

[Cite as *Janosek v. Janosek*, 2009-Ohio-3882.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 91882 and 91914

SANDRA L. JANOSEK

PLAINTIFF-APPELLEE
and CROSS-APPELLANT

vs.

JAMES C. JANOSEK, ET AL.

DEFENDANTS-APPELLANTS
and CROSS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Division of Domestic Relations
Case No. CP D-286943

BEFORE: Jones, J., Kilbane, P.J., and Stewart, J.

RELEASED: August 6, 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).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, James C. Janosek ("Husband"), appeals from various aspects of the judgment entry and decree of divorce entered by the Court of Common Pleas, Division of Domestic Relations. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} Husband and plaintiff-appellee, Sandra Janosek ("Wife"), were married on May 21, 1977. Four children were born of the marriage; all of whom are now emancipated. Throughout the course of the marriage, the parties accumulated a large marital estate comprised of several businesses, several homes, and other marital assets.

{¶ 3} On June 10, 2002, Wife filed for divorce. The court issued a temporary support order obligating Husband to pay child support of \$3,000 per month for one minor child and temporary spousal support of \$12,000 per month. The court awarded Wife interim attorneys fees and expenses of \$25,000 on January 23, 2003, and \$46,325.06 on October 23, 2003. A contested divorce trial was held for 27 days from January 7, 2005 through April 15, 2005. At the end of the trial, the judge asked both parties to prepare proposed findings of fact and conclusions of law. On May 20, 2005, Wife filed a notice of submission of proposed judgment entry of divorce with findings of fact and conclusions of law. On May 24, 2005, Husband filed his proposed findings of fact and conclusions of law.

{¶ 4} On June 13, 2005, the trial judge held an unscheduled attorney conference where he announced the terms of his judgment. He asked Wife's counsel to prepare the judgment entry. The judgment entry was delivered to the trial court. Wife's counsel claims to have served the proposed judgment entry by mail to Husband's counsel on June 16, 2005. On June 20, 2005, prior to the completion of the trial transcript and four days prior to Husband's deadline for responding, the trial court entered Wife's judgment entry without modification. On June 20, 2005, Husband filed a motion to strike, indicating that his counsel was never served with a copy of the proposed judgment entry. On June 22, 2005, Husband filed a motion to vacate the judgment entry and a motion to stay enforcement. On June 23 and 24, 2005, Husband filed his objections and supplemental objections to Wife's judgment entry. On July 20, 2005, the trial court denied Husband's motion to vacate and overruled Husband's objections to Wife's judgment entry.

{¶ 5} On July 20, 2005, the trial court stayed execution of the judgment entry subject to the posting of a \$9,000,000 bond. The stay did not apply to the award of spousal support or attorneys fees. On July 26, 2005, Husband filed a notice of appeal from the judgment entry. On August 12, 2005, this Court granted

{¶ 6} Husband's emergency motion to reduce the appeal bond and to stay further execution on property awarded to him upon the posting of a \$5,000,000 bond. On August 19, 2005, Husband posted the bond.

{¶ 7} Husband then appealed several different issues and raised 20 assignments of error with this court in *Janosek v. Janosek*, Cuyahoga App. Nos.

86771 and 86777, 2007-Ohio-68 (“*Janosek I*”). In *Janosek I*, this court reversed and vacated the trial court judgment as to the requirement that the husband secure the wife’s support with a life insurance policy, as to the valuation of business interests and golf club memberships, as to his payment of the deficiency on the sale of the marital residence, as to the purge condition of his contempt, and as to the attorneys fees award. Those issues were remanded back to the trial court, and the remainder of the judgment was affirmed.¹

{¶ 8} The specific issues on remand after *Janosek I* involved the trial court’s award of attorneys fees to Wife, the trial court’s division of property in regard to the marital estate, and spousal support. The trial court held an evidentiary hearing on the attorneys fees issue. During the cross-examination of wife’s counsel, the parties settled the attorneys fees issue by reducing the fee award from \$400,000.00 to \$50,000.00. The parties submitted an agreed judgment entry regarding the fees, which the trial court entered.

