[Cite as *Gaul v. Gaul*, 2010-Ohio-2156.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

WESLEY J. GAUL, JR.,	:	**O P I N I O N**
Plaintiff-Appellee/ Cross-Appellant,	:	**CASE NO. 2009-A-0011**
	:	
- vs -		
DIANA J. GAUL,	:	
Defendant-Appellant/ Cross-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2006 DR 425.

Judgment: Affirmed.

James R. Skirbunt and *Sharon A. Skirbunt*, Skirbunt & Skirbunt Co., L.P.A., 3150 One Cleveland Center, 1375 East Ninth Street, Cleveland, OH 44114 (For Plaintiff-Appellee/Cross-Appellant).

Kenneth J. Cahill, Dworken & Bernstein, 60 South Park Place, Painesville, OH 44077 (For Defendant-Appellant/Cross-Appellee).

Carol G. Grasgreen, 5061 Glenn Lodge Road, Mentor, OH 44060 (Guardian ad litem).

COLLEEN MARY O'TOOLE, J.

{¶1} Diana J. Gaul appeals from the judgment entry filed by the Ashtabula County Court of Common Pleas in Wesley J. Gaul, Jr.'s divorce proceeding against her. Wesley cross-appeals. We affirm.

{¶2} Diana and Wesley were married September 16, 1978, in Jefferson, Ohio. There is issue: Caleb Wesley, d/o/b March 3, 1981; Jared Hunter, d/o/b December 15,

1985; and Zachary Bryce, d/o/b April 22, 1995. Diana was fifty-one years old at the time the final decree of divorce was entered in this matter; Wesley, forty-nine. Wesley has a degree from Youngstown State University. At the time of divorce, he worked as a Master Consultant for Breakthrough Management, making a gross income averaging approximately $120,000 per year. His work requires Wesley to spend some thirty-five weeks per year travelling outside Ashtabula County. Diana had a cosmetology license, but had only worked from home, cutting hair, since the mid-nineties, making about $5,000 per year. Diana had briefly attended Youngstown State herself, but, at Wesley's insistence, quit to raise their children. At the time of the divorce hearing, Diana was taking classes at Kent State University, with the intention of becoming a Christian counselor.

{¶3} Wesley's health is good. Diana has several medical conditions which have required frequent surgeries, including the placement of screws and a plate in her neck, plus bones and rods in her back.

{¶4} The parties owned a house located at 772 South Spruce Street, Jefferson, Ohio, with a stipulated value of $370,000, and a mortgage of about $220,000 in June 2008. The trial court ordered that Diana would have exclusive possession of the marital home until it was sold, with each party to receive one-half of the net proceeds. It further ordered that each party would be responsible for one-half of the realty taxes and homeowner's insurance.

{¶5} During the course of the marriage, the parties had become part owners of two commercial properties, one at 12 East Jefferson Street, Jefferson, Ohio, the other at 22 South Chestnut Street, Jefferson, Ohio. Evidently, the properties were originally

purchased so that Diana could run a tanning salon, and a retail crafts business, Kountry Décor. Some space was rented to other businesses; some, rented as apartments. The Chestnut Street property originally was titled to Wesley and Diana; later, it was refinanced, and Diana's partner in Kountry Décor, Kenneth Baker, became an owner. Mr. Baker was the primary obligor on the Jefferson Street property. Eventually, Wesley, Diana, and Mr. Baker each had an undivided one-third interest in these properties. On June 2, 2008, during the trial of this matter, the parties reached an agreement that Wesley would transfer his one-third interest in these commercial properties to Diana, in return for which she would hold him harmless regarding any financial or other obligations associated with the properties. Consequently, in its decree, the trial court awarded Diana her two-thirds interests in these properties as separate property.

