[Cite as *Lee v. Lee*, 2009-Ohio-5250.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

KYUNG JIN LEE		:	JUDGES:
		:	Julie A. Edwards, P.J.
	Plaintiff-Appellee	:	Sheila G. Farmer, J.
		:	Patricia A. Delaney, J.
-vs-		:	
		:	Case No. 2008 CA 112
RAMI R. LEE		:	
		:	
	Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal From Licking County Court Of Common Pleas, Domestic Relations Division, Case No. 2007 DR 00054 CRB
JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	September 30, 2009

APPEARANCES:

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Edwards, J.

{¶1} Defendant-appellant, Rami Lee, appeals from the August 13, 2008, Judgment Entry Decree of Divorce filed in the Licking County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Rami Lee and appellee Kyung Jin Lee were married on December 30, 1994. Two children were born as issue of such marriage, namely, Jenai Lee (DOB 11/30/95) and Jelena Lee (DOB 12 /10/2000).

{¶3} On January 12, 2007, appellee filed a complaint for divorce against appellant. Appellant filed an answer and counterclaim on February 20, 2007.

{¶4} Prior to the divorce action being filed, the parties operated a restaurant called The Manna located at 5 North Third Street in Newark, Ohio. The restaurant had been opened since early 2002. On January 12, 2007, the trial court issued a restraining order preventing appellant from entering the restaurant. Thus, appellee has had total responsibility for management of the restaurant since January 12, 2007.

{¶5} On October 31, 2007, appellant filed a motion requesting that a hearing be held on her request to modify the restraining order to enable and authorize her to operate the restaurant pending the final trial. Hearings were held on the same on January 12, 2008, and January 17, 2008.

{¶6} At the hearing, testimony was adduced that the restaurant is operated in the basement and first floor of the building located on North Third Street in Newark and that appellant and the minor children have been residing on the second and third floors, an area known as the “loft,” of the building since August of 2006. A corporation called

Euro-Pac has ownership interest in the restaurant. Appellee is the sole shareholder of Euro-Pac.

{¶7} Prior to the parties' marriage, appellee had been in the timber export business for a number of years. Appellee testified that the last year he managed the timber export business, he earned between $90,000.00 and $100,000.00. Testimony was adduced at the hearing that over the previous two or three years, business was down and that if business continued in the same fashion, the restaurant would be in trouble. The restaurant's gross revenues for the fiscal year October 1, 2004, through September 30, 2005, were approximately $411,000.00, with $47,894.00 in taxable income, and for the fiscal year October 1, 2005, through September 30, 2006, were approximately $386,000.00, with net income of $13,000.00. Testimony was adduced that the restaurant's gross revenues for the fiscal year October 1, 2006, through September 30, 2007, were approximately $365,000.00, with taxable income of $16,334.00.

{¶8} Appellee testified that over the last year or so, he had minimized his role in food preparation at the restaurant and that employees were able to take charge of and run the restaurant when appellee was gone. Appellee further testified that, during the last fifteen years, other than working at the restaurant, appellant had no other employment and no earned income.

{¶9} On direct examination, appellee testified that he did part of the cooking at the restaurant on a daily basis as well as the food preparation. He also testified that he paid the bills, did the payroll and handled the finances. Appellant testified that the affidavit of income, expenses and disclosure that was filed with the court on January 12,

2007, showed that there was an approximately $40,000.00 mortgage on the North Third Street property held by National Bank, an approximately $94,000.00 line of credit with Chase, and an approximately $25,000.00 line of credit with National City. He further testified that, in 2006, he left the restaurant in appellant's hands for approximately twenty days when he went to Korea and that appellant was unable to handle the payroll and finances. Appellee also testified on direct examination that he did 95% of the hiring and that he handled human resource issues.

{¶10} At the January 2008 hearing, appellant testified that she and the minor children moved above the restaurant in September of 2006. She testified that running a restaurant had been a dream of hers her whole life and that she had considered opening a restaurant years earlier. Appellant testified that after the parties' marriage in 1994, she looked at different locations for a restaurant. The following is an excerpt from appellant's testimony at the hearing:

{¶11} "Q. And what did you and your father and your husband do in 2001 relating to starting a restaurant that ultimately became known as The Manna?

{¶12} "A. Well, first we started looking at different locations that the restaurant would fit. We started talking about different aspects of the business, whether it was menus, planning, equipment, cost, you know, staffing, attire, it - - - I - - - I mean, just basically the ground business plan of - - - of what would be required to do this.

