[Cite as *Wolf v. Wolf*, 2009-Ohio-3687.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

DIANE WOLF,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-001
	:	O P I N I O N
- vs -		7/27/2009
	:	
RAYMOND D. WOLF,	:	
Defendant-Appellant.	:	

APPEAL FROM PREBLE COUNTY COURT OF COMMON PLEAS
Case No. 2002-DR-03655

David P. Mesaros, 7051 Clyo Road, Centerville, Ohio 45459, for plaintiff-appellee

Keith R. Kearney, 2160 Kettering Tower, Dayton, Ohio 45423, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Raymond D. Wolf, appeals from the Preble County Court of Common Pleas' decision regarding spousal support, assignment of debts, and payment of medical bills and attorney fees. We affirm the trial court's decision.

{¶2} Raymond and plaintiff-appellee, Diane Wolf, were married in 1983. In or around 2001, Raymond, a Doctor of Osteopathic Medicine, received notice that his medical practice had not filed federal corporate tax returns, federal wage withholding returns, and municipal and state tax returns from 1998 through 2001. Because of these omissions, both

Raymond and Diane owed taxes and penalties and, as a result, they each had tax liens worth tens of thousands of dollars issued against them.

{¶3} The following year, Diane filed for divorce. Throughout the duration of the divorce process, Raymond, pursuant to a court order, paid Diane $1,000 per month in spousal support and $685.48 per child per month in child support. The parties' divorce proceedings were subsequently delayed by several years because Diane filed for bankruptcy three times, and Raymond filed for bankruptcy once. Largely in part due to the bankruptcy proceedings, and their existing tax obligations, both Raymond and Diane saw significant fluctuations in their personal finances.

{¶4} The trial court issued a decision on September 25, 2008 granting custody of the sole remaining minor child to Diane, ordering Raymond to pay $678.53 per month in child support and requiring Raymond to pay 89% of his children's past outstanding medical bills.[1] The trial court also ordered Raymond to pay Diane $1,750 per month in spousal support for 60 months, while retaining jurisdiction over spousal support; and pay $20,000 of Diane's attorney fees. The trial court divided the parties' remaining real and personal property, but did not allocate the parties' debt other than to make Diane responsible for debt on the marital home. In its December 23, 2008 final judgment and decree of divorce, the trial court held both parties responsible for the debt in their respective names. Raymond filed an appeal raising four assignments of error.

{¶5} Assignment of Error No.1:

{¶6} "THE TRIAL COURT ERRED IN FINDING THAT IT WAS APPROPRIATE AND REASONABLE TO ORDER APPELLANT TO PAY APPELLEE SPOUSAL SUPPORT IN THE AMOUNT OF $1,750.00 PER MONTH FOR A PERIOD OF FIVE YEARS WHILE RETAINING JURISDICTION OVER BOTH THE AMOUNT AND DURATION OF SPOUSAL

SUPPORT."

{¶7} In his first assignment of error, Raymond argues that the trial court erred in ordering a $1,750 per month award of spousal support, and in retaining jurisdiction over the spousal support award. We find no merit to these arguments.

{¶8} The trial court has broad discretion in deciding whether an award of spousal support is proper based on the facts and circumstances of each case. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. "A reviewing court cannot substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion" in making the award. Id.

{¶9} After the division of marital property, a trial court may order an award of reasonable spousal support to either party in a divorce proceeding. R.C. 3105.18(B). Pursuant to R.C. 3105.18(C)(1), "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support * * * the court shall consider all of the * * * factors" set forth in R.C. 3105.18(C)(1). See, also, *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, paragraph one of the syllabus. "These factors include each party's income, earning capacities, age, retirement benefits, education, assets and liabilities, and physical, mental and emotional condition; the duration of the marriage; their standard of living; inability to seek employment outside the home; contributions during the marriage; tax consequences; and lost income capacity due to a party's fulfillment of marital responsibilities." *Brickner v. Brickner*, Butler App. No. CA2008-03-081, 2009-Ohio-1164, ¶21, citing R.C. 3105.18(C)(1)(a)-(m). "In addition, a trial court is free to consider any other factor it deems relevant and equitable." Id., citing R.C. 3105.18(C)(1)(n). If the trial court orders an award of spousal support, "the trial court must indicate the basis for its award in sufficient detail to enable a reviewing court to determine

1. At the time the divorce was granted, two of the parties' three children were emancipated.

that the award is fair, equitable and in accordance with the law." *Kaechele,* paragraph two of the syllabus.

