[Cite as *Humphrey v. Humphrey*, 2007-Ohio-6738.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

SANDRA R. HUMPHREY,	:	**O P I N I O N**
Plaintiff-Appellant / Cross-Appellee,	:	**CASE NO. 2006-A-0083**
- vs -	:	
RALPH L. HUMPHREY,	:	
Defendant-Appellee / Cross-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 97 DR 684.

Judgment: Affirmed in part, reversed in part, and remanded.

Gary S. Okin, 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellant/Cross-Appellee).

Randil J. Rudloff, 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellee/Cross-Appellant).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant/Cross-Appellee, Sandra Humphrey ("Sandra"), appeals from the judgment of the Ashtabula County Court of Common Pleas addressing various issues pertaining to the court's original property division as well as other incidental matters. Appellee/Cross-Appellant, Ralph Humphrey ("Ralph"), filed a cross-appeal from the same judgment entry. For the reasons discussed below, the trial court's judgment is affirmed in part, reversed in part, and remanded for further proceedings.

{¶2} After the parties separated on May 1, 1997, Sandra filed a complaint for divorce on November 18, 1997. Over a three day period, a final hearing on divorce was conducted culminating in a final decree of divorce entered on November 30, 2000. In the final order, the trial court set the marriage termination date on the date of separation, May 1, 1997. The trial court divided the parties' marital assets as follows: Sandra was awarded two parcels of real property valued at $260,000.00; Ralph was awarded other real property valued at $20,000.00. The parties' retirement accounts were ordered to be equitably divided; and the Humphery Insurance Agency, Inc., ("Agency"), was equally divided.

{¶3} The Agency's stipulated value was $1,251,555.00 and comprised of two parts: the business itself and six parcels of real property. The business, which was valued at $579,551.00, was awarded to Ralph. The parcels of real property were valued at $672,000.00. Sandra was awarded $625,577.00, as her share of the Agency. The trial court further ordered that the Agency's real property be sold and that upon the sale of the last parcel, Sandra pay Ralph $46,026.00 to realize his one-half share of the stipulated value of the Agency. The court retained jurisdiction in order to make adjustments if either the real estate or business sold for an amount different than the stipulated value.

{¶4} In addition, the court awarded Sandra spousal support in the amount of $4,000.00 per month for a five year period. The court reserved jurisdiction concerning spousal support so that it could adjust both the amount and the duration of the award. Ralph was also ordered to pay Sandra's attorney fees.

{¶5} Ralph appealed the trial court's judgment to this court and, on June 21, 2002, in *Humphery v. Humphery*, 11th Dist. No. 2000-A-0092, 2002-Ohio-3121 ("*Humphery I*"), this court affirmed in part, reversed in part, and remanded the matter for further proceedings. On remand, the trial court was ordered to: (1) equitably divide the marital property pursuant to R.C. 3105.171(C) and the Ohio Supreme Court's opinion in *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93. *Humphrey I*, supra, at ¶36; (2) award Ralph, as separate property, three identified bank accounts and divide, as marital property, an identified checking account. Id. at ¶38; (3) develop an equitable plan allowing Ralph to retain ownership of the Agency's real property and order Ralph to pay Sandra the stipulated value of her interest in the Agency; if the parties and trial court are unable to develop such a plan, the property was to be sold, and the trial court must consider the tax consequences of the sale. Id. at ¶42. (4) set forth the rationale the trial court used in awarding Sandra spousal support. Id. at ¶50; and (5) state its findings, pursuant to R.C. 3105.18(H), for awarding Sandra attorney fees. Id. at ¶56.

{¶6} During the pendency of the appeal, on May 8, 2001, the trial court ordered the parties to enter into a Qualified Domestic Relations Order ("QDRO") relating to the distribution of the parties' retirement benefits. Specifically, the order required Ralph to arrange for the preparation of the QDRO. By September of 2002, Ralph had yet to make the necessary arrangements to initiate the drafting of the QDRO. Accordingly, on September 5, 2002, Sandra filed a motion to show cause as to why Ralph should not be held in contempt for failure to comply with the trial court's May 8, 2001 order. The motion to show cause was not formally addressed. However, on July 18, 2003, the parties submitted a mutually agreed upon QDRO establishing a segregation date of

May 1, 1997 which would act to exclude any contributions to the retirement accounts deposited subsequent to that date. The trial court adopted the QDRO via judgment entry on July 21, 2003.

