awarding spousal support is controlled by the R.C. 3105.18(C)(1) factors. *Carmony v. Carmony*, 6th Dist. No. L-02-1354, 2004-Ohio-1035, ¶ 10. The trial court is not required to comment on each factor; instead, the record need only show that the court considered each factor in making its spousal support award. *Tallman v. Tallman*, 6th Dist. No. F-03-008, 2004-Ohio-895; *Stockman v. Stockman* (Dec. 15, 2000), 6th Dist. No. L-00-1053.

{¶ 12} R.C. 3105.18(C)(1) provides:

{¶ 13} "(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶ 14} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶ 15} "(b) The relative earning abilities of the parties;

{¶ 16} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶ 17} "(d) The retirement benefits of the parties;

{¶ 18} (e) The duration of the marriage;

{¶ 19} "(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

{¶ 20} "(g) The standard of living of the parties established during the marriage;

{¶ 21} "(h) The relative extent of education of the parties;

{¶ 22} "(i) The relative assets and liabilities of the parties, including but not limited to any court ordered payments by the parties;

{¶ 23} "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶ 24} (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

{¶ 25} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 26} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 27} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 28} Here, the trial court noted that appellant earned $70,108.52 in 2007. This amount included $19,976 in proceeds he received when his company was purchased. The court imputed income to him in the amount of $50,000 which represented his 2007 income minus the company sale proceeds. The court noted that appellee, who recently went back to work, earns $23,920 a year. Appellant contended that appellee is capable of making more money if she went back to work as a dental assistant. However, the court found that appellee had been away from that field for ten years and she no longer has a current license. Neither appellant, age 44, nor appellee, age 46, have any health problems. During their eight and one-half year marriage, appellant was the primary wage earner. The parties owe the Internal Revenue Service approximately $50,000 from their joint tax filings. This liability was incurred when appellant made withdrawals from an IRA account. Appellee was unaware of the withdrawals. The court considered that there are arreages of child support and spousal support in the amount of $15,886.88 as of January 2008, and $22,593.00 as of May 2008. Upon review, we find that the trial court was well within its discretion in awarding spousal support in the amount of $900 per month for 30 months. Appellant's first assignment of error is found not well-taken.

{¶ 29} Appellant next contends that the court erred in calculating his child support amount. Appellant contends that appellee, as a former dental hygienist, is voluntarily underemployed and that the court should have imputed income to her consistent with the wages she could be making as a dental hygienist.

{¶ 30} Before a trial court may impute income to a parent, it must first find that the parent is voluntarily unemployed or underemployed. *Inscoe v. Inscoe* (1997), 121 Ohio App.3d 396, citing *Rock v. Cabral* (1993), 67 Ohio St.3d 108, syllabus. Whether a parent is voluntarily unemployed or underemployed is a determination within the trial court's discretion and will be upheld absent an abuse of discretion. *Rock* at 112, applying former R.C. 3113.215. R.C. 3119.01(C)(11) provides the following guidelines for determining imputed income:

"(a) Imputed income that the court or agency determines the parent would have earned if fully employed as determined from the following criteria:

{¶ 31} "(i) The parent's prior employment experience;

{¶ 32} "(ii) The parent's education;

{¶ 33} "(iii) The parent's physical and mental disabilities, if any;

{¶ 34} "(iv) The availability of employment in the geographic area in which the parent resides;

{¶ 35} "(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

{¶ 36} "(vi) The parent's special skills and training;

{¶ 37} "(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

{¶ 38} "(viii) The age and special needs of the child for whom child support is being calculated under this section;

{¶ 39} "(ix) The parent's increased earning capacity because of experience;

{¶ 40} "(x) Any other relevant factor."

{¶ 41} Here, the court found that appellee, who only has a high school diploma, did not work for most of the marriage. For approximately eight months at the beginning of the marriage, she was employed with a dentist as a certified dental assistant. However, she has been away from that line of employment for ten years and her license has long since expired. Updating her license would require further education. These factors, the court found, would make imputing income to her difficult. We are not permitted to substitute our judgment for that of the trial court, and thus we cannot say that there was an abuse of discretion in this decision.

