[Cite as *Walczak v. Walczak*, 2004-Ohio-3370.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD B. WALCZAK

Appellant

-vs-

MARIA L. WALCZAK

Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2003 CA 00298

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 2002 DR 00981
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 28, 2004

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

CHRIS G. MAOS
2745 Nesbitt Avenue
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Wise, J.

{¶1} Appellant Richard B. Walczak appeals from the decision of the Stark County Court of Common Pleas, Domestic Relations Division, which granted him a divorce from Appellee Maria L. Walczak. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were married in 1986 in Panama. No children were born as issue of the marriage. After appellant's discharge from the military, the parties purchased a residence in Philadelphia, Pennsylvania, in which the parties lived from approximately 1988 until 1994. During that year, appellant lost his job in Pennsylvania, but soon thereafter secured new employment in Ohio. The parties decided to continue ownership of the house in Philadelphia, maintaining it as a rental property. However, appellant permitted the house to be titled in appellee's name at the time they relocated to Ohio.

{¶3} On July 2, 2002, appellant filed a bankruptcy petition in the United States District Court, Northern District of Ohio. On July 9, 2002, appellant filed a complaint for divorce in the Stark County Court of Common Pleas. On the same day, appellee transferred title to the Philadelphia property to her son from a prior marriage, Pedro Forero. On July 24, 2002, appellee filed a counterclaim for divorce.

{¶4} Following a bench trial, the trial court issued a decree of divorce on July 17, 2003. The court found, inter alia, that the Philadelphia property was not a marital asset because appellant did not list it as an asset in his bankruptcy petition, and because appellee had transferred ownership to her son. The court further ordered appellant to pay appellee spousal support of $800 per month, subject to the continuing jurisdiction of the court, to terminate upon either party's death, appellee's remarriage, or fifty-one months, whichever would occur first.

{¶5} Appellant filed a notice of appeal on August 15, 2003, and herein raises the following three Assignments of Error:

{¶6} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY NOT INCLUDING THE REAL PROPERTY TITLED IN THE APPELLEE'S NAME DURING THE MARRIAGE AS A MARITAL ASSET.

{¶7} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY MAKING AN AWARD OF SPOUSAL SUPPORT WITHOUT CONSIDERING THE RENTAL INCOME WHICH APPELLEE COULD HAVE RECEIVED FROM THE REAL PROPERTY.

{¶8} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY NOT PROVIDING FACTS AND REASONS FOR AWARDING SPOUSAL SUPPORT."

I

{¶9} In his First Assignment of Error, appellant argues that the trial court erred and abused its discretion in finding that the Philadelphia property was not a marital asset. We disagree.

{¶10} We generally review the overall appropriateness of a trial court's property division in divorce proceedings under an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. However, with the enactment of R.C. 3105.171, the characterization of property as separate or marital is a mixed question of law and fact, not discretionary, and the characterization must be supported by sufficient, credible evidence. *Chase-Carey v. Carey* (Aug. 26, 1999), Coshocton App. No. 99CA1; see, also, *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 654, 664 N.E.2d 1012; *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 676 N.E.2d 1210. Thus, the initial determination by a trial court that an asset is separate or marital property is a factual finding that will not be reversed unless it against the manifest weight of the evidence. *Okos v. Okos* (2000), 137 Ohio App.3d 563, citing *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159. Accord *McLendon v. McLendon* (Dec. 2, 1999), Muskingum App. No. CT99-0003.[1] Once the characterization has been made, the actual distribution of the asset may be properly reviewed under the more deferential abuse-of-discretion standard. R.C. 3105.171(D); *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶11} R.C. 3105.171(A)(3)(a) reads in pertinent part:

{¶12} " 'Marital property' means, subject to division (A)(3)(b) of this section, all of the following:

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[1] We find these standards of review appropriate in this case, even though technically the real property at issue was found to "no longer exist" as to these parties, i.e., it was found to be neither separate nor marital. See Judgment Entry at 3.

{¶13} "(i) All real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

{¶14} "* * *"

{¶15} As appellant notes, R.C. 3105.171(H) makes clear that "[e]xcept as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." The titling of the Philadelphia property in appellee's name, however, was not the sole basis for the court's decision. Rather, the court cited in support the undisputed facts that appellant left out any mention of the Philadelphia property as an asset in his bankruptcy pleadings and that appellee had thereafter quitclaimed the deed to her son. Although appellant apparently switched course and listed the house in his financial affidavit for the divorce, we hold the aforesaid facts recited by the trial court constituted sufficient evidence to find the property to be a non-asset in the divorce.

{¶16} Accordingly, appellant's First Assignment of Error is overruled.

II, III

{¶17} In his Second and Third Assignments of Error, appellant contends the trial court abused its discretion in awarding spousal support, and erred in failing to sufficiently consider the factors under R.C. 3105.18(C). We disagree.

{¶18} A trial court's decision concerning spousal support may only be altered if it constitutes an abuse of discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. An abuse of discretion connotes more than an error of law or judgment; it

implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore*, supra. R.C. 3105.18(C)(1)(a) thru (n), provides the factors that a trial court is to review in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms of payment, and duration of spousal support. A trial court's decision not to acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C)(1) does not necessarily mean the evidence was not considered. *Barron v. Barron*, Stark App.No. 2002CA00239, 2003-Ohio-649.

{¶19} R.C. 3105.18(C)(1) provides as follows:

{¶20} "(C)(1) 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:

{¶21} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code; (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, including but not limited to any court-ordered payments by the parties; (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any

party's contribution to the acquisition of a professional degree 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."

{¶22} In the case sub judice, the court took note that appellant, age 38, is in good mental and physical health, although he suffers from some back pain. He has held steady employment as a truck driver with Overnight Transportation since 1994. He earned $53,326 in 2002. He has a 401(K) plan and a possible vested interest in a teamster pension. Appellee is 44 years old, and was found to be in fair health. The court found she suffers from stress and lower back pain. Her past employment included Hartville Plastics and Dairy Mart; she now earns $12,000 per year at Suarez Corporation. Evidence at trial showed the Philadelphia house had, prior to appellee's quitclaim to Pedro Forero, produced rental income of more than $400 per month; appellant essentially argues this income should have been imputed to appellee for the purposes of spousal support calculation. Nonetheless, we are unpersuaded the trial court erred or abused its discretion under these circumstances in assessing a spousal support award per the factors under R.C. 3105.18(C). See, also, *Kennard v. Kennard*, Delaware App. No. 02CA-F-11-059, 2003-Ohio-2800, ¶ 35, citing *State v. Eley* (1996),

77 Ohio St.3d 174, 180-181. ("A trial court judge is presumed to know the applicable law and apply it accordingly.")

{¶23} Appellant's Second and Third Assignments of Error are therefore overruled.

{¶24} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is hereby affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.

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JUDGES

JWW/d 617

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RICHARD B. WALCZAK	:	
Appellant	:	
-vs-	:	JUDGMENT ENTRY
MARIA L. WALCZAK	:	
Appellee	:	Case No. 2003 CA 00298

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Stark County, Ohio, is affirmed.

Costs to appellant.

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JUDGES