{¶7} On December 22, 2003, the trial court conducted a hearing on remand. In addition to the issues set forth in *Humphery I*, several additional matters arose requiring the trial court's attention. Specifically, the court was asked to resolve: (1) Sandra's motion to show cause pertaining to the preparation of the Qualified Domestic Relation Order; (2) whether certain additional contributions to Ralph's retirement account would be treated as marital or separate property; and (3) whether Sandra should be entitled to interest on any property settlement award. During the hearing, Sandra, Ralph, Sandra's attorney, Gary S. Okin, Esq., and Ralph's financial expert, Robert L. Lewis, Jr., CPA, testified.

{¶8} On November 14, 2006, nearly three years after the remand hearing, the trial court entered its judgment entry. Both parties appealed the November 14, 2006 judgment and concede that the entry did not comply with this court's remand. Each party alleges additional, separate errors as well. On appeal, Sandra assigns five errors for our review. On cross-appeal, Ralph asserts four assignments of error. We shall address Sandra's contentions first.

{¶9} Sandra's first assignment of error alleges:

{¶10} "The trial court erred when it failed to adhere to the mandate of the Court of Appeals remand."

{¶11} Under her first assignment of error, Sandra points out that the trial court was required, pursuant to this court's remand order in *Humphery I,* to develop an

equitable payment plan relating to her interest in the Agency's real property; if such a payment plan could not be reached, the trial court was ordered to sell certain Agency real property to accomplish the same. Ralph concedes that the trial court failed to follow this court's order in *Humphery I*, thereby conceding the necessity of a second remand.

{¶12} In *Humphery I,* this court held:

{¶13} "This case is remanded for the trial court to develop an equitable plan allowing appellant to retain ownership of the Agency's real property and ordering appellant to pay appellee the stipulated value of the Agency's real property. If the parties and the trial court cannot develop an equitable payment plan, and the property consequently must be sold, the trial court must consider the tax consequences that the sale of the Subchapter S corporation's real property will have on appellant to manifest an equitable division of marital property." Id. at ¶42.

{¶14} On December 22, 2003, the trial court conducted a hearing on remand and took testimony, presumably to comport with the foregoing order from *Humphrey I.* Nearly three years later, in its November 14, 2006 judgment entry, the court determined:

{¶15} "*** that it should have permitted for [Ralph] or the parties to develop a payment plan, which would allow the insurance business to remain in tact and to permit [Sandra] to receive compensation for her share of the Agency. Therefore, [Ralph] shall develop a plan to pay to [Sandra] her share of the stipulated value of the Agency's real estate. If such a plan cannot be developed, the real estate shall be sold and the proceeds divided as previously ordered.

{¶16} "Concerning the requirement in the remand that the Court should consider the tax consequences of the sale of a Sub Chapter S corporation's real property, that will be done, however, to do so at this time would be speculative and will be dealt with, if necessary, with testimony concerning the tax consequences of the sale of the real estate."

{¶17} Our holding in *Humphery I* detailed the nature of the trial court's charge on remand. However, for whatever reason(s), the trial court, far from establishing a plan or ordering a sale, delegated its responsibility to the parties. If the parties had been unable to arrive at a mutually acceptable, equitable plan prior to the court's November 14, 2006 order, it is difficult to understand why it felt the parties would be able to do so after its order, especially in light of the parties' adversarial relationship and the contentious nature of the proceedings. If no acceptable plan had been offered at the time the judgment was filed, *Humphery I* specifically directed the trial court to order the real estate sold and consider the tax consequences in view of an equitable distribution.

{¶18} We believe that courts of law, whether inferior or superior, should strive for an efficient and fair administration of justice in all matters before them. This court's opinion in *Humphery I* clearly set forth the issues that the trial court was to address on remand and, as in the case of the instant issue, ordered the trial court to proceed with very specific instructions.

{¶19} The amount of assets to be divided was established with certainty in the original divorce decree. The only issue requiring attention was the manner in which the division would be accomplished: either by equitable payment plan or, if such a plan was unfeasible, a sale of the Agency's property. Our holding in *Humphery I* was clear,

ONLY in the case of a sale would the court be required to consider the tax consequences of that sale. Instead of mandating one of these two limited options, the trial court chose not to act.