{¶ 42} Appellant next contends that the trial court miscalculated appellee's yearly daycare expenses. The court found that appellee's yearly daycare expenses amounted to $9,092. Appellant contends that the expenses are in fact much less than that since the children would be starting the first grade in a few months and they therefore would require less daycare.

{¶ 43} The record shows that the magistrate's conclusion is supported by the evidence. The amount reflects the money appellee had to pay for daycare from January

2008 until July 2008. The amount also reflects the lesser amount appellee would be paying in the fall of 2008, when the children would be starting school. In sum, the amount accurately reflects appellee's yearly daycare expenses for 2008, the year of the decision. Should appellee's daycare expenses decrease in the future, appellant's concerns would be more appropriately addressed through a motion to modify. Appellant's second assignment of error is found not well-taken.

{¶ 44} Appellant next contends that the court erred in finding that his IRA and stock fund were marital property.

{¶ 45} It is well-settled that "review of a trial court's division of marital property is governed by the abuse of discretion standard." *Raff v. Raff*, 5th Dist. No.2004-CA00251, 2005-Ohio-3348, ¶ 21, citing *Martin v. Martin* (1985), 18 Ohio St.3d 292. Pursuant to R.C. 3105.171(A)(3)(a)(i), marital property consists of "real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both * * * during the marriage." Conversely, separate property includes "real or personal property * * * that was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(a)(ii). Under these statutory parameters, the party seeking to classify property as separate bears "the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734.

{¶ 46} In conjunction with the above applicable legal principles, it is well-settled that "under certain circumstances separate property may be converted to marital property

when it is commingled with marital property." Id. However, pursuant to R.C. 3105.171(A)(6)(b), "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property * * * except when the separate property is not traceable."

{¶ 47} Accordingly, "traceability is the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Rash v. Rash*, 6th Dist. No. F-04-016, 2004-Ohio-6466, ¶ 29, citing *Peck*, supra.

{¶ 48} In determining what constitutes marital or separate property, the transmutation doctrine considers: "(1) the expressed intent of the parties * * *; (2) the source of the funds, if any, used to acquire the property; (3) the circumstances surrounding the acquisition of the property; (4) the dates of the marriage, the acquisition of the property, the claimed transmutation, and the breakup of the marriage; (5) the inducement for and/or purpose of the transaction which gave rise to the claimed transmutation; and (6) the value of the property and its significance to the parties." *Kuhen v. Kuhen* (1988), 55 Ohio App.3d 245, 246. However, following the enactment of R.C. 3105.171, the transmutation doctrine is no longer applicable "unless the financial history of an asset cannot be traced * * *." *Cataline v. Cataline* (Nov. 5, 1993), 6th Dist. No. S-93-10. Thus, this court has emphasized that "under [R.C. 3105.171(A)(6)(b)], the key is the traceability of the property." *Landphair v. Landphair* (July 26, 1996), 6th Dist. No. H-96-005.

{¶ 49} Defendant's exhibit A, introduced into evidence, showed that, in June 1999, before the parties were married, appellant had a balance of $181,108.17 in his Key Bank IRA account. Appellant testified that when he went to work for National City Bank after his marriage, he rolled over his Key Bank IRA into a National City Bank IRA. In 2002, appellant lost his job at National City Bank and he began withdrawing sums from the IRA to pay the family living expenses. Appellant estimated that he depleted the account to $50,000. After National City Bank, appellant went to work for Online Banking Services. He used money from his IRA to purchase $50,000 in OBS stock. As of the time of the parties' divorce hearing, appellant testified that his IRA was worth approximately $3,700 and his OBS stock was worth approximately $19,000.

