[Cite as *Newman v. Newman*, 2004-Ohio-5363.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JUDITH L. NEWMAN	:	JUDGES:
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee/Cross-Appellant	:	Hon. Julie A. Edwards, J.
	:	Hon. John F. Boggins, J.
-vs-	:	
	:	Case No. 2003 CA 00105
MARK A. NEWMAN	:	
	:	
Defendant-Appellant/Cross-Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from Licking County Common Pleas Court, Domestic Relations Division, Case No. 01 DR 01398
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	OCTOBER 1, 2004

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
A. TERRANCE TRENEFF 33 West Main Street P.O. Box 4190 Newark, Ohio 43058	J. MICHAEL KING 2 North First Street P.O. Box 4010 Newark, Ohio 43058

Boggins, J.

{¶1} Appellant Mark A. Newman appeals the November 12, 2003, Judgment Decree of Divorce issued by the Licking County Common Pleas Court.

{¶2} Cross-Appellant Judy L. Newman also appeals the November 12, 2003, Judgment Decree of Divorce issued by the Licking County Common Pleas Court

STATEMENT OF THE FACTS AND CASE

{¶3} Judy L. Newman and Mark A. Newman were married on April 12, 1986, and two children were born as issue of the marriage: Elizabeth Nicole Newman, DOB 12/30/1986 and Jacob Allen Newman, DOB 5/23/1991.

{¶4} On October 8, 2001, Appellee Judy Newman filed a Complaint for Divorce in the Licking County Court of Common Pleas.

{¶5} Appellant Mark A. Newman filed an Answer and Counterclaim.

{¶6} On October 31, 2001, a Magistrate's Order was filed which provided for no temporary spousal support. However, such Order was made without the benefit of Appellee's financial affidavits concerning income and expenses.

{¶7} On November 21, 2001, a motion was filed by Appellee for modification of the temporary orders. A hearing was held on said motion on January 3, 2002.

{¶8} On January 25, 2002, a new Magistrate's Order was filed ordering Appellant to pay spousal support in the amount of $150.00 per month. An additional Order also required Appellant to pay Appellee's monthly vehicle loan payment of $430.00 per month as well as her monthly automobile insurance payment of $42.00 per month.

{¶9} Appellant objected to the Magistrate's Order and on May 8, 2002, the trial court via Judgment Entry, held that "the spousal support award was unnecessary." The trial court did not eliminate Appellant's obligation to pay Appellee's car payment and car insurance payments.

{¶10} On May 23, 2002, the final contested divorce hearing was held. Immediately prior to the hearing, the parties entered into a written stipulation regarding certain issues including child support.

{¶11} On July 24, 2002, the Magistrate's Decision was filed. In said decision, the Magistrate ordered appellant to continue to pay the $430.00 vehicle payments until the $8,000.00 balance on the loan on said vehicle was paid off. The Magistrate provided that such payments constituted spousal support

{¶12} Both parties filed objections to the Magistrate's Decision and a hearing was held on same before the trial court judge.

{¶13} On August 14, 2003, the trial court filed an Opinion on said objections. With regard to the parties' objections concerning the spousal support award, the trial court held:

{¶14} "The Court finds that the duration of marriage and plaintiff's relative absence from the work force warrants spousal support. The Court determines the defendant shall pay the plaintiff the sum of $500.00 per month as and for spousal support for a period of four years."

{¶15} On November 12, 2003, the trial court filed its Judgment Entry Decree of Divorce.

{¶16} It is from this decision which Appellant and Appellee now appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

APPELLANT MARK A. NEWMAN

{¶17} "I. THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO PAY SPOUSAL SUPPORT OF $500.00 PER MONTH FOR A PERIOD OF FOUR (4) YEARS,

{¶18} "II. THE TRIAL COURT ERRED BY FAILING TO RETAIN JURISDICTION OVER THE ISSUE OF SPOUSAL SUPPORT.

{¶19} "III. THE TRIAL COURT ERRED IN ORDERING THE APPELLANT TO MAINTAIN THE PARTIES MINOR CHILDREN AS BENEFICIARIES ON HIS EXISTING LIFE INSURANCE POLICIES WITHOUT REGARD TO NEED OR EMANCIPATION."