{¶13} "Q. When you indicated, Rami, that we talked about that, who would be we?

{¶14} "A. My father, Jin, and myself.

{¶15} "Q. Ultimately then, Rami, you moved forward and you purchased a building and you constructed a restaurant know as The Manna, is that correct?

{¶16} "A. That is correct.

{¶17} "Q. Prior to the opening of the restaurant, Rami, once you had identified the location on Third Street, once you moved forward with construction and renovation, during that time period prior to opening, what was your involvement?

{¶18} "A. Primarily finding different people that would be able to do what we needed; craftsmen, work - - - work - - - craftsmen that design, you know, all the seating, the table, the chairs, anything wood in there. Finding people that would be able to build the barn where our service area is. Decorative aspects of even the beams in there, you know, consulting on a decorative level, on a constructional level and design." Volume I of Transcript of Hearing on January 12, 2008, and January 17, 2008, at 53-54.

{¶19} At the hearing, appellant was questioned about her involvement with the restaurant when it first opened in 2002. She testified that she initially was not as involved because she had young children, but that during the two years prior to the filing of the divorce, she became much more involved. Appellant testified that she acted as a public relations and marketing person for the restaurant and that she worked in the restaurant in 2006, including during Friday and Saturday nights when the restaurant was busiest. She also testified that she interviewed and trained restaurant staff and adopted polices as to dress codes, background checks and other matters. Appellant also testified that she overhauled the restaurant website in 2006. She further testified that despite the restraining order preventing her from having any involvement with the restaurant, she continued promoting the restaurant in 2007.

{¶20} At the hearing, appellant also testified that she never did any of the cooking at the restaurant, did not order the food, and that the majority of the restaurant's bills, including payroll, were paid by appellee. She admitted that nothing related to the business, with the exception of mortgages in both names, was in her name.

{¶21} Daniel Huston testified at the hearing that he used to eat lunch at the restaurant frequently, but that there has been an overall decline in service and quality of food over the last few months. He testified that he no longer ate there. He further testified that he knew appellant and had gone out to lunch with her a few times both alone and in groups. Phillip Koontz testified that over the last year or two, he noticed that service at the restaurant was slower and the atmosphere was less friendly than when appellant was there.

{¶22} Testimony also was adduced at the hearing that appellant sat down with customers at the restaurant and discussed personal problems with them, including religion and her problems with appellee. Testimony also was adduced that appellee did not treat employees professionally. Craig Connor, who was employed by the restaurant for five years, testified that appellant was "very condescending, very negative towards all of us …" Volume I of Transcript of January 12, 2008, hearing. Brianne Hannah, another employee, testified that appellant stood over her while Hannah did a task as if she did not trust Hannah.

{¶23} Pursuant to a Judgment Entry filed on January 23, 2008, the trial court denied appellant's request to modify the temporary orders to enable her to operate the restaurant pending the final hearing. The trial court, in its entry, stated that appellant "fell short" of convincing the court that appellee was "not fully engaged in or fully

pursuing the best business interest of the restaurant" and that she could manage the restaurant.

{¶24} A trial on the complaint for divorce was held over three days in March of 2008. The parties agreed that the evidence presented at the hearing on January 12, 2008, and January 17, 2008, would be considered as evidence for the purpose of trial.

{¶25} Prior to the commencement of trial, the parties agreed upon a shared parenting plan, but not as to the parenting time schedule. At the trial, appellee testified that, under the schedule then in existence, he picked up the children at 10:00 a.m. on Sunday and had them until Tuesday morning. He testified that the schedule was conducive to his work schedule because the restaurant was closed Sunday and Monday. Appellee testified that Friday and Saturday nights the restaurant did roughly 70% of its business and that it was important for him to be there to be able to cook and keep an eye on things.

{¶26} At the trial, appellee also testified as to the parties' assets. He testified that the property in which the restaurant is located on North Third Street was titled in both parties' names and that, before appellant and the children moved into the upper floors of the building, he had a tenant for five years on the third floor. Appellee testified that he agreed that the fair market value was $225,000.00 based upon an appraisal that he had done. The parties stipulated as to such value. When asked what he wanted to happen to the building, appellee testified that he wanted the trial court to give it to him because the restaurant was on the first floor and because he did not want to be appellant's tenant. Appellee testified that the restaurant paid $1,000.00 a month rent to him and

appellant and that the annual property taxes on the building, which were not paid by the restaurant, were roughly $1,970.00.