{¶6} The parties also owned a vacant property on Black Sea Road, Jefferson, Ohio, which they had purchased in 2000, for $45,000. The loan for this purchase was, evidently, secured by a mortgage on the marital residence. At the time of divorce, the appraised value of this property was $48,000, and the mortgage balance, about $30,000. The Black Sea Road property contains a natural gas and oil well. Since the summer of 2005, the parties received monthly royalties from the operator of the well. The trial court found these monthly royalties slightly exceeded $8,000 per month, for the period November 2005 through February 2007. From June 2006 through October 2007, Diana arranged to have these royalty checks sent directly to her at the marital residence, thus obtaining almost $90,000. The trial court awarded this property to Diana, except for Wesley's share in the mineral rights. It further ordered that, from

March 2009 onward, the gas and oil royalties were to be divided equally between the parties.

{¶7} Wesley had commenced the divorce proceeding September 12, 2006. September 13, 2006, the trial court had issued a temporary restraining order, preventing the parties from dissipating marital assets. Diana, however, had spent a great amount of the almost $90,000 she received from the Black Sea Road royalty checks. Wesley objected, filed a show cause motion, and demanded his half of the royalty checks. The trial court found in pertinent part:

{¶8} "The Court finds that [Diana] paid just over $20,000 for delinquent sales tax on the [Jefferson and Chestnut] commercial properties, together with approximately $2,000 for renovations to those properties; $10,000 as legal fees for her attorney; $2,000 to the parties' son Caleb; over $1,000 for a washer and dryer; and $1,500 for ambulance service for her; plus $4,300 for Christmas gifts; and a $5,000 church tithe.

{¶9} "[Wesley] was a part owner of those commercial properties, so those expenditures were in his interest, as well as [Diana's].

{¶10} "The Court awards [Diana] $10,000 from [Wesley's] share of the royalties for her fees for Attorney Virginia Miller; the $2,000 was a gift to the parties' son Caleb; and the other expenses were for necessities or were reasonable under the circumstances.

{¶11} "[Wesley's] request for reimbursement of the $40,000 to $45,000 from the oil and gas royalties is overruled."

{¶12} The trial court awarded Diana spousal support. After a thorough review of the factors mandated by R.C. 3105.18(C)(1) when setting spousal support, the trial

court ordered that Wesley pay Diana $2,000 per month, from January 1, 2009. It further ordered that he pay, as spousal support, $360 per month for her COBRA coverage for a period of up to three years, but ending sooner if Diana should find coverage through employment. Finally, the trial court ordered Wesley to pay, as spousal support, the $2,300 per month mortgage on the marital home. The trial court retained jurisdiction to modify the spousal support.

{¶13} The trial court ordered Wesley to pay $570 per month in child support for Zachary. Wesley was required to provide medical insurance for Zachary, and pay two-thirds of any uncovered medical expenses. Diana was ordered to pay one-third of such expenses. Wesley was awarded the income tax exemption relating to Zachary. Diana was made legal custodian and residential parent for Zachary.

{¶14} Regarding visitation, the trial court ordered that the Standard Companionship Order for the county would control, with modifications. Noting Wesley's extensive business travel, the trial court ordered that Wesley have Zachary for a minimum of three weekdays, during the weeks when he is in Ashtabula County. Zachary noted his desire for nonconsecutive days with his father, and the option to not remain overnight. On Wesley's objection to this arrangement, the trial court ordered that Wesley be given the option of determining whether the days should be nonconsecutive, and whether Zachary would stay overnight. It further ordered that Wesley be responsible for Zachary's transportation to and from visitation.

{¶15} The trial court filed its judgment entry of divorce January 8, 2009. February 9, 2009, Diana noticed appeal. February 18, 2009, Wesley cross-appealed. Diana assigns four errors:

{¶16} "[1.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY NOT CONSIDERING THE TAX IMPLICATIONS OF ITS SPOUSAL SUPPORT ORDER.

{¶17} "[2.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY IMPROPERLY AWARDING PERSONAL PROPERTY TO APPELLEE THAT WAS APPELLANT'S SEPARATE PROPERTY.

{¶18} "[3.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT-APPELLANT BY ORDERING PLAINTIFF-APPELLEE TO PAY 2/3 OF THE MINOR CHILD'S UNCOVERED MEDICAL EXPENSES AND DEFENDANT-APPELLEE 1/3 OF SAID EXPENSES.