CROSS-APPELLANT JUDY L. NEWMAN

{¶20} "I. CROSS APPELLANT SUBMITS THAT THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD SPOUSAL SUPPORT IN A SUM GREATER AND FOR A LONGER TERM THAN THAT WHICH WAS PROVIDED FOR IN THE DECISION OF THE MAGISTRATE AS AMENDED BY TRIAL JUDGE.

{¶21} "II. CROSS APPELLANT SUBMITS THAT THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT CERTAIN EXPENSES RELATED TO THE MINOR CHILDREN ARE ONLY MORAL OBLIGATIONS.

{¶22} "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD CROSS APPELLANT A CERTAIN GUN SAFE.

{¶23} "IV. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO ALLOW OWNER AND POSSESSOR OF A CERTAIN 4 WHEELER TO HAVE FIRST RIGHT OF PURCHASE.

{¶24} "V. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING CERTAIN PERSONAL PROPERTY OF THE PARTIES.

{¶25} "VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO AWARD TO CROSS APPELLANT ANY PORTION OF HER LEGAL FEES.

{¶26} "VII. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT TO CROSS APPELLANT EITHER OF THE TAX EXEMPTIONS APPLICABLE TO THE MINOR CHILDREN OF THE PARTIES."

Appellant Mark A. Newman

I.

{¶27} In his first assignment of error, Appellant argues that the trial court erred in ordering him to pay spousal support in the amount of $500.00 for four years.

{¶28} As a general matter, we review the overall appropriateness of the trial court's award of spousal support under an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348. However, R.C. §3105.18(C)(1) mandates the trial court consider certain factors in making its determination of spousal support. We find our review of the trial court's findings regarding these factors presents a factual analysis, and the trial court's findings must be supported by sufficient, credible evidence. After the trial court has considered the factors, the actual determination of whether or not to award spousal support, as well as the amount and duration of the

spousal support award, must be properly reviewed under the more deferential abuse of discretion standard.

{¶29} Pursuant to R.C. §3105.18(C)(1), the trial court must consider certain factors in making determinations of spousal support: 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:

{¶30} "(a) The income of the parties, from all sources* * *;

{¶31} "(b) The relative earning abilities of the parties;

{¶32} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶33} "(d) The retirement benefits of the parties;

{¶34} "(e) The duration of the marriage;

{¶35} "(f) The extent to which it would be inappropriate for a party, because he will be custodial of a minor child of the marriage, to seek employment outside the home;

{¶36} "(g) The standard of living of the parties established during the marriage;

{¶37} "(h) The relative extent of education of the parties;

{¶38} "(I) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶39} "(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;

{¶40} "(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;

{¶41} "(l) The tax consequences, for each party, of an award of spousal support;

{¶42} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶43} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶44} Further, the trial court is governed by the standards and guidelines imposed by the Ohio Supreme Court in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83, paragraph one of the syllabus, which reads: "Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities."

{¶45} In the Decree of Divorce, the trial court states only “IT IS FURTHER ORDERED that Defendant shall pay to the Plaintiff as and for spousal support the sum of $500.00 per month payable through CSEA for a period of four years from the filing of this decree.”

{¶46} However, upon review of the Court's Opinion on the Objections to the Magistrate's Order, we find the trial court stated that "[t]he Court find that the duration of marriage and plaintiff's relative absence from the work force warrants spousal support."

{¶47} We conclude that this finding, in addition to those contained in the twenty page Magistrate's Decision, along with the trial court's findings contained in the Decree of Divorce satisfy the requirement of the trial court to provide its facts and reasons for awarding spousal support. Although the trial court did not list the factors in the same paragraph as the spousal support award, we find the trial court considered the length of the marriage, the education of the parties, the necessary living expense, etc. When we consider these findings as set forth by the trial court, we cannot say the trial court abused its discretion in ordering an award of spousal support in the amount of $500.00 for four years.

{¶48} Appellant's first assignment of error is overruled.

II.

{¶49} In his second assignment of error, Appellant argues that the trial court erred in failing to retain jurisdiction over the issue of spousal support. We disagree.

{¶50} Appellant argues that the court's decision does not allow for a change in the financial condition of either party nor does it address the possibility of cohabitation or remarriage on the part of Appellee.