{¶27} Appellee was questioned about the liabilities levied against the restaurant property. He testified that Park National Bank had a mortgage against the building with a balance of $34,018.65 as of December 13, 2007, and that the parties paid $650.00 a month on the same. He also testified that the same bank had a mortgage against the building in the amount of $207,611.33 and that the parties paid $2,150.00 a month on the same. Both debts were in the parties' joint names. When asked, appellee agreed that the total monthly costs for the mortgages and taxes were $2,914.16. He further testified that he paid $440.00 a month for insurance on the restaurant and the building. According to appellee, the payments on mortgages, the property taxes and the insurance were current.

{¶28} Appellee also testified that the parties owned a house located on 775 South Hampton and that he had been living there. Both parties had the property appraised. Appellant's appraisal indicated a value of $153,000.00 whereas appellee's appraisal indicated a value of $140.000.00. While the parties were unable to agree as to the fair market value of the property, they agreed that the appraisals would be admitted and that the trial court would determine the fair market value of the property. There are two mortgages on such property one, with a balance of $111,270.93 and the other with a balance of $25,485.54. The monthly payments on the two mortgages, which were held by Wachovia, totaled $1,250.00. Appellee testified that the payments on the mortgages were up to date. Appellee stated that he wanted the house awarded to appellant so that she could live there with the children.

{¶29} Appellee also testified that appellant drove a BMW X5 that was leased in the name of his corporation, Euro-Pac, and that he was making the $580.66 monthly payments on the same. The lease terminates January of 2009. Testimony was adduced that appellee drove a leased Dodge Ram truck for which he paid $417.00 a month. Appellee testified that the lease payments on both vehicles were current.

{¶30} Appellee also testified that he listed a checking account with Chase Bank titled "The Manna" or "Manna" and that the same had a balance of $2,500.00. According to appellee, who did not present a statement for such account, money from the restaurant went into such account.

{¶31} At the trial, appellee was also questioned about a joint Chase Bank account that was listed in his Exhibits as Exhibit 10. Appellee testified that appellant took $25,000.00 from such account on December 19, 2006, leaving a balance of $6,275.36. Appellee testified that he put the remaining $6,275.36 into a personal account and used all of the money to pay bills. He asked that the $25,000.00 be figured into the calculation of the asset division.

{¶32} Appellee was questioned at trial about $20,000.00 in cash that the parties kept in a barrel in the basement of their house. Appellee testified that $10,000.00 of such money was given to them by his mother. According to appellee, appellant took all of the money when she moved out of the marital home. He further testified that appellant showed him the money once after she moved out and that the money was in a bundle of one hundred dollar bills that were secured by a rubber band. Appellee denied that he had the money and asked that it be allocated to appellant even though she indicated that she did not know where it was.

{¶33} Testimony also was adduced at trial about the restaurant. The parties stipulated that the value of the restaurant equipment was $9,000.00. Appellee did not have the restaurant and/or liquor license appraised. Appellee indicated that he understood that if the restaurant were awarded to him, he would also be liable for the debt associated with the restaurant. He testified that nothing had changed since the hearing in January of 2008 and that the restaurant was doing about the same. He indicated that he had contacted other area businesses and was attempting to work with them at promoting area vendors. The following testimony was adduced when he was asked why he decided not to have the restaurant appraised:

{¶34} "A. Because for the life of me I could not figure out that why was, you know, somebody would be able to put a value in a business that isn't making money. I stated from day one that The Manna - - - Manna is not necessarily making money. Manna is paying the bill. I think there's a - - - there's a big difference between Manna paying the bills and Manna not making the money. And, you know, I just don't think that it's appropriate to put a value in a business that - - - that is not making money. And, you know, in terms of positive cash flow." Volume I of Transcript of March 11, 2008, proceedings at 88.

{¶35} Appellee was questioned about the debt associated with the restaurant. He testified that there was $8,500.00 owed to Phisco, Limited and that he paid $600.00 a month on the note associated with such debt. Appellee also testified that the restaurant had a Chase business line of credit in the amount of $100,000.00. Such debt was in the name of Euro-Pac. Testimony also was adduced that there was a Visa business account with a balance of $10,953.06 as of December 2007 – January 2008,

and a National City account with a balance of approximately $24,272.08 as of January of 2008. Appellee testified that he borrowed the money from National City in order to start up his business. He further testified that he was current on all of the above.

{¶36} Appellee testified that appellant had not sought any employment since he filed for divorce and that there was nothing limiting her ability to go out and obtain employment. Appellee testified that he was forty years old and that his wife was thirty-nine, that neither had any retirement benefits and that both of them were healthy. Appellee's tax return for 2007 showed social security earnings of $23,540.00.