{¶19} "[4.] THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT–APPELLANT BY ORDERING DISCRETIONARY PARENTING TIME."

{¶20} Wesley makes two cross-assignments of error:

{¶21} "[1.] The Trial Court Erred To The Prejudice of Plaintiff/Cross-Appellant in Its Division of Property Award.

{¶22} "[2.] The Trial Court Erred To The Prejudice of Plaintiff/Cross-Appellant by failing to find that Defendant-Appellant had committed financial misconduct and by not compensating Plaintiff/Cross-Appellant with a greater amount of marital property or with a distributive award."

{¶23} By her first assignment of error, Diana contends the trial court's analysis of the tax consequences of its order for spousal support is insufficient. She notes that she receives only $2,000 per month in direct support, while Wesley pays $2,300 monthly on the mortgage for the marital home, and $360 monthly for her COBRA. As all of this is

income to her for tax purposes, she contends the award leaves her insufficient cash to pay her other expenses and taxes.

{¶24} In making an award of spousal support, the trial court is required to consider the factors listed in R.C. 3105.18(C)(1), including the tax consequences to each party of the award. R.C. 3105.18(C)(1)(l). *Kondik v. Kondik*, 11th Dist. No. 2008-P-0042, 2009-Ohio-2300, at ¶90. "*** [T]he trial court must 'indicate the basis for its award in sufficient detail to enable a reviewing court to determine that the award is fair, equitable and in accordance with the law.'" Id. at ¶93, quoting *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97. We review a grant of spousal support for abuse of discretion. *Kondik* at ¶92. An abuse of discretion is no mere error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Rather, the phrase connotes an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. Id. Therefore, "abuse of discretion" describes a judgment neither comporting with the record, nor reason. See, e.g., *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The party challenging an award of spousal support bears the burden of showing the award was an abuse of discretion. *Kondik* at ¶92.

{¶25} In its decree, the trial court considered each of the statutory factors set forth in R.C. 3105.18(C)(1) in making its order of spousal support. Regarding the tax consequences to the parties, R.C. 3105.18(C)(1)(l), the judgment entry reads: "An award of spousal support will be a deduction for [Wesley] and income for [Diana]. The Court will also grant [Wesley] the income tax exemption for support for the parties' son

Zachary."[1] However, further on in the decree, while explaining its decision to retain continuing jurisdiction of spousal support, the trial court noted that this would allow the court to take into account the parties' income from the royalties from the Black Sea Road property. Diana receives one-half of these. As her objection seems, not so much the trial court's analysis of the tax consequences of her award, but rather, that it gives her insufficient cash to meet her obligations, we find this significant, and decline to find the trial court abused its discretion in fashioning that award.

{¶26} The first assignment of error lacks merit.

{¶27} By her second assignment of error, Diana objects to the trial court's award to Wesley of various items of personal property from the marital home. Wesley listed certain items on his Exhibit 37, and Diana, on her Exhibit M, many of which they both claimed as separate property. The trial court awarded Wesley everything listed on his Exhibit 37. Diana asserts she testified regarding the provenance of many of these items, sufficient to qualify them as her separate property pursuant to R.C. 3105.171(A)(6)(a), and that the trial court failed to make written findings, R.C.

1. Wesley argues at length the issue of whether the trial court abused its discretion in awarding him the income tax exemption for Zachary, concluding it did not. We note, generally, that when awarding this exemption to a noncustodial parent, a trial court must find that the child's best interest is served by such allocation. *Nist v. Nist*, 5th Dist. No. 02 CAF 11060, 2003-Ohio-3292, at ¶52. Further, if the parties do not agree as to which parent should receive the exemption, R.C. 3119.82 mandates a series of additional factors the trial court must consider in making the allocation. *Nist* at ¶53. It does not seem to us the trial court did so. However, Diana makes no argument regarding this issue on appeal, and points to nothing in the record indicating that she objected to Wesley receiving the exemption, or introduced evidence on the issue. Pursuant to App.R. 16(A)(7), this was her burden: we are not required to search the record to create an argument, and support for it. Cf. *Brown Bark I. L.P. v. Rubertino*, 11th Dist. No. 2009-L-046, 2009-Ohio-5897, at ¶15-18; see, also, *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, at ¶86-92. This being the case, we do not consider this aspect of the tax consequences of the award of spousal support.

3105.171(D), as to why she was not entitled to the disbursement of this property.

{¶28} Unfortunately, Diana fails to direct our attention to where, in the nearly one thousand pages of trial transcript, her testimony or evidence is located. Consequently, pursuant to App.R. 16(A)(7), we decline to consider the issue. Cf. *Brown Bark I. L.P.*, supra, at ¶15-18.

{¶29} The second assignment of error lacks merit.

{¶30} By her third assignment of error, Diana contends the trial court erred in ordering her to pay one-third of Zachary's uninsured medical expenses. She argues that Wesley's income, averaging $120,000 per year, is far greater than hers, of $5,000 per year. She further notes the trial court failed to attach to its final judgment a completed computation worksheet for child support. Finally, she notes that, pursuant to R.C. 3119.05(F), when ordering child support, a trial court is supposed to issue a separate order for "extraordinary" medical expenses – i.e., uninsured medical expenses exceeding one hundred dollars. R.C. 3119.01(C)(4).

{¶31} We review a trial court's judgments concerning child support for abuse of discretion. *Davenport v. Davenport*, 7th Dist. No. 02 BE 47, 2003-Ohio-4877, at ¶22.

{¶32} We do not find any abuse of discretion in the trial court's order that Diana pay one-third of Zachary's uninsured medical expenses. Inclusion of this order in the final decree of divorce is sufficient to comply with R.C. 3119.05(F)'s mandate that the trial court shall issue a "separate" order regarding a child's extraordinary medical expenses. *Davenport* at ¶35. Further, Diana exaggerates the disparity between her income, and Wesley's income. When his payments for spousal support and child support are deducted from his income, it is about $4,800 per month, not including his

half of the Black Sea Road royalties. When her income of $5,000 per year (about $400 per month), is supplemented by *only* the $2,000 per month she is receiving directly as cash in spousal support, it is one-half of Wesley's – again, not including her half of the royalties. Consequently, we find no abuse of discretion in the trial court determining she should pay one-half of what Wesley must pay for uninsured, or extraordinary, medical expenses for their son.

{¶33} We do not find the failure of the trial court to attach a completed child support worksheet to the final decree reversible error. Diana's counsel attached one to her proposed findings of fact and conclusions of law, which largely comports with the figure determined by the trial court. This is sufficient to meet the statutory requirements: any error may be cured in a Civ.R. 60(A) proceeding. *Schumann v. Schumann*, 8th Dist. Nos. 83404 and 83631, 2005-Ohio-91, at ¶64.

{¶34} The third assignment of error lacks merit.

{¶35} By her fourth assignment of error, Diana objects to the trial court's order regarding Wesley's visitation with Zachary. She argues that giving Wesley the discretion, during the seventeen weeks per year he is at home, to choose whether the three weekdays Zachary is to be with him shall be consecutive or not, or include overnights, violates R.C. 3109.051. That section, entitled "Order granting parenting time or companionship or visitation rights," provides, in pertinent part: "The court shall include in its final decree a *specific* schedule of parenting time for that [nonresidential] parent." (Emphasis added.)

{¶36} We review a trial court's judgment regarding parenting time, companionship, or visitation for abuse of discretion. *Waszkowski v. Lyons*, 11th Dist. No. 2008-L-077, 2009-Ohio-403, at ¶14.

{¶37} Our research indicates minimal authority interpreting the "specific schedule" language of R.C. 3109.051. In *Farias v. Farias* (Dec. 10, 1992), 5th Dist. No. 92-CA-61, 1992 Ohio App. LEXIS 6706, the court approved an arrangement whereby appellant father, who was limited to supervised visitation, was required to inform appellee mother forty-eight hours in advance of his desire to visit, other arrangements being left to the discretion of the parties. Id. at 2, 4. The court held that the specific schedule requirement of R.C. 3109.051 was sufficiently met if the visitation set forth in the decree is "appropriate to the parties involved." Id. at 4.