{¶51} R.C. §3105.18(E) mandates that a trial court must specifically reserve jurisdiction in its divorce decree or a separation agreement incorporated into the decree in order to modify a spousal support award. The decision of whether to retain such jurisdiction is a matter within the domestic relations court's discretion. *Smith v. Smith*

(Dec. 31, 1998), Lucas App. No. L-98-1027, citing *Johnson v. Johnson* (1993), 88 Ohio App.3d 329, 331, 623 N.E.2d 1294. An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶52} A court abuses its discretion in declining to reserve spousal support jurisdiction "where the likelihood is substantial that the economic condition of either or both parties may change significantly within that period." Id*.,* citing *Jackson v. Jackson* (Nov. 8, 1996), Montgomery App. No. 15795.

{¶53} We are mindful the review of a spousal support award is done under a very high standard giving great deference to the trial court's decision on the issue. *Easton v. Tabet* (Aug. 12, 1996), Stark App. Nos.1995CA00313, 1995CA00296.

{¶54} R.C. §3105.18(B) provides, in pertinent part: “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.”

{¶55} The legislature only provided death, not remarriage or cohabitation, shall terminate spousal support unless the order expressly provides otherwise.

{¶56} The Ninth District in *McClusky v. Nelson* (1994), 94 Ohio App.3d 746, 641 N.E.2d 807 noted: “the 1991 amendment to R.C. 3105.18(B) added the language, ‘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.’ * * * the fact that the legislature chose to provide a specific exception to the statute for the case of death of the obligor, but did not provide an exception for remarriage of the obligee, supports our finding that, under these circumstances, remarriage of the obligee

does not automatically terminate the obligor's duty to pay the alimony, as provided in the parties' agreement."

{¶57} The trial court is not required to reserve jurisdiction to terminate spousal support in event of cohabitation. R.C. § 3105.18(E). *Jordan v. Jordan* (1996), 117 Ohio App.3d 47.

{¶58} In the case sub judice, the spousal support award is ordered for only a four year duration. Under the financial facts and circumstances of this case, the Magistrate found:

{¶59} "… the defendant's income level is almost $47,000.00 and the plaintiff's almost $29,000.00. These are, aside from the child support obligation paid to the plaintiff, the entire sum and substance of their known incomes. The parties will both advance in their areas of occupational endeavor but it is unlikely that either make any great leaps into a higher income bracket at anytime in the foreseeable future. The plaintiff has a varied background of previous employment and a degree but she has not pursued any of these lines for a significant period of time. The Magistrate finds that out of factors (a), (b) and (e) of Revised Code section 3105.18(C), there is a slight tilting in favor of an award of spousal support for the plaintiff." (July 24, 2002, Magistrate's Decision at p. 14).

{¶60} Based on the foregoing, we are not persuaded that the trial court abused its discretion in failing to maintain jurisdiction over the issue of spousal support.

{¶61} Appellant's second assignment of error is overruled.

III.

{¶62} In his third assignment of error, Appellant argues that the trial court erred in ordering him to maintain his minor children as beneficiaries on his existing life insurance policy without regard to need or emancipation. We disagree.

{¶63} In the Magistrate's Decision, Page 19, Paragraph 12, the Magistrate ordered "[t]hat the life insurance in existence for the benefit of the children shall be maintained. The children shall also retain Certificates of Deposit, account or bonds that are presently in their respective names."

{¶64} Appellant failed to file an objection to this part of the magistrate's decision.

{¶65} Civ. R. 53(E)(3)(b) provides that a party shall not assign as error on appeal the court's adoption of any finding of fact or conclusion of law of a magistrate unless the party has objected to that finding or conclusion pursuant to the rule.

{¶66} As appellant failed to file an objection to this part of the decision of the magistrat**e**, he may not now claim error on appeal.

{¶67} Appellant's third assignment of error is overruled.

Cross-Appellant Judith L. Newman

I.

{¶68} In her first assignment of error, Cross-Appellant argues that the trial court erred in failing to award her a greater amount for spousal support for a longer period of time. We disagree.

{¶69} With respect to a trial court's findings for spousal support, an appellate court gives deference to these findings when they are supported by some competent, credible evidence in the record. *Carruth v. Carruth* (Jan. 27, 1999), 9th Dist. No. 2761-M, citing *Getter v. Getter* (1993), 90 Ohio App.3d 1, 8-9, 627 N.E.2d 1043.

{¶70} For the same reasons stated in Appellant's first assignment of error, we find that the trial court did not abuse its discretion in making it decision as to the amount and length of spousal support ordered.

{¶71} Cross-Appellant's first assignment of error is overruled

II.

{¶72} In her second assignment of error, Cross-Appellant argues that the trial court erred in finding that certain expenses as they pertained to the minor children were moral obligations only. We disagree.

{¶73} Cross-Appellant submits that Cross-Appellee should be responsible for "his share" of his daughter's cheerleading expenses, modeling expenses and extraordinary education costs. (Cross-Appellant's Brief at 5).

{¶74} In his decision, the Magistrate held that "the Bowling Green educational venture and modeling venture entered into by the plaintiff on behalf of the parties'

daughter shall be the financial responsibility of the plaintiff. (Magistrate's Decision at p. 17).

{¶75} This finding was adopted by the trial court on Page 9 of the Decree of Divorce: "IT IS FURTHER ORDERED that any expense connected with the daughter's educational venture at Bowling Green State University shall be the responsibility of Plaintiff."

{¶76} Upon review of the record, it appears that Cross-Appellee had little knowledge or understanding of the modeling and/or BGSU gifted programs in which Cross-Appellant had enrolled their daughter. (T. at 50-53, 155-156).

{¶77} Additionally, we find nothing in the transcript or in Cross-Appellant's argument to support a finding that Cross-Appellee should be held financially responsible for any portion the activities and/or programs.

{¶78} Cross-Appellant's second assignment of error is overruled.

III., IV. And V

{¶79} In her third, fourth and fifth assignments of error, Cross-Appellant argues that the trial court erred in its division and award of certain personal property, including, inter alia, a gun safe, a four-wheeler, a power washer and a log splitter. We disagree.

{¶80} Initially, we note that we review the overall appropriateness of the 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. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. R.C. 3105.171 explains a trial court's

obligation when dividing marital property in divorce proceedings as follows: (C)(1) Except as provided in this division or division (E)(1) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section. See also *Cherry,* supra., at 355, 421 N.E.2d 1293. Throughout this analysis, the trial court's property division should be viewed as a whole in determining whether it has achieved an equitable and fair division of marital assets. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222, 459 N.E.2d 896. Equity is the guidepost in dividing the marital assets of the parties in a divorce action. *Zimmie v. Zimmie* (1984), 11 Ohio St.3d 94, 464 N.E.2d 142.

{¶81} An examination of the magistrate's decision, accepted by the trial court, indicates the finding's relative to the respective valuations of the personal property. Upon dividing same, the Magistrate awarded Cross-Appellant personal property valued at $2,575.00. Cross-Appellee was awarded personal property valued at $1,675.00 but was also awarded his weapons valued at $1,500.00 for a total of $3,175.00 In order to correct for the disparity, the Magistrate found that Cross-Appellee owed $300.00 to Cross-Appellant.

{¶82} We find that ample evidence was presented to justify the conclusions drawn by the magistrate, and the resulting property division reviewed and approved by the trial court, and that no abuse of discretion occurred.

{¶83} Cross-Appellant’s third, fourth and fifth assignments of error are overruled.

VI.

{¶84} In her sixth assignment of error, Cross-Appellant argues that the trial court erred when it failed to order cross-appellee husband to pay any portion of her attorney fees. We disagree.

{¶85} The standard of review for the award of attorney fees and litigation expenses is abuse of discretion. *Arthur v. Arthur* (1998), 130 Ohio App.3d 398, 411, 720 N.E.2d 176. (citing *Motorist Mut. Ins. Co. v. Brandenburg* (1995), 72 Ohio St.3d 157, 648 N.E.2d 488,

{¶86} R.C. §3105.18(H) provides, in pertinent part:

{¶87} "(H) 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."