{¶20} After over seven years of posturing and obstinacy, Ralph still owes Sandra a certain sum relating to the division of marital assets. The parties, particularly Sandra, are entitled to finality on this issue. We therefore remand this matter, once again, to the trial court to specifically establish an equitable means by which Ralph will pay what he owes. It goes without saying that the resolution of this issue demands the immediate attention of the trial court for purposes of finality and equity.

{¶21} Sandra's first assignment of error is sustained.

{¶22} Sandra's second assignment of error is closely related to her first and asserts:

{¶23} "The trial court erred in not developing an equitable plan which requires appellee to pay appellant the stipulated value of the agency without any reduction for the tax consequences of the sale of the assets of the agency."

{¶24} Under her second assignment of error, Sandra contends the trial court erred by not ordering Ralph to directly pay her the full financial interest in the Agency's real property to which she asserts entitlement. Sandra alleges Ralph has the financial wherewithal to directly pay her and thus he is not financially required to sell the property to satisfy his obligation relating to the property division. Because no sale is necessary, Sandra maintains the tax consequences of a sale would be nugatory.

{¶25} Ralph asserts he has already sold two parcels of real estate formerly owned by the Agency and testified to the actual tax consequences which flowed from

the sales. He further testified to his desire to sell the entirety of the corporate real estate, save the building in which the business is located. Ralph concludes, his available liquid funds should not be used to satisfy his obligation under the property division and the court must consider the tax consequences of the sales in arriving at an equitable division.

{¶26} Both Sandra's and Ralph's positions are unripe for review at this time. The trial court had the authority to order an equitable payment plan which might obviate tax considerations *or* it had the authority to order the property sold which would necessitate tax considerations. It did neither. By failing to order the property to be divided via a payment plan or via sale, the trial court essentially did nothing. Where the trial court fails to act, there is no issue or ruling to appeal. On remand, the trial court may order Ralph to pay Sandra from funds immediately available to him; it may also order the sale of the property and, in so doing, be required to consider tax consequences. As the trial court has not yet acted, any harm alleged by Sandra is hypothetical and speculative. Generally, "a claim is not ripe if the claim rests upon 'future events that may not occur as anticipated, or may not occur at all.'" *Reiling v. Smith,* 11th Dist. No. 2006-G-2705, 2007-Ohio-3370, at ¶36, quoting *Texas v. United States* (1998), 523 U.S. 296, 300. Thus, pursuant to our holding under Sandra's first assignment of error, Sandra's second assignment of error fails to raise a justiciable issue and is therefore overruled.

{¶27} Sandra's third assignment of error alleges:

{¶28} "The trial court erred in failing to address or rule on the motion to show cause which was heard by the court at the time of the hearing on the remand issues."

{¶29} Sandra asserts her motion to show cause regarding the retirement issues was tried to the court during the December 22, 2003 hearing. However, the court made no specific ruling on the motion in its November 14, 2006 judgment entry. Sandra therefore concludes that this court should remand the matter for an order addressing her show cause motion. We disagree.

{¶30} A motion that is not expressly ruled upon when a case is concluded is presumed overruled. *Kastelnik v. Helper,* 96 Ohio St.3d 1, 3, 2002-Ohio-2985; see, also, *Physiatrists Asociates of Youngstown, Inc. v. Saffold,* 11th Dist. No. 2003-T-0038, 2004-Ohio-2793, at ¶18. As such, even if the trial court failed to explicitly address Sandra's motion, we presume it was overruled. Sandra fails to argue why the trial court erred in overruling her motion. She merely asserts the trial court erred procedurally in failing to do so. As a trial court is not procedurally required to expressly rule upon all motions, Sandra's third assignment of error lacks merit. See, e.g., *Bizjak v. Bizjak,* 11th Dist. No. 2004-L-083, 2005-Ohio-7047, at ¶37-38.

{¶31} Sandra's fourth assignment of error contends:

{¶32} "The trial court erred in failing to find that appellee violated the prior orders of the court, and was therefore in contempt for refusing to divide the retirement accounts equally as of the 'time of division.'"