{¶ 50} Appellant estimated that during the marriage, he deposited approximately $10,000 into his IRA. Appellant acknowledged that he could not prove through tracing that no marital funds were used to fund his retirement accounts. Accordingly, the court did not err in finding the entire IRA account and appellant's OBS stock was marital property as appellant failed to establish by a preponderance of the evidence the traceability of his separate property in the accounts. Appellant's third assignment of error is found not well-taken.

{¶ 51} In his fourth assignment of error, appellant contends that the trial court erred in failing to credit him $3,600 in spousal support. Appellant's argument is based on the magistrate's temporary order dated March 5, 2007, which reads in pertinent part:

{¶ 52} "* * * both parties agree and acknowledge that the spousal support will be decreased dollar-for-dollar for the difference between [appellee's] current [vehicle] monthly payment, and the monthly payment for whatever substitute vehicle [appellee] ultimately leases/purchases."

{¶ 53} In the trial court's final decision, the court gave appellant a $600 credit towards his spousal support for appellee's December 2007 vehicle payment. Appellee, however, testified that while she did not make any payments on the vehicle after November 2007, she continued to use the vehicle until it was repossessed in May 2008. In May 2008, appellee purchased a different vehicle. Appellant argues that he is entitled to a $3,600 credit towards his spousal support. Said amount reflects the six months appellee used her prior vehicle without making a payment. We agree. Accordingly, appellant's fourth assignment of error is found well-taken as appellant is entitled to a credit for his overpayment of spousal support.

{¶ 54} In his fifth assignment of error, appellant contends that the court erred in ordering him to obtain life insurance to secure his payment of spousal and child support.

{¶ 55} A trial court may secure a spousal support order with life insurance, but only if the court makes it clear that it is, in effect, ordering spousal support to extend beyond the death of the obligor. *Forbis v. Forbis*, 6th Dist. Nos. WD-04-056, WD-04-063, 2005-Ohio-5881, citing R.C. 3105.18(B) (spousal support ends at death of either party, unless court orders otherwise); *Waller v. Waller*, 163 Ohio App.3d 303, 2005-Ohio-4891; *Woodrome v. Woodrome* (Mar. 26, 2001), 12th Dist. No. CA000-05-074;

Vlah v. Vlah (Nov. 28, 1997), 11th Dist. No. 97-G-2049; *Pope v. Pope* (Apr. 11, 1997), 6th Dist. No. L-96-198; *Moore v. Moore* (1997), 120 Ohio App.3d 488; *Addy v. Addy* (1994), 97 Ohio App.3d 204; *McCoy v. McCo*y (1993), 91 Ohio App.3d 570.

{¶ 56} Here, the trial court specifically ordered appellant's spousal support obligation to terminate upon the death of either party. Accordingly, the trial court abused its discretion in ordering appellant to acquire and maintain life insurance to secure his spousal support obligation.

{¶ 57} As to appellant's child support obligation, it is appropriate to secure a child support obligation by ordering that the children be named as beneficiaries of the parent's life insurance policy until they reach the age of majority. *Pruit v. Pruit*, 8th Dist. No. 84335, 2005-Ohio-4424, citing *Gillespie* v. Gillespie (June 30, 1994), Cuyahoga App. No. 65518. In this case, however, the order erroneously requires appellee to be named as beneficiary of the policy. Accordingly, appellant's fifth assignment of error is found well-taken.

{¶ 58} In his sixth assignment of error, appellant contends that the court erred in issuing inconsistent orders regarding an outstanding $500 medical bill for the parties' children. We agree. In one section of the court's final order, the parties are ordered to split the expense and in another section of the court's order, appellant is ordered to pay the entire $500 bill. Accordingly, appellant's sixth assignment of error is found well-taken.

{¶ 59} On consideration whereof, this court finds that the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part. This case is remanded to the trial court for modification and clarification regarding the spousal support order, the order that appellant maintain life insurance as security for spousal support and child support obligations existing at the time of his death, and the order regarding the $500 medical debt. The balance of the trial court's decision is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Wood County.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE