

[Cite as *Deacon v. Deacon*, 2009-Ohio-2491.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91609

PATRICIA H. DEACON

PLAINTIFF-APPELLEE/
CROSS-APPELLANT

vs.

JAMES W. DEACON, ET AL.

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

**JUDGMENT:
AFFIRMED AND REMANDED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-310265

BEFORE: Boyle, J., Cooney, A.J., and Sweeney, J.

RELEASED: May 28, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon

the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant/cross-appellee, James Deacon ("Jim"), and plaintiff-appellee/cross-appellant, Patricia Deacon ("Holly"), both appeal the trial court's valuation and division of assets in connection with their divorce. Jim further appeals the trial court's award of spousal support and attorney fees and its finding him in contempt. We find no merit to the appeal and affirm.

Procedural Facts and History

{¶ 2} Jim and Holly were married on May 18, 1985 and have three children together, the youngest residing with Holly and only 10 years old at the time of trial.¹ Holly filed for divorce on April 26, 2006 and moved for a temporary restraining order, asking the court to restrain Jim from diminishing or transferring any assets. The court granted the restraining order. In July 2006, Holly moved for an order requiring Jim to vacate the marital home. Jim and Holly ultimately reached an agreement in August 2006, where Jim agreed to move out of the marital home on September 1, 2006, and the court subsequently issued a temporary support order for Holly. The case proceeded to a nine-day trial in February 2008.

¹Although the two older children are now emancipated, the middle child was still considered a minor at the time of trial. He became emancipated in June 2008 upon his graduation from high school.

{¶ 3} As to the specific and detailed evidence presented at trial, we will discuss these facts infra when addressing the corresponding assignments of error.

{¶ 4} On April 21, 2008, the trial court issued its order granting the parties a divorce, dividing the marital property, and awarding Holly spousal and child support. As part of the division of marital property, the trial court ordered Jim to transfer his interest in Wantage Properties, LLC (“Wantage”) to Holly, which he ultimately did after the court found him in contempt. In its April 21 order, the court further found Jim in contempt on several grounds, including failure to pay child and spousal support. The court sentenced him to 30 days in jail but allowed him 15 days to pay \$30,000 to purge the contempt. Jim satisfied the purge condition and paid the \$30,000.

{¶ 5} Jim appeals, raising the following four assignments of error:

{¶ 6} “[I.] The trial court erred and abused its discretion in its division of property.

{¶ 7} “[II.] The trial court erred and abused its discretion in its award of spousal support.

{¶ 8} “[III.] The trial court erred and abused its discretion in ordering appellant/cross-appellee to pay appellee/cross-appellant’s attorney fees and expenses.

{¶ 9} “[IV.] The trial court erred and abused its discretion in finding the appellant/cross-appellee to be in contempt of court and ordering the payment of \$30,000.00 in attorney fees as a purge for said contempt.”

{¶ 10} Holly has filed a cross appeal, raising the following two assignments of error:

{¶ 11} “[I.] The trial court erred and abused its discretion when it found that the entire value of appellant/cross-appellee’s interest in Deacon’s Chrysler Jeep (except for the value of \$125,000 attributable to the merger) was not marital property or, in the alternative, the court erred and abused its discretion when it found that the entire appreciation of appellant/cross-appellee’s interest in Deacon’s Chrysler Jeep is not marital property.

{¶ 12} “[II.] The trial court erred and abused its discretion when, after finding that the value of the Jeep franchise was \$650,000, it failed to include the marital [sic] of \$325,000 in its property division.”

Standard of Review

{¶ 13} The Ohio Supreme Court has long recognized that a trial court must have discretion to do what is equitable upon the facts and circumstances of each divorce case. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Thus, when reviewing a trial court’s determination in a domestic relations case, an appellate court generally applies an abuse of discretion standard. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 130. An abuse of discretion connotes more than an error of law; it “implies that

the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 14} As long as the trial's court division of property, calculation of income, and award of spousal support are supported by some competent, credible evidence, this court will not disturb the trial court's decision. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66; *Holcomb*, supra, at 130. Under this deferential standard, we may not freely substitute our judgment for that of the trial court. *Soulsby v. Soulsby*, 4th Dist. No. 07CA1, 2008-Ohio-1019, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138.

{¶ 15} With this deferential standard of review in mind, we proceed to address the assignments of error.

Division of Property

{¶ 16} In his first assignment of error, Jim argues that the trial court abused its discretion in dividing the property because (1) it improperly used the date of trial as the end of the marriage for purposes of calculating the marital assets; (2) it improperly awarded Jim's entire interest in Wantage to Holly; (3) it improperly valued the parties' marital home at an amount greater than what the parties originally stipulated to; and (4) it improperly deemed Jim's interest in a Transamerica annuity as marital property. We will address each of these arguments in turn.

1. *Termination Date of the Marriage*

{¶ 17} Jim contends that the trial court abused its discretion in failing to apply a de facto termination date of marriage because the record reflects a “clear and bilateral breakdown of the marriage” prior to the final hearing on divorce. He argues that principles of equity favored a de facto termination date of marriage to prevent Holly from unfairly reaping a windfall in his business interests that arose subsequent to her divorce filing, namely, his interest in Wantage and Deacon’s Collision, LLC (“Deacon’s Collision”). After careful review of the record, we disagree.

{¶ 18} Under R.C. 3105.171(A)(2), the date of the final hearing for divorce is presumed to be the appropriate termination date of the marriage unless the trial court determines that the application of such date would be inequitable. *O’Brien v. O’Brien*, 8th Dist. No. 89615, 2008-Ohio-1098, ¶40, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318, 321. The statute defines the duration of the marriage as follows:

{¶ 19} “(2) ‘During the marriage’ means whichever of the following is applicable:

{¶ 20} “(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 ***;

{¶ 21} “(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.” R.C. 3105.171(A)(2)(a) and (b).

{¶ 22} At trial, the court heard considerable evidence surrounding the formation and function of Wantage and Deacon's Collision. These two limited liability companies were formed by Jim, along with his cousin, in connection with their purchase of a Mullinax Lincoln Mercury Jeep dealership, certain parcels of land, and a collision center (hereinafter the "AutoNation transaction") in the summer of 2006.² As part of the AutoNation transaction, Jim and his cousin acquired a collision center, nka Deacon's Collision. They also formed Wantage, which owns the property upon which the collision center is located.

{¶ 23} The parties stipulated to the value of Wantage (Jim's interest: \$376,950) and Deacon's Collision (Jim's interest: \$424,300). Jim insisted at trial, however, that these assets were not part of the marital estate because he did not close the deal on the acquisition of these assets until after Holly filed for divorce. He urged the trial court to apply a de facto termination date of either (1) April 26, 2006 – the date Holly

²As noted by the trial court, the AutoNation transaction proved to be a brilliant and "amazing" business maneuver by Jim and his cousin. In the summer of 2006, Jim and his cousin purchased the Mullinax Lincoln Mercury Jeep dealership, certain parcels of land, and a collision center for \$4,500,000. The parcels of land included the property that the Mullinax Lincoln Mercury Jeep dealership occupied and the property where the collision center is located. They negotiated the dealership cost for \$900,000 and agreed to pay \$3,500,000 for the real estate. The success of the AutoNation transaction hinged on Jim and his cousin's ability to close on the acquisition of the dealership the same day that they sold the parcel of land where the dealership was located to a third party for \$4,500,000. The simultaneous closing of both transactions on the same day allowed Jim and his cousin to reap a \$1,000,000 gain on the property and then apply it toward the purchase of the Mullinax dealership for \$900,000, requiring no cash from them. Jim and his cousin further negotiated the sale of the Lincoln-Mercury portion of the dealership for \$250,000 to a third party and then merged the Jeep dealership into Deacon Chrysler in exchange for \$250,000 worth of stock.

filed for divorce; (2) November 2005 – the time that the parties stopped marriage counseling; or (3) December 2005 or early 2006 – the time period that the parties pursued mediation concerning the termination of the marriage. By applying any of these dates, the acquisition of Wantage and Deacon’s Collision would have been excluded from the marital estate. The trial court, however, expressly rejected Jim’s argument and found that applying a de facto termination date would be inequitable, stating:

{¶ 24} “[T]he Court finds it would be inequitable to omit these assets since the negotiations for the acquisition began prior to the complaint for divorce being filed. In addition, the parties did not even separate until four and a half months later, September 1, 2006, months after the transaction was completed. Prior to that time, they continued to occupy the same house, they slept in the same bed, and they continued to operate as a family.”

{¶ 25} The trial court further recognized that the parties’ history of a tumultuous marriage, including having previously separated and reconciled, further reinforced the application of the final hearing date as the appropriate end date of the marriage. The court specifically noted the parties’ testimony at trial indicating that a reconciliation was possible even after the divorce was filed:

{¶ 26} “[Holly] testified that she would have done anything, even at the time of trial, to salvage the marriage; but [Jim] was not accepting of the fact that his drinking

put undue stress on their marriage. [Jim] also testified that he spent the whole summer of 2006, after suit was filed, trying to convince [Holly] to drop her suit.”

{¶ 27} Contrary to Jim’s claim that the parties had established totally separate lives prior to the final hearing on divorce, the record reveals otherwise. Indeed, the parties separated only as a result of Holly requesting that Jim vacate the house; their assets were intertwined at the time of trial; and Holly was dependant on support from Jim, who controlled the majority of the assets during the pendency of the divorce.

{¶ 28} Further, the mere fact that the final closing of these transactions occurred approximately 34 days after the complaint for divorce was filed does not warrant excluding these significant assets from the property division. The record reveals that Holly’s support of Jim throughout the marriage, i.e., accompanying him to conferences and trade shows, directly contributed to his ability to establish a good reputation as a general manager and president of a car dealership. Indeed, this reputation contributed to AutoNation approaching Jim regarding the acquisition of the Lincoln Mercury Jeep dealership, resulting in the formation of significant business assets, including his interest in Wantage and Deacon’s Collision.

{¶ 29} We further find it compelling that Jim used marital funds to commence the legal work for the acquisition of these business assets, thereby reinforcing the trial court’s finding that these assets should be a part of the marital estate – not arbitrarily excluded.

{¶ 30} Accordingly, given the evidence in the record, we cannot say that the trial court abused its discretion in refusing to apply a de facto termination date of the marriage. Indeed, Jim's proposed de facto termination dates would have been inequitable – not more equitable. Here, the presumed statutory date of the final hearing is the appropriate termination date of the marriage and is not inequitable.

2. *Award of Wantage Properties, LLC*

{¶ 31} Jim argues that the trial court erred in awarding Holly his interest in Wantage. He first contends that the business entity should not have been part of the marital estate. As discussed above, Jim's interest in Wantage constitutes marital property and, therefore, the trial court had authority to factor in Jim's interest in Wantage as part of the property division. See R.C. 3105.171(C); see, also, *Dudich v. Dudich*, 8th Dist. No. 84742, 2005-Ohio-889 (court must divide marital property equitably between the spouses).

{¶ 32} Next, Jim argues, in the alternative, that even if Wantage constitutes marital property, the trial court abused its discretion in ordering him to transfer his interest to Holly when the subscription and operating agreements prohibited a transfer without the other member's consent. We find Jim's argument unpersuasive for several reasons.

{¶ 33} First, neither Jim nor Wantage raised this argument before the trial court.³ See, e.g., *In re Gibson* (1991), 61 Ohio St.3d 168, 171 (party's failure to raise argument in trial court waives the argument on appeal); *Cross v. Cross*, 12th Dist. No. CA2008-07-015, 2009-Ohio-1309 ("it is axiomatic that failing to raise an issue at the trial court level waives any error on appeal"). Thus, Jim has waived this argument on appeal.

{¶ 34} Second, the record reflects that Jim has already transferred his Wantage shares to Holly.⁴ On September 22, 2008, Wantage filed "a notice and certification of assignment and transfer of units." This filing verified that the shares were transferred and purged Jim of his contempt. Neither Jim nor Wantage obtained a stay prior to transferring the shares. The failure to obtain a stay and the actual transfer of the units render Jim's arguments on appeal moot. See, e.g., *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243 ("a satisfaction of judgment renders an appeal from that judgment moot"); *Atlantic Veneer Corp v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710 ("satisfaction of a judgment renders an appeal moot where an

³Wantage was added as a third party defendant to the proceedings below, thereby given the opportunity to participate and present all affirmative defenses.

⁴Although Jim initially moved to stay the trial court's judgment on May 7, 2008, he failed to post a supersedeas bond as ordered by the trial court in its judgment entry of May 20, 2008. Consequently, Holly filed another motion to show cause, alleging that Jim failed to comply with the court's judgment entry, including his failure to transfer the marital property awarded, except for the marital home. Jim was subsequently found in contempt for failing to transfer the property, including his shares in Wantage, and sentenced to 60 days in jail but given the opportunity to purge by transferring all of the assets by October 1, 2008.

appellant may preserve her appeal rights by seeking a stay of execution pending appeal”); *Hagood v. Gail* (1995), 105 Ohio App.3d 780 (property owner’s failure to seek a valid stay order before fully satisfying judgment rendered the appeal of a judgment ordering sale of land moot).

{¶ 35} Finally, the trial court enjoys broad discretion in fashioning an equitable division of property. The trial court reluctantly ordered the transfer of Jim’s interest in Wantage to Holly only after finding that Jim’s actions throughout the litigation left her no other option.⁵ Here, the trial court specifically emphasized Jim’s repeated representations throughout the proceedings that he had no money, as well as his failure to comply with the court’s order for temporary support. The trial court further recognized that the majority of the marital assets, which were in Jim’s name, were not liquid. Given the lack of liquidity of the marital assets and Jim’s previous failure to comply with a support order, we find it reasonable that the trial court awarded Jim’s interest in Wantage to Holly and that it did not abuse its discretion.

3. *Marital Home*

{¶ 36} Jim argues that the trial court abused its discretion by valuing the marital home at \$375,000 when the parties had stipulated to a value of \$400,000. He contends that the trial court was precluded from assigning any value other than

⁵As stated by the trial court: “While the court was not eager to allocate business assets to Mrs. Deacon, it was the only way available to provide her with her share of the marital assets. And given Mr. Deacon’s complaining throughout this litigation that he did not have any money, had the court ordered him to buy her out, he would have come in complaining he had no means to do so.”

the one to which the parties stipulated. The record reveals, however, that the parties stipulated to the fair market value of the marital home as of February 7, 2007 – a full year prior to the time of trial. (The stipulation specifically designates that it covers the fair market value as of “2/7/07.”)

{¶ 37} At trial, Holly presented expert testimony that the value of the home had diminished since the time of the stipulation because of the declining real estate market. The real estate appraiser testified that the value had decreased to \$375,000.

{¶ 38} While we are cognizant that formal stipulations of fact between parties are generally regarded as the equivalent of a “factual determination rendered by a jury” and should not be disregarded, we find that the stipulation at issue was limited to the house’s value as of February 7, 2007. See *Westhoven v. Westhoven*, 6th Dist. No. OT-07-003, 2008-Ohio-2875, ¶37; *Snyder v. Snyder*, 3d Dist. No. 14-06-52, 2007-Ohio-2676. Further, although Jim now complains that the trial court was precluded from considering the real estate appraiser’s testimony based on the stipulation of the parties made a year earlier, he never moved to exclude this testimony at trial. Accordingly, we find no abuse of discretion in the trial court’s consideration of the appraiser’s testimony nor its subsequent valuation of the marital home.

4. *Transamerica Annuity, I.R.A.*

{¶ 39} Jim also complains that the trial court erred in finding that the entire Transamerica annuity is marital property. We disagree.

{¶ 40} The decision as to whether property is marital or separate is a mixed question of law and fact and is reviewed under the manifest weight of the evidence standard. *Torres v. Torres*, 8th Dist. Nos. 88582 and 88660, 2007-Ohio- 4443, at ¶18. We will not reverse a trial court's judgment as being against the manifest weight of the evidence if it is supported by competent, credible, evidence. See *Wygant v. Wygant*, 3d Dist. No. 16-05-16, 2006-Ohio-1660.

{¶ 41} In determining whether assets are marital or separate, the trial court is governed by R.C. 3105.171. Under the statute, marital property is defined as including “[a]ll real and personal property that currently is owned by either or both of the spouses *** and that was acquired by either or both of the spouses during the marriage.” R.C. 3105.171(A)(3)(a)(i). “Property that is acquired during the marriage is presumed to be marital property unless it can be shown to be separate.” *Ockunzzi v. Ockunzzi*, 8th Dist. No. 86785, 2006-Ohio-5741, ¶17. Conversely, “separate property” includes all real and personal property that was acquired by one spouse prior to the marriage. *Id.*, citing R.C. 3105.171(A)(6)(a)(ii). Separate property commingled with marital property remains as separate property unless it becomes no longer traceable. R.C. 3105.171(A)(6)(b); see, also, *Peck v. Peck* (1994), 96 Ohio App.3d 731.

{¶ 42} Jim contends that the record contains unrefuted testimony, albeit his own, that he opened a Transamerica annuity several months prior to the marriage and that one-third of the account constitutes separate property. We find his argument unpersuasive.

{¶ 43} Here, the trial court addressed the Transamerica annuity and specifically found that, despite Jim's claim that one-third of the annuity constituted marital property, he failed to present any documentation to support his self-serving testimony. As the trier of fact, the trial court was free to disbelieve Jim's self-serving testimony. See, e.g., *Tokar v. Tokar*, 8th Dist. No. 89522, 2008-Ohio-6467 (trial court properly rejected husband's testimony regarding negative value of marital property because he failed to submit independent evidence); *Smith v. Smith*, 12th Dist. No. CA2001-11-259, 2002-Ohio-5449 (trial court did not abuse its discretion in rejecting husband's claim that he used money withdrawn from savings plan on marital household expenses when husband failed to substantiate his self-serving testimony). In rejecting Jim's self-serving testimony, the trial court specifically stated the following:

{¶ 44} "Since Mr. Deacon's recollection of facts are not always accurate from his own admission, that he cannot always remember figures, the Court believes that paperwork is necessary to review the figures and determine the rate of interest, growth, etc. There was no evidence submitted by Mr. Deacon to support this

conclusion. Therefore, the Court finds that the Transamerica Annuity, in total, \$21,674.86, is a marital asset.”

{¶ 45} Because Jim failed to present documentary support or corroborating testimony that one-third of the annuity constituted separate property, we find no error in the trial court’s finding that the asset had become commingled into the marital estate during the marriage. See *Peck*, supra (asset was marital property because spouse failed to offer documentary evidence to support his claim that marital asset was traceable to his separate property).

{¶ 46} Accordingly, we find no abuse of discretion in the trial court’s division of marital property and overrule Jim’s first assignment of error.

Temporary Support

{¶ 47} In his second assignment of error, Jim challenges the trial court’s order requiring him to pay Holly \$6,338.82 as part of the temporary support order. He further argues that the trial court abused its discretion by failing to order Holly to pay the first mortgage on the marital home with the \$3,000 in temporary spousal support that she was awarded. We disagree.

{¶ 48} In *Cangemi v. Cangemi*, 8th Dist. No. 86670, 2006-Ohio-2879, this court discussed a trial court’s authority to grant temporary spousal support and our review of such a decision as follows:

{¶ 49} “R.C. 3105.18(B) allows a court to award either party reasonable temporary spousal support during the pendency of any divorce proceeding.

Temporary spousal support need not be based on the factors in R.C. 3105.18(C), but only needs to be an amount that is 'reasonable.' R.C. 3105.18(B); *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600. Reasonable support is the amount which an obligor has the ability to pay and which is sufficient to meet the obligee's present needs. *Norton v. Norton* (1924), 111 Ohio St. 262. The purpose of awarding temporary spousal support is to preserve the status quo during the divorce proceeding. *Kahn v. Kahn* (1987), 42 Ohio App.3d 61, 68. ***

{¶ 50} "There is no set formula under R.C. 3105.18 to guide courts to arrive at an appropriate amount of temporary support. *Gourash v. Gourash* (Sept. 2, 1999), Cuyahoga App. Nos. 71882 and 73971. The only explicit limitation in R.C. 3105.18(B) is that the award must be 'reasonable.' Courts are given discretion in deciding what is reasonable support because that determination is dependent on the unique facts and circumstances of each case. *Gourash*, supra, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128." *Cangemi* at ¶14-15.

{¶ 51} Under the circumstances of this case, we find that the trial court's order of temporary spousal support, including its order for Jim to pay Holly \$6,338.82, was reasonable.

{¶ 52} In September 2006, the court granted Holly's motion for temporary support and ordered Jim to pay the mortgage, taxes, insurance, line of credit on the marital home, child support, and spousal support of \$3,000. Jim subsequently requested a full hearing on the order under Civ.R. 75(N), which was held before a

magistrate in February 2007. At the hearing, Jim complained that he had “no money” to pay the temporary support order. Consequently, the parties reached an agreement wherein Holly agreed to assume the monthly line of credit on the marital home, not to exceed \$700. The parties, however, reserved the right for the court to review the modification of the temporary support order reached between the parties.

{¶ 53} Jim purports to argue that the amount of temporary spousal support was unreasonable based on his stated W-2 income. He contends that it was unreasonable for him to have to pay both the mortgage and \$3,000 in spousal support. We disagree.

{¶ 54} Jim’s income was not limited to his W-2 income, but also included distributions from his business assets as well as rental income he received. Indeed, his income far surpassed Holly’s income, and the majority of the marital assets were in his name. Holly was financially dependent on Jim to maintain the status quo for her and the parties’ minor children. Because the record supports the trial court’s finding that the award of temporary spousal support was necessary to maintain the status quo, we find no abuse of discretion.

{¶ 55} We further find no abuse of discretion in the trial court’s decision requiring Jim to reimburse Holly for the payments she made on the home equity line of credit since February 1, 2007, which totaled \$6,338.82. Based on the evidence presented at trial, the court found that, despite Jim’s repeated insistence of having no money to pay the temporary support order, “he was sitting on large sums of

income” generated from his business transactions in the summer of 2006. Given that Jim misrepresented his financial situation to obtain a favorable reduction in the temporary spousal support order, we cannot say that the trial court abused its discretion in finding that “the temporary support order should not have been modified.”

Spousal Support

{¶ 56} Jim further argues in his second assignment of error that the trial court (1) imposed an unreasonable period for support; (2) failed to reserve jurisdiction over the spousal support order; and (3) awarded too much spousal support. He contends that the spousal support should be reduced and limited to four years. We disagree.

{¶ 57} In determining whether to grant spousal support and in determining the amount and duration of the payments, the trial court must consider the factors listed in R.C. 3105.18(C)(1)(a)-(n). *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, paragraph one of the syllabus. The goal of spousal support is to reach an equitable result. *Id.* at 96. And while there is no set mathematical formula to reach this goal, the Ohio Supreme Court requires the trial court to consider all 14 factors of R.C. 3105.18(C) and “not base its determination upon any one of those factors taken in isolation.” *Id.*

{¶ 58} The award of spousal support lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Holcomb*, *supra*, at 130-131; see, also, *Moore v. Moore* (1992), 83 Ohio App.3d 75, 78.

{¶ 59} In its order discussing spousal support, the trial court meticulously applied each factor listed in R.C. 3105.18(C)(1) and ultimately concluded that Holly was entitled to \$6,000 per month in spousal support for a period of eight years. The trial court later in its judgment entry, however, ordered Jim to pay Holly spousal support for an indefinite period of time, subject to the death of either party or Holly's remarriage. Holly concedes that the trial court did not intend to award a "lifetime" of spousal support, and the language to this effect was simply a clerical error. Based on our review of the trial court's detailed 38-page judgment entry, we agree. Accordingly, we remand for the trial court to correct its order to reflect its finding that the spousal support is limited to eight years.

{¶ 60} As for Jim's contention that eight years is too long, we find no merit to his claim. Apart from arguing that the marriage lasted only 22 years, he offers no authority to support his claim that eight years of spousal support constitutes an abuse of discretion. Moreover, we are precluded from substituting our judgment for the trial court's. See *In re Jane Doe I*, supra, at 137-138.

{¶ 61} Further, we find no abuse of discretion in the amount of spousal support awarded. Although Jim broadly argues that the award is unfair, the record overwhelmingly demonstrates otherwise. In applying the statutory factors, the trial court recognized the huge disparity in income between Jim and Holly, as well as Jim's much greater earning potential. The record reveals that Jim's annual income is \$216,500, and Holly's income is \$34,944. Although Holly works part-time, the trial

court specifically found that it was necessary for Holly to continue this arrangement for the sake of the parties' minor daughter. The court further found that the parties had agreed to Holly's working part-time during the marriage for the sake of their children. Additionally, the court factored in the parties' expenses as well as their assets and liabilities in determining its award. Here, the amount of spousal support awarded reflected an amount necessary for Holly to sustain a similar standard of living while raising their minor child and an award that Jim had the ability to pay. See *Gallo v. Gallo*, 11th Dist. No. 2000-L-208, 2002-Ohio-2815, ¶40. ("To be equitable, the parties should, if feasible, enjoy a standard of living comparable to that enjoyed during the marriage, adjusted by the factors set forth in R.C. 3105.18.")

{¶ 62} Further, the trial court even considered the rental income Holly *may* receive as a result of her acquiring Jim's interest in Wantage and ordered that such rental income, if paid, should be offset from Jim's spousal support obligation. Thus, based on the evidence in the record, we find that the trial court acted well within its discretion.

{¶ 63} We likewise find no error in the trial court's decision not to retain jurisdiction over the spousal support order. The decision to retain jurisdiction to modify an award of spousal support is left to the sound discretion of the trial court. *Johnson v. Johnson* (1993), 88 Ohio App.3d 329. Although Ohio courts generally agree that a trial court abuses its discretion in failing to reserve jurisdiction when imposing an indefinite award of spousal support, the same does not automatically

apply when the court imposes a limited time period. *Id.*, citing *Nori v. Nori* (1989), 58 Ohio App.3d 69; *Gullia v. Gullia* (1994), 93 Ohio App.3d 653. Instead, a reviewing court must consider the totality of the circumstances and the specific facts of each case in determining whether a trial court abused its discretion in declining to retain jurisdiction. *Nori*, *supra*; *Orwick v. Orwick*, 7th Dist. No. 04JE14, 2005-Ohio-5055 (decision to retain jurisdiction depends on the facts of each case); see, also, *Soley v. Soley* (1995), 101 Ohio App.3d 540, 551 (trial court has authority to refuse to retain jurisdiction over spousal support award and reviewing court should find no abuse of discretion when the facts support such decision).

{¶ 64} Here, the trial court imposed a definite period of spousal support of eight years. Apart from broadly claiming that the trial court erred in choosing not to retain jurisdiction, Jim offers no reason why, in this specific case, the trial court should have reserved jurisdiction over the spousal support. See *Orwick*, *supra* (rejecting husband's claim that court abused its discretion in failing to sua sponte add the reservation of jurisdiction language to divorce decree when husband failed to offer any explanation why it was needed). Indeed, this case does not involve a party whose circumstances may easily change in the future or who lacks the resources to comply with the support order. Here, Jim has considerable assets, aside from his regular income, and the record overwhelmingly demonstrates that he is a savvy businessman whose skill has served him well over the years. Moreover, given that R.C. 3105.18(E) specifically authorizes a trial court to make a spousal support award

non-modifiable and given the *specific facts of this case*, we cannot say that the trial court abused its discretion.

{¶ 65} Accordingly, the second assignment of error is overruled.

Attorney Fees

{¶ 66} In his third assignment of error, Jim argues that the trial court abused its discretion in ordering him to pay a portion of Holly's attorney fees and expenses. We disagree.

{¶ 67} In this case, the trial court ordered Jim to pay approximately one-half of Holly's attorney fees, namely, \$60,000 and \$23,500 toward her litigation expenses.⁶

{¶ 68} R.C. 3105.73(A) provides that a court may award reasonable attorney fees 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." (Emphasis added.)

{¶ 69} Jim contends that the award of attorney fees is inequitable because the trial court failed to consider the \$3,000 per month in temporary spousal support that he paid Holly during the pendency of the divorce. We disagree.

{¶ 70} Temporary spousal support is a factor, among others, that the trial court *may* consider in deciding whether to award attorney fees. See *O'Brien*, supra.

⁶The trial court ordered Jim to pay \$40,000 toward Holly's attorney fees in its final judgment entry. Jim, however, had previously paid \$20,000 during the pendency of the proceedings.

Although the trial court did not specifically state that it considered the temporary spousal support award, it highlighted a number of factors supporting its decision to award attorney fees.

{¶ 71} First, the trial court recognized the disparity of income between the two parties and that Holly did not have access to the marital assets. Although Jim counters that she was granted temporary spousal support, the record reflects that Jim failed to regularly comply with the order and provide such support.

{¶ 72} Second, the trial court considered the complexity of the case as well as the need to involve third parties for discovery and valuations. Although the parties stipulated to a value for Wantage and Deacon's Collision, Jim insisted that the assets were not marital. As for determining the value of Jim's interest in Deacon's Chrysler Jeep, the parties each had their own expert and valuation. The case was further complicated by accounting errors, which Jim relied on to claim a decreased interest in Deacon's Chrysler.

{¶ 73} Third, the trial court considered Jim's actions throughout the proceedings, which directly contributed to an increased amount of attorney fees that Holly was forced to incur. Relying on the testimony of Holly's attorney, the trial court found that Jim's lack of candor and cooperation "made the litigation much more drawn out and difficult." For example, Jim was not forthcoming about his income, especially as it related to Wantage and Deacon's Collision, and failed to take

distributions that were available to him to downplay his income. Further, he disobeyed court orders, forcing Holly to file several show cause motions.

{¶ 74} Finally, the court examined the reasonableness of the fees in accordance with Rule 1.5(a) of the Rules of Professional Conduct.

{¶ 75} Accordingly, based on the record, we find that the award of attorney fees was neither unreasonable, arbitrary, nor unconscionable and affirm the trial court's decision. The third assignment of error is overruled.

Finding of Contempt

{¶ 76} In his final assignment of error, Jim argues that the trial court abused its discretion in finding him in contempt and ordering him to pay \$30,000 to purge such contempt.

{¶ 77} In this case, the trial court found Jim in contempt of court for (1) failing to pay the mortgage on the marital residence in January and February 2007, (2) failing to comply with the court's restraining order with respect to cash distributions from Wantage, and (3) failing to pay spousal and child support as required under the temporary support order. The trial court found Jim's actions to be intentional, deliberate, and outrageous.⁷

⁷In reference to Jim's failure to pay the mortgage, the court noted: "Mr. Deacon's actions at that time were outrageous considering he was sitting on substantial funds in Deacon's Collision and was overpaying his income taxes." As for his violation of the restraining order, the court found: "[Jim's] testimony indicated to this Court that when the restraining order suited his goals he would use it as an excuse for not paying his support order, but when it did not suit his goals, he would ignore it and use the money as he deemed appropriate. While he was receiving these proceeds, contrary to the restraining

{¶ 78} Although Jim broadly states that the trial court erred in finding him in contempt, he fails to offer any reason why the contempt finding was erroneous or rebut the evidence relied on by the trial court in making its finding. See App.R.12(A)(2) and 16(A) (court may summarily overrule an appellant's assignment of error that fails to offer any argument and legal authority to support his claim). Regardless, the record is replete with evidence to support the court's finding of contempt as a result of Jim's intentional disregard of court orders.

{¶ 79} The gravamen of Jim's argument, however, is that the trial court exceeded its authority in sentencing him to 30 days in jail and requiring him to pay \$30,000 toward Holly's attorney fees as a condition to purge such contempt. He contends that the \$30,000 is an arbitrary amount. Although he concedes that Holly is entitled to an award of reasonable attorney fees as a result of the contempt finding under R.C. 3105.18(G) and 3109.05(C), he argues that the award of \$30,000 far exceeds the amount of attorney fees that Holly incurred in prosecuting the motions to show cause, thereby constituting an impermissible penalty. We find his argument to be misplaced.

{¶ 80} In ordering a contempt sanction, a trial court enjoys both civil and criminal contempt powers.⁸ *Brown v. Executive 200, Inc.* (1980), 64 Ohio St.2d 250,

order, he was not paying his support order." Finally, regarding his failure to pay temporary support, the court found that "[Jim] had the ability to pay, but chose to overpay his income tax."

⁸R.C. 2705.05 sets forth penalties for contempt but does not distinguish between

253. “While both types of contempt contain an element of punishment, courts distinguish criminal and civil contempt not on the basis of punishment, but rather, by the character and purpose of the punishment.” *Id.* at 253. The purpose of a civil contempt sanction is to coerce or remedy the party harmed, whereas the purpose of a criminal contempt is to punish the contemnor for past violations of the court’s orders as a means to vindicate the court. *State v. Kilbane* (1980), 61 Ohio St.2d 201, 206-207. Notably, the mere fact that a contempt sanction is conditional does not automatically render it civil. *Id.*

{¶ 81} Here, we find that the trial court’s imposition of the contempt sanction was criminal in nature, as opposed to civil. Contrary to Jim’s argument, criminal contempt sanctions are entirely punitive; therefore, the court acted well within its authority for imposing a sanction to penalize Jim for his repeated and blatant disregard of court orders. See *Whitman v. Whitman-Norton*, 3d Dist. No. 5-2000-10, 2000-Ohio-1935 (trial court acted within its discretion in imposing criminal contempt sanction for appellant’s deliberate failure to comply with visitation schedule). We further note that Jim raises no argument attacking the validity of the court’s criminal contempt powers nor claims any violation related to the criminal contempt proceedings.

{¶ 82} Accordingly, we find that the trial court did not abuse its discretion in finding Jim in contempt and overrule the fourth assignment of error.

civil and criminal contempt sanctions.

Holly's Cross Appeal

Division of Property

1. *Jim's Separate Interest in the Dealership and Any Accrued Interest*

{¶ 83} In her first cross-assignment of error, Holly states that the trial court erred in finding that Jim's interest in Deacon's Chrysler Jeep (except for the value of \$125,000 attributable to the Jeep merger) constituted separate property. She argues, in the alternative, that even if Jim's interest in Deacon's Chrysler Jeep constituted separate property, the trial court erred in finding that the entire appreciation on Jim's interest in the entity is not marital property. She further contends in her second cross-assignment of error that the trial court erred in its valuation of Jim's interest in the Jeep franchise. We find these arguments unpersuasive.

{¶ 84} Under R.C. 3105.171(A)(6)(a)(vii), separate property also includes "[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse."

{¶ 85} The dealership, which was formed by Jim's father, originated as Deacon's Chrysler, Inc., aka Deacon's Chrysler Plymouth, Inc. Jim began working at Deacon's Chrysler in 1983 and slowly acquired shares of the dealership as gifts from his father, but always remained a minority shareholder. He became the president and general manager of Deacon's Chrysler in 1996 and holds this position today.

(After Deacon’s Chrysler acquired the Jeep franchise as a result of the AutoNation transaction, the dealership took on the name Deacon’s Chrysler Jeep.)

{¶ 86} Here, the trial court found that Jim’s interest in Deacon’s Chrysler Jeep constitutes separate property because there was no evidence that he purchased any shares. Instead, the evidence revealed that the shares were gifted to him. We find that this conclusion is supported by the weight of the evidence. Jim testified that the shares of stock that he received over the years from his father were gifts made exclusively to him. Further, although Holly broadly claims that the trial court erred in this finding, she fails to support her claim or rebut the trial court’s finding that the shares were gifts to Jim. Accordingly, we find no merit to her claim.

{¶ 87} Next, Holly argues, in the alternative, that the trial court erred in finding that the entire appreciation of Jim’s interest in Deacon’s Chrysler Jeep was not marital property. The record, however, reflects that the trial court specifically acknowledged that the appreciation of Jim’s interest may constitute marital property.

To the extent that the trial court did not award Holly a portion of the appreciation, the trial court specifically found that “there is not sufficient evidence to demonstrate what that appreciation is. [Holly’s] own expert said it was impossible to put a value on the appreciation.” Thus, because Holly failed to offer any evidence as to the value of the alleged marital asset, we cannot say that the trial court abused its discretion in choosing not to apply an arbitrary number and award her such amount. See, generally, *Abolfatzadeh v. Abolfatzadeh*, 1st Dist. Nos. C-050039 and C-050056,

2006-Ohio-573 (party claiming that the appreciation of separate property constitutes marital property bears the burden of proving).⁹

{¶ 88} Moreover, to the extent that Holly argues that she may not have benefitted from the marital appreciation of Jim's interest in Deacon's Chrysler Jeep, albeit, due to her own failure to present competent evidence of its value, the court clearly took this into consideration in awarding her other property.

2. *Value of the Jeep Franchise*

{¶ 89} In her second cross-assignment of error, Holly contends that the trial court erred in its valuation of Jim's half-interest in the Jeep dealership. She argues that because Jim and his cousin acquired the Jeep dealership for \$650,000, the trial court should have relied on this figure in calculating the dealership's value as opposed to the price for which they sold the Jeep dealership to Jim's father.

{¶ 90} The value assigned to a property rests within the discretion of the trial court. See *Tokar*, supra, at ¶11, 15. Here, the trial court valued Jim's interest in the Jeep dealership based on the testimony of Jim, his cousin Tom Deacon, and Jim's expert, John Stark. As noted by the trial court, "Mr. Jim Deacon's share of the Jeep dealership that was merged into Deacon Chrysler was, by the testimony of Mr.

⁹Holly's reliance on *Teaberry v. Teaberry*, 7th Dist. No. 07MA168, 2008-Ohio-3334, and *Entingh v. Entingh*, 2d Dist. No. 2005DR831, 2008-Ohio-756, for the proposition that Jim bears the burden of proving the value of the appreciation is misplaced. These cases merely recognize that the trial court did not abuse its discretion in finding that the appreciation in the value of the husband's stock constituted marital property. Contrary to the instant case, these cases did not involve an issue of the wife's failing to present evidence of the value of the increase.

Deacon, Tom Deacon and the experts, worth \$125,000.” This amount also reflected the value of the shares in Deacon’s Chrysler that Jim received from his father upon merging the Jeep dealership into Deacon’s Chrysler. The testimony offered, coupled with the sale price of the asset, constitutes competent, credible evidence as to the asset’s value.

{¶ 91} Further, although Holly claims that Jim and his cousin intentionally accepted less than what the franchise was worth, the trial court specifically noted that Jim was willing to do so because he and his cousin had spun off Deacon’s Collision and Wantage from the transaction, worth a combined total of \$1,602,500. Given that the trial court took this into consideration and awarded Holly one-half of Jim’s interest in Deacon’s Collision and his entire interest in Wantage, we cannot say that it abused its discretion.

{¶ 92} Moreover, we must emphasize our limited review on appeal in contrast to the wide discretion afforded a trial court in fashioning an equitable division of marital property. We must look at the entire division of the marital property and determine whether it is fair and reasonable. Here, the record is abundantly clear that the trial court went to great lengths to fashion a fair and equitable division. After hearing nine days of testimony, reviewing hundreds of pages of exhibits, and considering the parties’ arguments, the trial court issued a detailed, well-reasoned order, dividing the marital property in an equitable manner. Based on the entire

division of property, we cannot say that the trial court abused its discretion. Accordingly, we overrule Holly's first and second cross-assignments of error.

{¶ 93} In sum, we find that the trial court acted well within its discretion in dividing and assigning value to the marital assets. We further find that the trial court did not abuse its discretion in awarding spousal support or finding Jim in contempt. We remand the case for the trial court to correct its order to reflect its finding that the spousal support is limited to eight years.

Judgment affirmed and case remanded to the lower court for proceedings consistent with this opinion.

It is ordered that the parties share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY J. BOYLE, JUDGE

COLLEEN CONWAY COONEY, A.J., and
JAMES J. SWEENEY, J., CONCUR