{¶33} First, we point out that Sandra's motion to show cause merely challenged Ralph's failure to "immediately arrange *** and approve" the QDRO after the court so ordered. This failure was cured by the parties' mutually approved QDRO entered into on July 18, 2003. As the alleged problem animating the show cause motion was rectified by way of a mutually agreed upon QDRO, we hold Sandra suffered no

prejudice from the trial court's failure to hold Ralph in contempt. Although this assignment of error is based upon her show cause motion, we shall nevertheless address Sandra's argument relating to the trial court's failure to modify the segregation date of the retirement funds.

{¶34} At the time of the original trial, the parties entered into a stipulation concerning retirement accounts that were deemed marital assets. The stipulation read:

{¶35} "Retirement Accounts to be divided equally at time of division by Qualified Domestic Relations Order. Division to be pro-rata among various accounts as to type of investment and tax basis."

{¶36} Pursuant to the stipulation, Sandra argues that the amount subject to allocation should be that amount within the accounts at the time they were divided via the QDRO. As such, Sandra asserts she is entitled to not only half of the amount available in the accounts at the time of the final decree, but also an additional $81,600.00 that had been deposited in one of the accounts by Ralph after the decree, but before the QDRO was drafted. We disagree.

{¶37} The QDRO, which was submitted and approved by the attorneys for both parties on July 18, 2003, specifically states that Sandra is entitled to half of Ralph's "total Account Balance accumulated under the Plan as of the plan segregation date (May 1, 1997), plus any interest and investment earnings or losses attributable thereon for periods subsequent to the plan segregation date (May 1, 1997), until the date of total distribution. *** It is the intent and purpose of this order to exclude Participant's contributions of $81,600.00 made for the years 1998-2001, provided however that nothing contained herein shall limit [Sandra] from asserting, and the Court from

ordering, a different plan segregation date and/or that some or all of the excluded sums are marital and subject to further division by Qualified Domestic Relations Order issued at a later date." (Emphasis sic.)

{¶38} The foregoing plan was agreed to by Sandra's attorney and, on July 21, 2003, the trial court filed its judgment entry approving the QDRO. At the hearing, Sandra, via her attorney, moved the court to establish a different segregation date than that provided in the QDRO; namely, the date the QDRO was entered and filed. The trial court did not expressly rule upon Sandra's proposal to move the segregation date forward to the date into which the QDRO was entered. As discussed supra, a motion not expressly decided by a trial court is presumed overruled. *Kostelnik,* supra. We must therefore determine whether the trial court erred in failing to move the segregation date to July 21, 2003, the date the QDRO was finalized. We hold it did not.

{¶39} The language of the QDRO makes it clear that the parties agreed to establish a May 31, 1997 segregation date as recently as July 21, 2003 *and* they explicitly excluded the $81,600.00 to which Sandra now stakes a claim. Counsel had the opportunity to negotiate a later date and/or include some or all of the $81,600.00 in the QDRO's division. Instead, he agreed to the segregation date and acceded to the exclusion of the additional $81,600.00. The $81,600.00 was money earned in the retirement account after the established, agreed upon segregation date and therefore represents Ralph's separate property. Accordingly, we hold, the agreed judgment entry establishing the date and exclusion effectively waives any attempt to modify the same. Accordingly, we hold the court did not err when it tacitly rejected Sandra's invitation to modify the order.

{¶40} Even if the issue was not waived, Sandra's argument would lack merit. Sandra submits that the stipulation was entered into at the time of the original trial. The QDRO, which was endorsed by the trial court, represents an agreed upon judgment entry between the parties. As indicated above, both parties' attorneys "submitted and agreed to" the QDRO. In our view, the jointly agreed upon segregation date within the QDRO supersedes the trial stipulation. We accordingly hold the QDRO renders the trial stipulation a legal nullity. Although the QDRO allows the parties to move the court for an alternate segregation date, her basis for modifying the date does not withstand scrutiny. The post hoc, subjective revelation that one has entered into a "bad deal" is insufficient to warrant setting the agreement aside. Even were the issue not waived, Sandra's reliance upon a trial stipulation to modify the segregation date lacks persuasive and logical force.

{¶41} Sandra's fourth assignment of error lacks merit.

{¶42} Sandra's fifth assignment of error alleges:

{¶43} "The trial court erred in not awarding interest to appellant on the outstanding amount of the funds due her from appellee."

{¶44} Sandra argues that because the original divorce decree was filed nearly seven years ago and Ralph has still failed to provide her with her equitable share in the Agency, the trial court erred in failing to award her interest on the amount due. We agree.

{¶45} Courts have held that "an order distributing marital assets from one party to another has the force of a money judgment, and the recipient is entitled to interest on any amount due and owing under the order but unpaid." *Woloch v. Foster* (1994), 98

Ohio App.3d 806, 812; see, also *Koegel v. Koegel,* (1982), 69 Ohio St.2d 355, syllabus; *Cardone v. Cardone* (Aug. 30, 2000), 9th Dist. No. 19867, 2000 Ohio App. LEXIS 3947, *6. In its original judgment entry on divorce, the trial court determined Sandra's interest in the Agency was $625,577.00. While Ralph has paid a percentage of this, he still owes Sandra money on the original division.

{¶46} R.C. 1343.03 governs the rate of interest chargeable to a debtor on, inter alia, monetary judgments. In 2004, R.C. 1343.03 was modified by the General Assembly via HB 212, eff. June 2, 2004. Prior to that date, former R.C. 1343.03 awarded interest at a rate of ten per cent per annum on money judgments and the like. After June 2, 2004, R.C. 1343.03, by operation of R.C. 5703.47, a court may award interest at a rate equal to the federal short-term rate plus three percent. Current R.C. 1343.03 has been held to operate prospectively only. *Hilliard v. First Industrial, L.P.,* 165 Ohio App.3d 335, 2005-Ohio-6469, at ¶47.

{¶47} In the instant matter, the money became due on the date of the original judgment, i.e., November 30, 2000. Thus, pursuant to former R.C. 1343.03(A), Sandra is entitled to interest at a rate of ten percent per annum on the amount Ralph still owes her from November 30, 2000 through June 2, 2004, the effective date of current R.C. 1343.03(A). All interest accruing from June 2, 2004 through the date Ralph pays Sandra in full will accrue interest at a percentage equal to the federal short-term interest rate plus three percent pursuant to R.C. 5703.47. See current R.C. 1343.03(A).

{¶48} Sandra's fifth assignment of error has merit.

{¶49} Ralph's first assignment of error on cross-appeal asserts:

{¶50} "The trial court erred in failing to address or rule upon the nonmarital contributions made by appellee to his retirement fund after May 1, 1997 in the total sum of $81,600."[1]

{¶51} Under his first assignment of error on cross-appeal, Ralph entreats this court to issue a mandate that the trial court explicitly exclude $81,600.00 he contributed to the retirement accounts after the marriage terminated. We hold any such ruling redundant and therefore inconsequential.

{¶52} As discussed in Sandra's fourth assignment of error, supra, the QDRO entered into by both parties on July 18, 2003 and adopted by the trial court three days later specifically excludes the $81,600.00 with which Ralph is concerned. As the record currently reflects this amount is excluded, the trial court need not formally reiterate the same. Therefore, Ralph's first assignment of error on cross-appeal is without merit.

{¶53} Ralph's second assignment of error on cross-appeal states:

{¶54} "The trial court erred in failing to address or rule upon credits appellee was to receive against what was owed to appellant thereby reducing the final balance due appellant."

{¶55} Ralph argues this court should order the trial court to credit him for $56,000.00 against the ultimate property settlement pursuant to an agreed judgment entry filed by the trial court on May 8, 2001; he further argues the trial court should credit him for one-half of the cost of the preparation of the QDRO, and one-half of the

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1. Although Ralph's assigned errors meet the requirements for a cross-appeal under App.R. 4(C)(1), his assigned errors in his brief on cross-appeal are inappropriately enumerated; that is, his assignments of error on cross-appeal are designated assignments of error 6 through 9, sequentially following Sandra's five assignments of error on appeal. For sake of clarity and organization, Ralph's assigned errors should have been labeled assignments of error 1 through 4 on cross-appeal.

fees of the financial expert, Robert Lewis, CPA, called to testify regarding the tax consequences of liquidating the Agency's assets.

{¶56} First, the May 8, 2001 judgment entry crediting Ralph $56,000.00 against the ultimate property settlement is a matter of record. Much like our analysis of Ralph's first issue on cross-appeal, any further action would be redundant and unnecessary. With respect to the cost of preparing the QDRO, the May 8, 2001 judgment entry provides: "*** Defendant will advance the total cost for the preparation of such QDROs and one-half (1/2) of the cost thereof will be credited to Defendant at such time as final payment of the property division in the within matter is made to Plaintiff ***." Hence, the trial court has also formally ruled on this issue.

{¶57} Finally, regarding the fees owed to the financial expert, the trial court's December 24, 2003 judgment entry indicates Mr. Lewis testified *on Ralph's behalf*. The transcript of the hearing further reveals that Sandra objected to Mr. Lewis' testimony as irrelevant. Finally, there is no evidence Ralph actually moved the court for the credit he now seeks on appeal. Viewed as a whole, we hold appellant is not entitled to a credit in the amount of half of Mr. Lewis' total fees. Ralph's second assignment of error on cross-appeal lacks merit.

{¶58} Ralph's third assignment of error on cross-appeal provides:

{¶59} "The trial court erred in finding that appellee should pay appellant's attorney fees in the sum of $30,000.00 when there was no evidence before the court that appellant would be prohibited from fully litigating all her rights in protecting her interests without having fees awarded."

{¶60} In its judgment entry, the trial court determined:

{¶61} "Given the Defendant's $150,000.00 annual income, the marital property and retirement benefits accruing to the Defendant, as well as the substantial inheritance received from his mother, the Defendant has sufficient income and assets to pay the Plaintiff's attorney fees. Further, in the Judgment Entry granting divorce, the Court noted that the Plaintiff had been earning between $2,500.00 and $3,000.00 per year, several years prior to the final hearing, and that her own expectation was that her income would reach $35,000.00 per year. On current and projected income in those amounts, the Plaintiff would have been prevented from fully litigating all of her rights in protecting her interests without having the fees awarded for her attorney."

{¶62} Ralph takes issue with the trial court's concluding sentence; in short, Ralph maintains there was no evidence in the record to support the award. We disagree with Ralph's conclusion. However, before addressing the merits of his assertion, we must first clarify which statute governs our analysis.

{¶63} At the time of the final divorce hearing and the hearing on remand, R.C. 3105.18(H) was the controlling statute on the subject of attorney fees. That statute provided, in pertinent part:

{¶64} "In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully

litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees."

{¶65} After the hearing on remand, but while the court's judgment was pending, the legislature repealed R.C. 3105.18(H) and enacted R.C. 3105.73, effective April 27, 2005. That statute provides, in relevant part:

{¶66} "(A) In 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."

{¶67} Accordingly, the latest statute sets out a different standard relating to whether an award of fees is appropriate. Under former R.C. 3105.18(H), a court could award reasonable fees to any party at any stage of the proceedings if it determined the other party had the ability to pay. Under current R.C. 3105.73(A), the court must determine whether the award is equitable, and in doing so, may award all or part of reasonable fees and litigation expenses to either party. Under the old statute, a court was required to determine whether either party would be prevented from fully litigating his or her rights and adequately protecting his or her interests if fees were not awarded. Under the current statute, a 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 in its analysis of whether an award is equitable.

{¶68} In *Dunham v. Dunham,* 171 Ohio App.3d 147, 2007-Ohio-1167, the Tenth Appellate District recently pointed out:

{¶69} "The uncodified law with regard to [R.C. 3105.73] indicates that the legislature intended the new statute to apply retroactively. Under the uncodified law, the section is to apply to any action for divorce, if any of the following apply: 'The action or proceeding is brought, or a notice of appeal in the action or proceeding is filed, prior to the effective date of this act, and the action or proceeding is pending in a trial or appellate court on the effective date of this act.'" Id. at ¶93.

{¶70} Using the General Assembly's direction, the court in *Duhham* accordingly held that a matter pending on the effective date of R.C. 3105.73 must apply that version of the statute. Here, the matter was pending on April 27, 2005, the effective date of R.C. 3105.73. Thus, pursuant to the Tenth District's guidance in *Dunham,* the trial court was obligated to apply the new standard.

{¶71} Here, the trial court utilized the standard set forth under former R.C. 3105.18(H) to arrive at its conclusion. However, in so doing, it also indicated that an award of fees was both reasonable and equitable. In arriving at its conclusion, the court considered the relative incomes of the parties; namely, Ralph's annual income of $150,000.00 and Sandra's meager income, at the time of the divorce, of $2,500.00 to $3,000.00 per year. Although Sandra indicated she could earn as much as $35,000.00 per year, no evidence was presented at the remand hearing whether she had achieved her projected goal. The court considered the parties' relative marital property and retirement benefits of both parties, particularly those accruing to Ralph as much of the marital property had not been divided at the time of the remand hearing. Finally, the court pointed out that Ralph had recently received a sizable inheritance from his mother (the record indicates the inheritance totaled over $800,000.00).