{¶ 9} Although the trial court held a hearing to address the attorneys fees issue, it declined to hold an evidentiary hearing concerning the spousal support issue. Instead, the court ordered the parties to submit proposed findings of fact and

¹R.C. 3105.18(B) bars any court from deciding whether to award spousal support, or how much, until “after” the court “determines the division or disbursement of property under section 3105.171 of the Revised Code.” Therefore this court did not review the initial spousal support order, explaining that “the reassessment of the marital estate includes the reconsideration of spousal support.” *Janosek I*, at _145. This court also reversed the order requiring Husband to pay Wife approximately \$400,000.00 for her attorneys’ fees and expenses and remanded the matter back to the trial court for it to consider further evidence on the issue. *Janosek I*, at _139.

conclusions of law based upon the previously established record. On March 6, 2008, the lower court issued a judgment entry granting, in part, Wife's motion to strike defendant's findings of fact and conclusions of law and exhibits 1-7.

{¶ 10} On July 23, 2008, the trial court issued its decision addressing the remaining issues ("Remand Decision"). As far as spousal support is concerned, the lower court ordered Husband to pay \$3,240,000.00 in spousal support, payable at \$15,000.00 per month for 18 years until Husband is 71 years old. The 18 years are retroactive, beginning on February 7, 2005, and ending on February 7, 2023. On the same day, the court entered a separate order requiring Husband to post a \$45,000.000 cash bond to secure the spousal support obligation.²

{¶ 11} The parties ultimately agreed to a reassessment and division of the marital estate, with each of them receiving in excess of \$11,000,000.00 in property division.³

{¶ 12} Husband filed a notice of appeal, challenging both the spousal support order and the bond order. The clerk assigned number 91882 to that appeal. The next day, August 1, 2008, the trial court entered a "nunc pro tunc" order that reduced the bond amount to \$10,000.00 but did not explain why.⁴ Husband filed a second notice of appeal challenging the second bond order. The clerk assigned number 91914 to the second appeal. On August 22, 2008, Wife filed a cross-appeal in case

²Bond Order, July 23, 2008.

³Remand Decision, 7/23/08, Exhibit A.

⁴Second Bond Order, August 1, 2008.

number 91882, also challenging the spousal support order. On October 8, 2008, this court consolidated both appeals.

ASSIGNMENTS OF ERROR

Appellant's Seven Assignments of Error

{¶ 13} Appellant assigns seven assignments of error on appeal:

{¶ 14} “I. The trial court erred and abused its discretion by awarding spousal support to appellee despite finding that she is self-sufficient and capable of sustaining and supporting her lifestyle without any spousal support;

{¶ 15} “II. The trial court erred and abused its discretion by ignoring the stated purpose of the spousal support statute (to provide ‘sustenance’ and support) and by disregarding the statutory scheme devised by the General Assembly;

{¶ 16} “III. The trial court erred and abused its discretion by not explaining how it calculated the arbitrarily chosen figure of \$15,000.00 per month for spousal support;

{¶ 17} “IV. The trial court erred and abused its discretion by ‘double dipping’ – awarding appellee 50% of the value of appellant’s business (the value of which was determined by the profit it generates) as marital property and then counting those profits again as appellant’s income available for spousal support;

{¶ 18} “V. The trial court erred when it determined that a company’s ‘retained earnings’ book entry on a balance sheet is the same thing as existing cash inside the company when in fact the record shows the company only had about \$126,000.00 in cash;

{¶ 19} “VI. The trial court erred and abused its discretion by requiring appellant to continue paying spousal support well past an ordinary retirement age of 65;

{¶ 20} “VII. The trial court erred by ordering appellant to post a cash bond.”

Cross-Appeal – Appellee’s Three Cross-Assignments of Error

{¶ 21} In addition to appellant’s seven assignments of error, Sandra Janosek filed three cross-assignments of error in her cross-appeal. Her three cross-assignments of error are as follows:

{¶ 22} “[I.] The trial court erred and abused its discretion by reconsidering and/or modifying the spousal support order issued on June 20, 2005;

{¶ 23} “[II.] The trial court erred and abused its discretion by considering new evidence and arguments which are not part of the record as of June 20, 2005 and otherwise not properly before the trial court and/or this court;

{¶ 24} “[III.] The trial court erred and abused its discretion by failing to increase the spousal support order given the fact that the appellee’s property division and payment of attorney fees was substantially reduced on remand.”

{¶ 25} Due to the substantial interrelation between Husband’s first six assignments of error we shall address them together.

LEGAL ANALYSIS

Standard of Review

{¶ 26} Appellate review of a trial court’s division of marital property is governed by an abuse of discretion standard. *Martin v. Martin* (1985), 18 Ohio St.3d 292, 342, 480 N.E.2d 1112. R.C. 3105.171(C)(1) mandates an equal *division of marital*

property, unless such would be inequitable under the circumstances. In dividing marital assets, and in deciding whether to order an unequal award, a trial court must consider all relevant factors, including those listed in R.C. 3105.171(F). The trial court also must make written findings of fact to support its decision to divide the marital property equitably. See R.C. 3105.171(G).

{¶ 27} A trial court enjoys wide latitude in determining the appropriateness as well as the amount of spousal support. *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120, 551 N.E.2d 157.

Award of Spousal Support

{¶ 28} R.C. 3105.18, Award of spousal support; modification, subsection(B), provides the following:

{¶ 29} “(B) In divorce and legal separation proceedings, upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 [3105.17.1] of the Revised Code, the court of common pleas may award reasonable spousal support to either party. During the pendency of any divorce, or legal separation proceeding, the court may award reasonable temporary spousal support to either party.

{¶ 30} “An award of spousal support may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, from future income or otherwise, as the court considers equitable.

“Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise.”

{¶ 31} Husband argues that *Simoni v. Simoni* (April 3, 1995), Cuyahoga App. No. 66995, 102 Ohio App.3d 628, supports a reversal of the trial court’s spousal support award in this case. However, contrary to Husband’s assertions, *Simoni* is distinguishable and inapplicable to the case at bar. In *Simoni*, the parties were married in 1964 and there were no children born in the marriage. The parties in *Simoni*, 68 and 67 years old at the time of divorce, were older than the parties in this case. Furthermore, the wife in *Simoni* was working at the time of the divorce. More importantly, unlike the case at bar, the primary issue in *Simoni* concerned the facts surrounding an antenuptial agreement. Finally, *Simoni* was based upon the standard of need; which is no longer the standard.

“As this court has noted previously, R.C. 3105.18, effective April 11, 1991, established a significantly different standard for awarding spousal support. The new “appropriate and reasonable” standard is broader than the old “necessary” standard. Thus, once the fourteen factors have been considered, the amount of spousal support is within the sound discretion of the trial court. See *Young v. Young* (Dec. 29, 1993), Lorain App. No. 93CA005554, unreported; see, also, *Leversee v. Leversee* (Mar. 25, 1993), Franklin App. No. 92AP-1307, unreported (1993 Opinions 1003); *Griffin v. Griffin* (Mar. 9, 1993), Franklin App. No. 92AP-1305, unreported (1993 Opinions 690); *Frye v. Frye* (Mar. 31, 1994), Franklin App. No. 93APF09-1218, unreported (1994 Opinions 1522).”

Pruden v. Pruden (June 2, 1994), Franklin App. No. 93APF10-1428.

{¶ 32} Under R.C. 3105.18(A), spousal support is defined as payments to a spouse for sustenance and support. R.C. 3105.18(C) provides the following:

{¶ 33} “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:

“(a) The income of the parties * * *;

“(b) The relative earning abilities of the parties;

“(c) The ages and the physical, mental, and emotional conditions of the parties;

“(d) The retirement benefits of the parties;

“(e) The duration of the marriage; * * *

“(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;

“(g) The standard of living of the parties established during the marriage;

“(h) The relative extent of education of the parties;

“(i) The relative assets and liabilities of the parties * * *;

“(j) The contribution of each party to the education training, or earning ability of the other party; * * *

“(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;

“(l) The tax consequences, for each party, of an award of spousal support;

“(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

“(n) Any other factor that the court expressly finds to be relevant and equitable.”

A review of the above noted statute reveals that an award of spousal support is no longer predicated on the idea of need.⁵ R.C. 3105.18, as amended {¶ 34} January 1, 1991, directs courts to consider the appropriateness and reasonableness of spousal support rather than whether it is a necessity.⁶

{¶ 35} This court has recently addressed the issue of spousal support in *Tokar v. Tokar*, Cuyahoga App. No. 89522, 2008-Ohio-6467, providing the following:

“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, 518 N.E.2d 1197, paragraph one of the syllabus; see, also, *Keating, supra*, at 37. Although a trial court is bound to consider these 14 factors, 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, 613 N.E.2d 1097. “[I]f the court does not specifically address each factor in its order, a reviewing court

⁵This court notes that the “need” standard set forth in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 68-69, 554 N.E.2d 83, has been statutorily replaced by an “appropriate and reasonable” standard delineated in R.C. 3105.18(C)(1). See, e.g., *McConnell v. McConnell* (Feb. 3, 2000), Cuyahoga App. No. 74974, where we stated: “After *Kunkle*, the General Assembly redefined R.C. 3105.18(C)(1) to include the *appropriate and reasonable standard*. (Emphases added.) Suggesting at least that the need factor is not the only barometer in which a trial court may be guided to award spousal support.”

⁶This issue was also addressed in *Tomovcik v. Tomovcik* (Jan. 22, 1997), Jefferson App. No. 95 JE 22, p. 3, when the Seventh Appellate District recognized the shift in the statute’s focus. The Tenth Appellate District likewise recognized the shift in the statute’s focus when it analyzed R.C. 3105.18(C) in *Schultz v. Schultz* (1996), 110 Ohio App.3d 715, 724, 675 N.E.2d 55, providing the following: “This court takes note of the fact that need is still a consideration. However, it is only a consideration and not the test.”

will presume each factor was considered, absent evidence to the contrary.” *Carroll v. Carroll*, 5th Dist. No. 2004-CAF-05035, 2004-Ohio-6710, ¶28.”

{¶ 36} R.C. 3105.18 sets forth the factors that the trial court must consider in determining whether spousal support *is appropriate and reasonable*, and in determining the nature, amount, terms of payment, and duration of spousal support. (Emphasis added.) *Cahill v. Patronite*, Cuyahoga App. No. 82931, 2003-Ohio-6050.

{¶ 37} The record clearly reflects that the trial court considered all 14 statutory factors. Indeed, the trial court expressly discussed every factor in detail in its July 23, 2008 Judgment Entry. Accordingly, given the trial court’s consideration of the factors, including its detailed analysis, we cannot say it abused its discretion in awarding spousal support.

{¶ 38} Accordingly, we find Husband’s arguments that Wife will enjoy a lavish lifestyle without spousal support, his argument that *Simoni* applies, and his argument that Wife does not “need” spousal support to be without merit.

{¶ 39} As previously stated, the lower court properly ordered spousal support to Wife pursuant to its extensive analysis of the R.C. 3105.18 factors. The trial court did not ignore the Wife’s share of the marital estate and properly determined Husband’s income. In fact, these issues were addressed in great detail in the lower court’s Judgment Entry. The trial court engaged in and provided a 17-page analysis in its July 23, 2008 decision, in addition to the 10 pages devoted entirely to its findings of fact relative to the factors enumerated in R.C. 3105.18(C)(1) and the justification for

Wife's spousal support award in the lower court's June 20, 2005, Judgment Entry of Divorce.

{¶ 40} Specifically, the lower court provided the following in its July 23, 2008, Judgment Entry:

"This court finds that the Plaintiff should be awarded spousal support of a stated duration of years, 18 years from the date of February 7, 2005 in the amount of \$15,000 per month.⁷ (Credits or debits are to be adjusted accordingly.) *The decision to award spousal support is based upon the totality of the evidence, including the demonstrated earning capacity of Mr. Janosek of between three and four million dollars annually. This court finds that Mrs. Janosek's monthly standard of living is not less than \$15,000 per month, but that any amount in excess of that figure can be borne by her share of marital assets.*"

(Emphasis added.)

{¶ 41} The lower court looked at the totality of the circumstances, including information from thousands of pages of documents, 27 days of trial and many hours of testimony before coming to its decision.

{¶ 42} Moreover, we find Husband's argument regarding the lower court's \$15,000.00 per month in spousal support to be without merit. The lower court's rationale behind the \$15,000.00 per month figure was proper.⁸

⁷The following information was listed in the trial court opinion, footnote number four, "Mrs. Janosek will be 71 on October 10, 2023. She will be approximately 70 ½ on February 7, 2023, when spousal support terminates. At that time, at age 70 ½, she will be obligated to commence annual draw down of her ING-IRA, currently valued between \$900,000 and \$1,000,000. * * *."

⁸See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 70; *Kaechle v. Kaechle* (1988), Ohio St.3d 93, 96 (all statutory factors must be considered by the trial court; the method by which the goal is achieved cannot be reduced to a mathematical formula) (emphasis added); *Manley v. Manley* (January 14, 2005), Montgomery App. No. 20426, 2005-Ohio-129; *Burner v. Burner* (Oct. 18, 2000), Summit App. No. C.A. 19903,

{¶ 43} Accordingly, need is no longer the standard, *Simoni* does not apply, and the lower court properly applied and analyzed the R.C. 3105.18 factors in its decision.

We find no error on the part of the lower court regarding its analysis and award of spousal support to the Wife. We find no error on the part of the lower court in its spousal support award.

{¶ 44} In addition, we find husband's "Double Dipping," retained earnings, and post retirement payment arguments to be without merit. Husband has waived his right to raise these new arguments by his failure to raise these issues at the time of trial.

{¶ 45} Generally, if a party has knowledge of an error with sufficient time to object before the judge takes any action, that party waives any objection to the claimed error by failing to raise that issue on the record before the action is taken. *Tissue v. Tissue*, Cuyahoga App. No. 83708, 2004-Ohio-5968; *Belvedere Condominium Unit Owners Assn. v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 279, 1993-Ohio- 119, 617 N.E.2d 1075; *Mark v. Mellott Mfg. Co., Inc.* (1995), 106 Ohio App.3d 571, 589, 666 N.E.2d 631; *Sagen v. Thrower* (Apr. 8, 1999), Cuyahoga App. No. 73954. Therefore, a litigant who had the opportunity to raise a claim in the trial court, but failed to do so, waives the right to raise that claim on appeal. *Id.*

2000-Ohio-6606 (reversed trial court's decision basing spousal support on mathematical formula); *Griffith v. Griffith* (January 24, 1997), Geauga App. No. 95-G-1947 (the appropriate level of spousal support cannot be reduced to a mathematical formula; and doing so reveals that a trial court did not consider any other relevant factors, including those listed in R.C. 3105.18(C)).

{¶ 46} Husband failed to raise these issues at the trial court level. Accordingly, he has waived the right to now raise those three issues on appeal.

{¶ 47} Accordingly, Husbands first, second, third, fourth, fifth, and sixth assignments of error are overruled.

{¶ 48} Husband argues in his seventh assignment of error that the lower court erred when it ordered him to post a \$45,000.00 cash bond. This assignment of error is dismissed as moot.

{¶ 49} “A nunc pro tunc order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. *It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued.*” (Emphasis added.) *State v. Greulich* (1988), 61 Ohio App.3d. 22, 24.

{¶ 50} Here, after the initial \$45,000.00 bond order was issued, the lower court issued a *new* order requiring Husband to post a new cash bond in the amount of \$10,000.00. This new order is in compliance with the statutory scheme set forth in R.C. 3121.03(C), limiting a cash bond to \$10,000.00. Accordingly, this assignment of error has been made moot by the trial court’s nunc pro tunc judgment order and is therefore dismissed as moot.

CROSS-APPEAL

{¶ 51} In addition to appellant’s seven assignments of error, Wife has proffered three assignments of error in her cross-appeal. Wife argues that the trial court erred

by: (1) reconsidering the spousal support order issued on June 20, 2005; (2) considering new evidence and arguments that are not part of the record as of June 20, 2005 and; (3) failing to increase the spousal support order.

{¶ 52} Due to the substantial interrelation in Wife’s cross-appeal assignments of error, we shall address them together.

{¶ 53} Contrary to Wife’s claims, this court does indeed have jurisdiction to review spousal support in this case. This court has the right to reassess the marital estate; and reassessment of the marital estate includes the reconsideration of spousal support. This court noted as much when we remanded *Janosek I* to the lower court to resolve various remaining issues. More specifically, the reconsideration of spousal support was addressed in *Janosek I*, where we cited *Burma* for the proposition that the reassessment of the marital estate includes the reconsideration of spousal support.⁹

{¶ 54} After the Court of Appeals issues its mandate, the case returns to the trial court, “reinvesting” it with jurisdiction. *Int’l Union of Operating Engineers, Local 18 v. Dan Wannemacher Masonry Co.* (1990), 67 Ohio App.3d 672, 675.

⁹This court provided the following in *Janosek I*, “Because of our determination that several of the marital assets were improperly valued (see Assignment of Errors 4, 5, 6, 7, 8, 17, 18, and 19), and that *the trial court must reassess its division of the Janosek’s marital estate*, we find that the issue of spousal support is not yet ripe for review.” *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10, 608 N.E.2d 802. See, also, *Burma v. Burma* (Sept. 29, 1994), Cuyahoga App. No. 65052, (*the reassessment of the marital estate includes the reconsideration of spousal support.*) (Emphasis added.)

{¶ 55} On remand, the trial court must do what the mandate directs, which is called the mandate rule. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. The mandate rule restricts a trial court's discretion on remand only as to matters actually decided by the appellate court. *Quern v. Jordan* (1979), 440 U.S. 332, 347 n.18.

{¶ 56} Where the appellate court has declined to reach the merits of a trial court's ruling, the trial court ordinarily is free to reconsider that ruling on remand. The mandate rule "has long been held not to require the trial court to adhere to its own previous rulings if they have not been adopted, explicitly or implicitly, by the appellate court's judgment." *Exxon Corp. v. United States* (1991), 931 F.2d 874, 877-878.

{¶ 57} In the case at bar, this court never addressed the merits of the 2005 spousal support order, Therefore, the lower court was free to issue a new spousal support order, superseding the prior order.

{¶ 58} We find no abuse of discretion on the part of the lower court in its reconsideration and/or modification of the spousal support order issued on June 20, 2005.

{¶ 59} Wife argues in her second assignment of error that the lower court erred in considering new evidence and arguments that were not part of the record as of June 20, 2005. We find the lower court's actions to be proper. After reviewing the evidence in the record we find no error on the part of the lower court in its actions.

{¶ 60} Wife argues in her third assignment of error that the trial court's failure to increase the spousal support award was error. However, after reviewing the

evidence in the case at bar, we find no error on the part of the lower court concerning the amount of spousal support awarded.

{¶ 61} Accordingly, Wife's three cross-appeal assignments of error are overruled.

{¶ 62} We find that the extensive evidence in the record and the significant analysis by the lower court demonstrates that it properly addressed the property division and spousal support award amounts. As previously stated, the trial court's 27 days of trial, analysis of thousands of pages of information, significant review of the evidence, and detailed analysis of the 14 statutory factors in R.C. 3105.18(C) did not constitute an abuse of discretion.

Judgment affirmed.

It is ordered that appellee recover of appellant 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.

LARRY A. JONES, JUDGE

**MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART
AND DISSENTS IN PART WITH SEPARATE OPINION**

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶ 63} I concur with the majority opinion that the wife’s cross-assignments of error are without merit. I respectfully dissent from the affirmation of the husband’s appeal because the court abused its discretion both in the amount of spousal support ordered and the length of time over which it must be paid.

{¶ 64} As the majority correctly notes, the statutory standard for awarding spousal support is based on a determination of what amount is “appropriate and reasonable.” See R.C. 3105.18(C)(1). While a spouse’s “need” for spousal support is no longer part of the statutory standard, the concept of “need” is subsumed within what is appropriate and reasonable – an award of spousal support would not be appropriate if a spouse did not “need” additional support. Consequently, we have continued to analyze spousal support issues in terms of “need” when considering whether spousal support is appropriate and reasonable. See, e.g., *Brandon v. Brandon*, Cuyahoga App. No. 91453, 2009-Ohio-866 (“Further, it does not appear that the trial court assessed [the wife’s] need for support against [the husband’s] ability to pay.”); *Torres v. Torres*, Cuyahoga App. Nos. 88582 and 88660, 2007-Ohio-4443, ¶35 (“a trial court must determine whether there is a need for spousal support and, if so, the amount needed and the duration of the need”).

{¶ 65} A division of the marital property gave the wife over \$11 million in assets. Eight million of that award was either cash or liquid assets. The court found that when the wife reaches 59½ years of age she can begin drawing from retirement accounts worth an additional \$1.1 million. Against these assets the court found that the wife had expenses of \$15,000 per month. These expenses were primarily for clothes, dining, and entertainment. The wife had no mortgage payments – as part of the division of marital property she received a \$2 million condominium in Florida and a house in Ohio.

{¶ 66} Even with \$15,000 of monthly expenses (amounting to \$180,000 per year), the court found that the wife “can expect to earn a 4% rate of return, on safe investments, of some \$320,000 of pretax income, which, after taxes, would adequately sustain her standard of living.” In other words, the court found that the wife could maintain her lifestyle and meet her monthly expenses by living off the interest generated by her liquid assets. If the wife could sustain her standard of living by living off the interest generated by her share of the marital estate, I fail to see how spousal support for the total amount of her monthly expenses, \$15,000 per month, is appropriate and/or reasonable.

{¶ 67} Despite making findings that appeared to show that the wife had no need for spousal support, the court awarded her spousal support because it believed that the husband’s share of the marital estate had the potential to grow significantly, while the wife’s share of the estate was mostly in liquid assets that

would grow far less rapidly. The flaw with this conclusion is that the court had already considered the husband's future income when valuing his companies for purposes of the marital estate. The wife's appraisers used the "income approach" to value these companies. This approach uses the concept of time value of money – the income streams or cash flow the business anticipates receiving in the future are translated into their present value by taking into account their risk. By definition, the income approach to valuation took into account the projected income of the business, and by definition, the husband's income since it was derived from the company's profits. The court necessarily factored the husband's future income into the valuation of marital assets, so in essence it awarded the wife a double recovery when it granted her spousal support based on projections of his future income. This was an abuse of discretion.

{¶ 68} The court also abused its discretion by finding that the husband "intentionally deflated" his income by moving money into his company's retained earnings.¹⁰

{¶ 69} The amount of a corporation's retained earnings is the cumulative net income since the corporation began minus all of the dividends that the

¹⁰There is no legal authority for the majority's conclusion that the husband waived the right to argue the retained earnings issue on appeal because he "failed to raise these issues at the time of trial." The wife's argument that husband improperly sheltered income is not a procedural or evidentiary issue that required a contemporaneous objection at trial in order to preserve the matter for appeal under Evid.R. 103(A) – the argument was simply a theory in support of an award of spousal support.

corporation has declared since it began. In other words, retained earnings demonstrate what a company did with its profits – they are the amount of profit the company has reinvested in the business since its inception.

{¶ 70} One of the husband's companies is a privately-held manufacturer of parts for airplanes and related technologies. It was formed in 1960, and given the age and capital-intensive nature of the company, one would expect it to report a high amount of retained earnings. The company's balance sheets confirm that it traditionally carried an amount of retained earnings in a range consistent with the amount that the court thought was so excessive. For example, in 1999, the company reported retained earnings of approximately \$6 million. This was at a time well before divorce proceedings were initiated and the husband had no apparent incentive to intentionally deflate his income. In fact, retained earnings for the company fluctuated between \$5 million and \$7 million during the time period leading up to the divorce. There was no significant increase in retained earnings during the divorce proceedings, so the court abused its discretion by disregarding the historical financial data and finding that excessive retained earnings were proof that the husband intentionally deflated his income.

{¶ 71} Finally, the court abused its discretion by forcing the husband to pay spousal support until the husband's 71st birthday, which occurs in the year 2023. This order likely requires the husband to work beyond the traditionally-recognized retirement age in order to meet the spousal support obligation. It also

fails to take into account the \$1.1 million in retirement accounts that the wife will have access to in the very near future (she can access the funds without a penalty at age 59½ – in approximately two years), as well as another retirement account, currently valued at approximately \$1 million, that will mature in 2023 (at which time it presumably will have greatly increased in value). And as even the court seemed to concede, the wife can easily maintain her present lifestyle simply by living off the interest generated by her share of the marital estate. The order requiring the husband to pay spousal support beyond the traditional retirement age is an abuse of discretion not only because it forces him to work until he turns 71 years of age, but because the wife has not demonstrated need for support beyond that which she received as a share of the marital property.