{¶10} Raymond argues that an award of spousal support was improper because Diane had already received approximately $69,000 in spousal support for the six years it took to finalize their divorce. In addition, Raymond argues that the amount of spousal support was unreasonable in light of the fact that his income has declined significantly and is likely to decline even further, and because Diane's retained assets, namely the marital home, would leave her with $100,000 to $130,000 titled solely in her name.

{¶11} We can presume the trial court considered the factors enumerated in R.C. 3105.18 in making its decision as the court stated that it did so within its decision. See *Mavity v. Mavity*, Butler App. Nos. CA2000-12-244, CA2000-12-247, 2002-Ohio-556, 5, citing *Babka v. Babka* (1992), 83 Ohio App.3d 428, 435 (finding "[w]hen a trial court indicates that it has reviewed the appropriate statutory factors, there is a strong presumption that the factors were indeed considered").

{¶12} Specifically, with regard to the factors, the trial court noted that there was a significant disparity in income between the parties. Diane was earning $43,000 annually, while Raymond was earning $100,000 per year. The trial court also found Diane was essentially at the limit of her earning potential, while Raymond had the potential to increase his income. However, the trial court tempered its finding regarding Raymond's earning capacity by stating that Raymond's loss of his business property may affect his earning potential and have an adverse impact on his ability to maintain his current income. In addition, the trial court observed that parties had experienced a decline in their standard of living. The trial court was also mindful of the fact that Raymond had been paying $1,000 per month in spousal support to Diane for six years. Finally, the trial court found that the parties had a 25-year marriage, notwithstanding the fact they had lived separately for the final six

years.

{¶13} We find that the trial court considered the statutory factors and the special circumstances of the parties. It is also obvious that the trial court was particularly aware of Raymond's declining income and his potential loss of earning capacity. Furthermore, because property division is made prior to any award of spousal support, we must assume that the trial court took into consideration the fact that Diane was allowed to retain the marital home. See R.C. 3105.18(B). After reviewing the facts of this case, we cannot say that the trial court's decision to award spousal support in the amount of $1750 per month to Diane was an abuse of discretion. The court's decision regarding the award and amount are both reasonable and appropriate under the totality of the circumstances.

{¶14} Raymond also contends that the trial court erred in retaining jurisdiction over the spousal support award, likening the award to an order of indefinite support.

{¶15} "The decision whether to retain jurisdiction to modify a spousal support award is within the trial court's discretion." *Ricketts v. Ricketts* (1996), 109 Ohio App.3d 746, 755, abrogated on other grounds *Erb v. Erb*, 91 Ohio St.3d 503, 2001-Ohio-104, citing *Johnson v. Johnson* (1993), 88 Ohio App.3d 329, 331. Thus, we will not disturb the trial court's decision absent an abuse of discretion. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} Raymond's argument is premised on his belief that the trial court will lengthen the period of spousal support "for a potentially indefinite period of time." Raymond's contention is that the factors recited in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, supporting indefinite awards – marriage of long duration, parties of advanced age, and/or a homemaker spouse who had little opportunity to develop meaningful employment outside the home – are not present, so retention of jurisdiction was improper. Id., at paragraph one of the syllabus. However, we point out that *Kunkle* did not address the issue of jurisdiction over a spousal support award. Instead, it merely explained when courts should consider permanent or fixed

term spousal support. Id.

{¶17} In this case, the trial court awarded a fixed term of spousal support for 60 months or five years, which is entirely consistent with *Kunkle*'s holding. It is pure conjecture by Raymond to suggest that at the end of this period the trial court will prolong his obligation. While it is certainly possible that the trial court may, at the end of the five years, place additional support requirements upon Raymond, it could only do so after a finding that there was a substantial change in circumstances. See *Mandelbaum v. Mandelbaum*, 121 Ohio St.3d 433, 2009-Ohio-1222.

{¶18} We cannot speculate on what the trial court may do in the future, we can only assess whether, in the present, the court erred in retaining jurisdiction. We find that the trial court's retention of jurisdiction over the spousal support award was not an abuse of discretion, especially in light of the parties' tenuous financial status, and the probable fluctuation of the statutory factors related to spousal support. See *McLeod v. McLeod,* Lake App. No.2000-L-197, 2002-Ohio-3710, ¶114. Raymond's first assignment of error is hereby overruled.

{¶19} Assignment of Error No. 2:

{¶20} "THE TRIAL COURT ERRED IN FAILING TO ALLOCATE RESPONSIBILITY BETWEEN APPELLANT AND APPELLEE FOR THE PAYMENT OF THE INTERNAL REVENUE SERVICE TAX LIENS OWED BY THE PARTIES DURING MARRIAGE."

{¶21} Raymond's second assignment of error asserts the trial court erred in allocating marital debt between the parties. Specifically, Raymond claims that the trial court failed to allocate responsibility for the payment of the tax liens owed by the parties. Raymond argues the trial court should have divided the tax lien debts equally between the parties, and ordered the sale of his medical practice property with the proceeds applied to both parties' tax lien obligations. We find no merit to Raymond's arguments.

{¶22} "A trial court has broad discretion in making divisions of property in domestic cases." *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. "While a reviewing court in any domestic-relations appeal must be vigilant in ensuring that a lower court's determination is fair, equitable, and in accordance with law, an appellate court must refrain from the temptation of substituting its judgment for that of the trier-of-fact, unless the lower court's decision amounts to an abuse of discretion." *Martin v. Martin* (1985), 18 Ohio St.3d 292, 295.

{¶23} Because a trial court must consider the assets and liabilities of both parties, dividing marital property requires the trial court to also divide marital debt. See R.C. 3105.171(F)(2). Thus, "[a] trial court's allocation of marital debt will not be reversed absent an abuse of discretion." *Vaughn v. Vaughn*, Warren App. No. CA2007-02-021, 2007-Ohio-6569, ¶41, citing *Elliott v. Elliot,* Ross App. No. 05CA2823, 2005-Ohio-5405, ¶17.

{¶24} In its final judgment and decree of divorce, the trial court clearly allocated the debt between the parties where it stated, "each party will maintain the debt in their respective names and hold the other party harmless and any debt incurred by either party in their own name since the filing of the Complaint for divorce shall remain the sole obligation of that party free and clear of any claim or contribution from the other party." While the trial court's judgment is general, as it does not specifically identify the debts each party is responsible for paying, it is clear from the record that the trial court was aware of the outstanding tax liens. Thus, its entry can fairly be read to encompass those debts.

{¶25} "When questions of fact are tried by the court without a jury, judgment may be general * * * *unless one of the parties in writing requests otherwise* * * * in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law." Civ.R. 52. (Emphasis added.)

{¶26} This court has stated that "[t]he purpose of separately stated findings of fact

and conclusions of law is to enable a reviewing court to determine the existence of assigned error." *Creggin Group, Ltd. v. Crown Diversified Industries Corp.* (1996), 113 Ohio App.3d 853,859, citing *Abney v. W. Res. Mut. Cas. Co.* (1991), 76 Ohio App.3d 424, 431. "A party who fails to bring an alleged error to the attention of the trial court at a time when the error may be corrected waives the error on appeal." *Pawlus v. Bartrug* (1996), 109 Ohio App.3d 796, 801, citing *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123. Moreover, "Civ.R. 52 provided the appellant[ ] with a means after entry of the judgment to obtain separate findings of fact and conclusions of law by which we could test the trial court's judgment. Having failed to do so, [he] cannot be heard to complain that the court did not make the necessary findings." Id. Indeed, absent a request for findings of fact and conclusions of law, we must presume the regularity of the trial court proceedings. See *Bunten v. Bunten* (1998), 126 Ohio App.3d 443, 447.

{¶27} As Diane points out in her brief, Raymond failed to file a motion with the trial court requesting findings of fact and conclusions of law pursuant to Civ.R. 52. Because the trial court allocated the debts between the parties as part of its decision regarding property division, and because we must assume the trial court complied with all statutory factors regarding that division, we cannot say there was an abuse of discretion. See *Donese v. Donese* (April 10, 1998), Greene App. No. 97-CA-70, 1998 WL 165012, at *4 (finding a presumption of regularity and compliance with statutory factors where no request was made under Civ.R. 52). Therefore, Raymond's second assignment of error is overruled.

{¶28} Assignment of Error No. 3:

{¶29} "THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY EIGHTY-NINE PERCENT (89%) OF THE OUT-OF-POCKET UNPAID MEDICAL BILLS FOR THE MINOR CHILDREN IN THE AMOUNT OF $10,146.00."

{¶30} In his third assignment of error, Raymond argues that the trial court erred in

ordering him to pay 89 percent of the children's past medical bills because Diane's claim for reimbursement was barred by the doctrine of laches. We find no merit to this argument.

{¶31} "Laches is * * * neglect to assert a right under such circumstances and for such a length of time as, when not induced by fraud, or otherwise shown to be justified, will lead a court of equity to refuse its aid." *Russell v. Fourth Nat. Bank* (1921), 102 Ohio St. 248, 270. See, also, *Crago v. Kinzie* (C.P.2000), 106 Ohio Misc.2d 51, 63, quoting 66 Ohio Jurisprudence 3d (1986) 415, Limitations and Laches, Section 219 ("laches prevents an action 'by a plaintiff who has allowed so much time to elapse that the intervening equities of the defendant outweigh those of the plaintiff'"). "Delay in asserting a right does not of itself constitute laches, and in order to successfully invoke the equitable doctrine of laches it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Smith v. Smith* (1959), 168 Ohio St. 447, paragraph three of the syllabus. However, "'[t]he mere inconvenience of having to meet an existing obligation imposed * * * by an order or judgment of a court of record at a time later than that specified in such * * * order cannot be called material prejudice.'" *Connin v. Bailey* (1984), 15 Ohio St.3d 34, 37, quoting *Smith* at 457.

{¶32} Laches is an affirmative defense which is waived if not raised to the trial court. See, generally, *Jim's Steak House, Inc. v. Cleveland,* 81 Ohio St.3d 18, 20, 1998-Ohio-440; *State ex rel. Spencer v. E. Liverpool Planning Comm.*, 80 Ohio St.3d 297, 299, 1997-Ohio-77. Therefore, because Raymond failed to raise this defense to the trial court he has waived the issue on appeal.

{¶33} Although the trial court ordered both parties to maintain medical coverage for the children, the court failed to address any responsibility for the payment of uninsured medical costs that might arise over the duration of the parties' divorce. Over the course of the six-year proceeding, the parties' three children managed to accumulate $11,400.45 in

uninsured medical expenses that Diane alone paid. Although Diane attempted to present the initial bills at the beginning of the action, she said that Raymond refused to pay them so she stopped asking him for further recompense. Diane testified that she believed Raymond was aware of the bills because his insurance carrier would have sent statements to him apprising him of what expenses were covered and what expenses were uncovered.