{¶38} On the other hand, in *Leas v. Leech* (Aug. 9, 1996), 7th Dist. No. 95-J-5, 1996 Ohio App. LEXIS 3343, the Seventh Appellate District found the trial court abused its discretion in ordering that appellant father receive "'four weeks of extended summer visitation with the minor child of the parties, as the parties shall agree.'" Id. at 7. Appellant argued that, due to the animosity between himself and the child's mother, it would be impossible for them to reach any agreement regarding this summer visitation. Id. at 7-8. The Seventh District agreed with this argument. Id. at 8. It further cited to the specific schedule language of R.C. 3109.051 in concluding that a provision for visitation premised solely on the agreement of the parties was an abuse of discretion. Cf. *Leas* at 8-9. The court concluded: "The statute does not require the trial court to decree the exact hours and minutes of visitation. However, under the facts of this case, a definite alternate visitation schedule should have been provided." Id. at 9.

{¶39} In *Deckerd v. Deckerd* (Dec. 18, 1996), 7th Dist. No. 95-CO-33, 1996 Ohio App. LEXIS 5718, appellant father, citing to R.C. 3109.051, assigned as error the alleged failure of the trial court to include a specific schedule of visitation in the final decree of divorce. *Deckerd* at 7. The parties had previously entered an agreement about father's companionship schedule through mediation, which agreement further incorporated language stating that father's companionship should not be less than provided for by the trial court's standard local rule. Id. at 2-3. The trial court had referenced that agreement in its final decree. Id. at 8. On appeal, the Seventh District found this reference sufficient to meet the requirements of R.C. 3109.051 regarding specificity. *Deckerd* at 8.

{¶40} We agree with the *Farias* court that the specific schedule requirement of R.C. 3109.051 should be "appropriate to the parties involved[,]" and thus, may involve some flexibility. In this case, given Wesley's frequent business travel, and Diana's ongoing education and intention to seek employment, some flexibility is obviously desirable. The trial court ordered that the principles of Ashtabula County's local rule regarding standard visitation should apply, except as modified in the decree of divorce. It required that Wesley transport Zachary to and from any visitation. Zachary is a teenager, who may be expected to spend some time unsupervised by his parents. Given all these circumstances, we cannot find the trial court abused its discretion.

{¶41} The fourth assignment of error lacks merit.

{¶42} By his first cross-assignment of error, Wesley asserts the trial court divided the marital property in such a fashion that Diana received almost $200,000 of it, while he received less than $110,000. According to Wesley's calculations, this disparity

is largely due to the almost $90,000 in royalties from the Black Sea Road property which Diana received, and evidently spent, from June 2006 through October 2007.

{¶43} The division of marital and separate property in a divorce proceeding is governed by R.C. 3105.171. *Kondik*, supra, at ¶37. That section requires the trial court to make an equitable division of the property. Id. We review such decisions for abuse of discretion. Id. at ¶36.

{¶44} In its decree, the trial court held that Diana's expenditure of monies from the Black Sea Road royalties to pay delinquent sales taxes due the state from the parties' commercial properties benefited Wesley, since he was a one-third owner of these properties. It approved Diana's payment of $10,000 from the royalties to her first divorce counsel; and, generally, found her other expenditures of these marital monies were for necessities, or reasonable under the circumstances. We refuse to substitute our judgment for that of the trial court. While the law starts from the presumption a division of marital property should be equal, it is within a trial court's discretion to vary this, in order to reach an equitable division. Cf. *O'Brien v. O'Brien*, 11th Dist. No. 2008-T-0075, 2009-Ohio-3795, at ¶30.