{¶72} Given these findings, which are supported by the record, we hold the trial court's determination is equitable and thus its analysis conforms to the applicable standard set forth in R.C. 3105.73(A). Accordingly, the trial court did not abuse its discretion in awarding Sandra attorney fees in the amount of $30,000.00. Ralph's third assignment of error on cross-appeal is overruled.

{¶73} Ralph's final assignment of error on cross-appeal asserts:

{¶74} "The trial court erred when it justified a spousal support award to appellant, in large part, on the basis that appellant should not be required to deplete her resources (a very substantial marital estate award) while the appellee continues to work."

{¶75} R.C. 3105.18 governs spousal support determinations. The Supreme Court has held the factors set forth in R.C. 3105.18 give a trial court broad discretion in awarding spousal support based on the payor's ability to pay and the payee's need. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67; see, also, *Clendening v. Clendening*, 5th Dist. No. 2005CA00086, 2005-Ohio-6298, at ¶19. Hence, a trial court's decision will not be disturbed save an abuse of discretion, i.e., where the court's determination is unreasonable, arbitrary or unconscionable. *Tremaine v. Tremaine* (1996), 111 Ohio App.3d 703, 706.

{¶76} In *Humphery I,* this court remanded the trial court's original spousal support award due to the trial court's failure to provide a rationale for the award. Id. at ¶43-50. On remand, the trial court's November 14, 1006 judgment entry set forth its basis for the original spousal support award of $4,000.00 per month. Specifically, the court stated:

{¶77} "[Sandra's] monthly expenses [at the time of the original hearing] were $4,500.00 per month. At the time of the final hearing, she had earned only between $2,500.00 and $3,000.00 per year for several years, while [Ralph] was earning $150,000.00 per year.

{¶78} "[Sandra] testified that she is capable of earning $35,000.00 per year, which would not permit her to enjoy the lifestyle that she and [Ralph] enjoyed during their marriage.

{¶79} "This was a forty year marriage and [Sandra] should not be required to deplete her marital assets in order to maintain the standard of living the parties enjoyed during their marriage, while [Ralph] continued to earn $150,00.00 per year. In *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, the Court found that spousal support should terminate on a date certain except in marriages of long duration, with [Sandra] being sixty years old at the time of the final hearing. In the opinion, this Court reserved the right to adjust the spousal support either upward or downward, depending on the future circumstances of the parties. If [Sandra] is unsuccessful in her employment and does not reach the potential of $35,000.00 per year, as she projected, then she should not be required to deplete her resources while [Ralph] continues his employment at the same income."

{¶80} Ralph argues that the trial court abused its discretion in awarding Sandra the support. Ralph seizes upon the court's determination that if Sandra is unable to obtain employment at $35,000.00 per year, she should not be required to deplete her assets from the "substantial marital estate" while he continues to earn his income. We do not think the court abused its discretion in justifying the support order as it did.

{¶81} Ralph's argument is premised upon the erroneous assumption that Sandra's resources include her full share of the "substantial marital estate." To be sure, Sandra is entitled to an equitable division of the substantial marital estate; however, as our analysis of Sandra's first assignment of error indicates, a large portion of the substantial estate has yet to be divided and properly allocated. The court's order recognizes Sandra's current resources are minimal in comparison to Ralph's. The original award was for $4,000.00 per month, for five years. The amount was neither overly burdensome nor indefinite in duration. We do not believe its justification for the award is unreasonable or arbitrary. Therefore, Ralph's final assignment of error on cross-appeal is overruled.

{¶82} For the reasons set forth above, Sandra's first and fifth assignments of error have merit. However, her second, third, and fourth assignments of error are overruled. Furthermore, Ralph's assignments of error on cross-appeal are overruled in their entirety. The judgment entry of the Ashtabula County Court of Common Pleas, Domestic Relations Division, is therefore reversed and remanded for further proceedings in accord with this opinion.

DIANE V. GRENDELL, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.