{¶34} Assuming, arguendo, that Raymond had preserved laches on appeal, we point out that in his April 4, 2008 post-trial memorandum, he specifically stated, "[e]ven if the Court determines the validity of these [uninsured medical, dental, optical, orthodontics] expenses, they are not entirely Defendant's obligation, but rather should be apportioned between the parties according to their income percentage." In ordering Raymond to pay 89 percent of the bills, the trial court appears to have used the percentage of income Raymond was found to be responsible for in the child support worksheet completed on September 4, 2002. This order was in effect for the duration of the proceedings and was only amended in the worksheet completed for the final judgment and decree. Thus, the trial court ordered the parties to pay based on their percentage of income, which is exactly what Raymond proposed in his memorandum.

{¶35} Furthermore, Raymond testified that he was providing insurance for his children during the entire six-year period. Diane testified that Raymond would have received an explanation of benefits from his insurance company for what expenses were or were not covered when his insurance was either primary or secondary for the medical bills. Based on this information, we do not believe Raymond could have been materially prejudiced by the delay of presentation of the children's medical bills. Raymond's third assignment of error is overruled.

{¶36} Assignment of Error No. 4:

{¶37} "THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY

APPELLEE'S ATTORNEY FEES IN THE AMOUNT OF $20,000.00."

{¶38} In Raymond's final assignment of error, he argues that the trial court erred in awarding attorney fees to Diane because he had been paying her spousal support for six years, the excessive delay in the proceedings was primarily based on her decision to file for bankruptcy three times, and because in all likelihood her fees could be discharged in bankruptcy.[2] We find no merit to Raymond's arguments.

{¶39} "It is well-established that an award of attorney fees is within the sound discretion of the trial court." *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, citing *Blum v. Blum* (1967), 9 Ohio St.2d 92, syllabus; *Wolf v. Friedman* (1969), 20 Ohio St.2d 49, 58; *Cohen v. Cohen* (1983), 8 Ohio App.3d 109, 111. A trial court's decision in this matter "will not be overruled absent an attitude that is unreasonable, arbitrary or unconscionable." Id., citing *Blakemore*, 5 Ohio St.3d at 219.

{¶40} R.C. 3105.73(A) states in pertinent part, "[i]n an action for divorce * * * a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate."

{¶41} In its September 28, 2008 decision, the trial court, in awarding attorney fees to Diane stated, "there are no significant assets available, Defendant has paid temporary spousal support for six years, both parties were involved in creating the situation that resulted in the current financial problems, and the case has been pending for a long period of time

2. Raymond presented no evidence that Diane's attorney fees, related to her divorce, were discharged during her bankruptcy proceedings. Had he shown those fees were discharged, it would have been improper for the trial court to make such an award. See *Greer-Burger v. Temesi*, 116 Ohio St.3d 324, 2007-Ohio-6442, ¶24. Cf. *Mallin v. Mallin* (1995), 102 Ohio App.3d 717, 721-22 (attorney fees still owed even after discharge in bankruptcy

due to several bankruptcy proceedings resulting in stay orders. * * * In the domestic relations case, there is clear authority for the award of attorney fees. During much of the pendency of the case, Plaintiff's income was nominal relative to that of Defendant. Plaintiff does not receive any significant award of property in this Decision because there are no assets of significance to divide. In other words she cannot pay her attorney fees out of her property award. Defendant is ordered to pay to plaintiff for partial reimbursement of fees and costs incurred in prosecution of this case, the sum of $20,000."

{¶42} It is clear from this language that the trial court carefully considered all of the "equitable" considerations contained within R.C. 3105.73(A) when making the attorney fee award. Because of its discretion in this matter, we simply cannot substitute our judgment for that of the trial court. Raymond's fourth assignment of error is hereby overruled.

{¶43} Judgment affirmed.

POWELL, P.J., and YOUNG, J., concur.

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because the trial court stated the payment of the fees was part of an alimony award).

[Cite as *Wolf v. Wolf*, 2009-Ohio-3687.]