{¶45} The first cross-assignment of error lacks merit.[2]

2. We note that Wesley also objects to the following statement from page 9 of the divorce decree: "In the proposed Findings of Facts and Conclusions of Law submitted by [Wesley's] counsel ***, he states that he has approximately $89,944.20 in his trust account from accumulated oil and gas royalties. Whatever the amount of funds in [Wesley's] counsel's trust account shall be equally divided by the parties." We must respectfully agree that this appears to be an error by the trial court. At page 14 of the proposed findings of fact and conclusions of law, Wesley's counsel merely proposed that the trial court should divide between the parties the royalties taken exclusively by Diana from June 2006 through October 2007 – approximately $89,944.20. This appears in a sentence noting that the trial court had ordered, on November 9, 2007, that Wesley's counsel should hold any future royalty checks, pending division by the trial court. However, any error in referring to the amount actually being held by Wesley's counsel appears harmless, as the trial court's order, in substance, simply requires the division of whatever funds he actually holds.

{¶46} By his second cross-assignment of error, Wesley contends the trial court erred in failing to make him a distributive award, or greater award of marital property, for Diana's misconduct in appropriating the Black Sea Road royalties from June 2006 through October 2007.

{¶47} "Pursuant to R.C. 3105.171(E)(3), '(i)f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.' The trial court must make a factual finding on the record to support a distributive award for financial misconduct. *Eddy v. Eddy*, 4th Dist. No. 01CA02, 2002-Ohio-4345, ¶50. The offended party bears the burden of proving financial misconduct by his or her spouse. *Gallo v. Gallo*, 11th Dist. No. 2000-L-208, 2002-Ohio-2815, ¶43." *Kondik*, supra, at ¶84.

{¶48} We review a trial court's decision whether to make an award pursuant to R.C. 3105.171(E)(3) for abuse of discretion. *Gallo* at ¶43.

{¶49} In this case, we have already determined the trial court did not abuse its discretion in allocating the disputed Black Sea Road royalties to Diana. Consequently, neither did it abuse its discretion in failing to make Wesley an award for her alleged financial misconduct.

{¶50} The second cross-assignment of error lacks merit.

{¶51} The judgment of the Ashtabula County Court of Common Pleas is affirmed.

{¶52} It is the further order of this court that the parties are equally assessed costs herein taxed.

{¶53} The court finds there were reasonable grounds for this appeal and cross-appeal.

MARY JANE TRAPP, P.J., concurs.

DIANE V. GRENDELL, J., concurs in judgment only in part, and dissents in part, with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only in part, and dissents in part, with a Dissenting Opinion.

{¶54} I concur in judgment only, except as stated below.

{¶55} I disagree with the majority's conclusion that the failure of the trial court to attach a completed child support worksheet to the final decree was not reversible error. The decision must be remanded in order for the trial court to complete a worksheet and enter any deviations pursuant to R.C. 3119.22 and 3119.23. Accordingly, I respectfully dissent from that portion of the Opinion.

{¶56} The Ohio Supreme Court in *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 142, ruled that "a child support computation worksheet required to be used by a trial court in calculating the amount of an obligor's child support obligation *** must actually be completed **and made a part of the trial court's record**." (Emphasis added). As such, a trial court is required to prepare and assess the child support calculation worksheet in deciding to modify a child support order**.** This court held that "[t]he requirements of R.C. 3119.22, formerly R.C. 3113.215, are mandatory and a trial court's

failure to fully comply with the literal requirements of the statute constitutes reversible error." *Graham v. Graham*, 11th Dist. No. 2002-G-2410, 2003-Ohio-1098, at ¶7.

{¶57} In the instant case, there was an unsigned worksheet attached to Diana Gaul's proposed findings and conclusions of law, however, it was not attached to the final divorce decree. I do not find the Eighth District case cited by the majority, *Schumann v. Schumann*, 8th Dist. Nos. 83404 and 83631, 2005-Ohio-91, to be persuasive. The statute and case law require this court to remand the case in order for the worksheet to be entered into the record.

{¶58} I would remand the case in order for the trial court to attach a completed worksheet to the decree and enter any deviations pursuant to R.C. 3119.22 and 3119.23.