{¶88} The trial court awarded Cross-Appellant $400.00 in attorney fees as those fees were generated by the contempt portion of the divorce action. There is no evidence in the record nor in Cross-appellant's argument to support a finding that she was prevented from fully litigating her rights or protecting her interests. We therefore

find no abuse of discretion in the trial court's decision to not award attorney fees to Cross-Appellant above the stated $400.00.

{¶89} Cross-Appellant's sixth assignment of error is overruled.

VII.

{¶90} In her seventh assignment of error, Cross-Appellant argues that the trial court erred when it failed to grant her the tax exemption for either of the two minor children. We disagree.

{¶91} As with other domestic relations issues, a trial court's decision awarding the tax dependency exemption to a party is reviewed for an abuse of discretion. *Corple v. Corple* (1997), 123 Ohio App.3d 31, 33, 702 N.E.2d 1234. Thus, pursuant to *Blakemore,* supra., we must determine whether the trial court's decision in awarding the exemption to appellee was arbitrary, unconscionable or unreasonable.

{¶92} Ohio law provides the manner in which a state court may allocate a tax exemption. The trial court must find that "the interest of the child has been furthered" before it can allocate the tax exemption to the noncustodial parent. *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, 332, 528 N.E.2d 180. The best interest of the child is furthered when the allocation of the tax exemption to the noncustodial parent produces a net tax savings for the parents. *Singer v. Dickinson* (1992), 63 Ohio St.3d 408, 588 N.E.2d 806, paragraph two of the syllabus. Such net tax savings for the parents can only occur when the noncustodial parent's taxable income falls into a higher tax bracket. Id. at 415-416. When determining the net tax savings to the parties, a trial "court should review all pertinent factors, including the parents' gross incomes, the tax exemptions and deductions to which the parents are otherwise entitled, and the relevant federal,

state, and local income tax rates." Id. at 416. (Such a review is sometimes referred to as a "Singer analysis.")

{¶93} R.C. §3119.82 which became effective March 22, 2001, added additional factors to consider in allocating the tax exemption. Such section states as follows:

{¶94} “If the parties agree on which parent should claim the children as dependents, the court shall designate that parent as the parent who may claim the children. If the parties do not agree, the court, in its order, may permit the parent who is not the residential parent and legal custodian to claim the children as dependents for federal income tax purposes only if the court determines that this furthers the best interest of the children and, with respect to orders the court modifies, reviews, or reconsiders, the payments for child support are substantially current as ordered by the court for the year in which the children will be claimed as dependents. In cases in which the parties do not agree which parent may claim the children as dependents, the court shall consider, in making its determination, any net tax savings, the relative financial circumstances and needs of the parents and children, the amount of time the children spend with each parent, the eligibility of either or both parents for the federal earned income tax credit or other state or federal tax credit, and any other relevant factor concerning the best interest of the children.”

{¶95} In the case sub judice, the Magistrate, in his decision, noted that Cross-appellee’s annual income averaged $46,900.00. The Magistrate further noted that the Cross-appellant earned $28,900.00 for that year.

{¶96} The trial court, in the Decree of Divorce, granted the tax exemptions for both children to Cross-Appellee "as long as he is substantially current in his duty of support by December 31st of each year. Decree of Divorce at 7).

{¶97} Appellant is in a higher tax bracket and would realize greater tax savings if the exemption were awarded to him.

{¶98} Based on the foregoing, we find that the trial court did not abuse its discretion in awarding the income tax exemptions to Cross-Appellee since such decision was not arbitrary, unconscionable or unreasonable.

{¶99} Cross-Appellant's seventh assignment of error is overruled.

{¶100} The judgment of the Licking County Court of Common Pleas is affirmed.

By: Boggins, J.

Wise, P.J. and

Edwards, J. concur

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JUDGES

[Cite as *Newman v. Newman*, 2004-Ohio-5363.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JUDY L. NEWMAN	:	
Plaintiff-Appellee/Cross-Appellant	:	
-vs-	:	JUDGMENT ENTRY
MARK A. NEWMAN	:	
Defendant-Appellant/Cross-Appellee	:	CASE NO. 2003CA00105

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Court of Common Pleas of Licking County, Ohio, is affirmed. Costs assessed to Appellant/Cross-Appellee and Appellee/Cross-Appellant equally.

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JUDGES