{¶37} On cross-examination, appellee testified that the second and third floors of the loft totaled approximately 5400 square feet. He further testified that from October 1, 2007, through February of 2008, the restaurant's income had declined and that for three and a half years, there had been a constant decrease in revenues. Appellee also testified that in order to maintain the business since January of 2007, he had to borrow money, reduce his wages and reduce the amount that he paid in rental for the restaurant from $1,500.00 to $1,000.00 a month. He also testified that while he normally received $500.00 a month from the restaurant as rental for the use of part of his home as an office, in 2007, the restaurant was only able to pay $3,500.00 for the year. Appellee testified that if he were renting the restaurant from a third party, he probably would not still be operating at the same location.

{¶38} Appellee also testified on cross-examination that during the years from 1996 through 1999, when he was in the timber industry, his income each year was in excess of $100,000.00.[1] In 2001, his income was a little less that $41,000.00 and his

[1] Appellee's Social Security earnings were as follows: 1996 - $123,683.00, 1997 - $141,498.00, 1998 - $103,576.00, 1999 - $137,563.00, 2000 - $115,430.00

income for 2002, 2003, 2004, and 2005 was $37,740.00. Appellee testified that, in 2006, his income was $28,305.00 and in 2007, it was $23,540.00. He further testified that he had seven or eight employees at the restaurant, although two of them were not on the payroll.

{¶39} Appellee paid for a vocational expert to prepare a report and testify as to appellant's earning ability. At the hearing, Bruce Growick, who has a Ph.D. in rehabilitative psychology, testified that he met with appellant and prepared a report concerning her earning ability. Appellant earned her high school degree at age twenty-three or twenty-four and has some college credits. Growick opined both in his report and his testimony, that appellant should be able to make a least $34,000.00 a year based on her high verbal ability and clerical skills, her above average intelligence and her extensive employment experience in the retail work field and the family restaurant.

{¶40} Appellant testified at the trial that she moved into the apartment above the restaurant, which is known as the "loft," in August of 2006 and that intensive renovations were made to the loft that were handled by her. At the time, appellant thought that she and appellee would live there with the children. Appellant testified that appellee never moved to the loft and that he only spent two or three nights there. She further testified that other than her involvement with the restaurant, she had not been employed full-time since 1994 when she was employed by Sprint for six months. Prior to such time, appellant was a student. Appellant testified that her combined earnings for the last 18-20 years totaled less than $35,000.00 and that, other than one year, she had never made more than $15,000.00 in one year and that, other than one other year, she never made more than $3,000.00. Appellant was never paid for her work at the restaurant.

She further testified that she did not go to college because she had her children, but that she would like to do so if she was not awarded the restaurant.

{¶41} Appellant testified that her BMW lease allowed her a certain number of miles and that, if she continued her current usage, she would owe money once the lease expired. When asked, she testified that she did not have the $20,000.00 that appellee testified that she took when she moved out of the marital home. Appellant also testified that when the parties married, she brought into the marriage an automobile accident settlement in the amount of $25,000.00. According to appellant, some of the money was put into the original Euro-Pac checking account, some was used as a down payment on the marital home and ten thousand dollars was put into the Ameritrade account.

{¶42} On cross-examination, appellant admitted that she used part of the $25,000.00 she received for her automobile accident to purchase a Jeep Cherokee. The following is an excerpt from her testimony on cross-examination:

{¶43} "Q. Okay. The - - - the twenty-five thousand dollars that you said you got out of an automobile accident, you purchased a Jeep Cherokee with that money, correct?

{¶44} "A. Yes.

{¶45} "Q. . . . you paid for that in full?

{¶46} "A. Right.

{¶47} "Q. All right. And then you want this Court to understand that you also put original money into Euro-Pac out of that twenty-five thousand dollars?

{¶48} "A. Yes. There was money put into Euro-Pac to open the account.

{¶49} "Q. Do you have any documentation that proves or traces those funds from your settlement into Euro-Pac account?

{¶50} "A. I could probably come up with the original statement if I had to.

{¶51} "Q. Do you have them here today?

{¶52} "A. I don't have them here today." Volume 3 of Transcript of March 11, 2008, proceedings at 438-439.

{¶53} Appellant also admitted that since the divorce was filed, she had incurred approximately $44,070.00 in debt and that, in December of 2006, she had removed $25,000.00 from the family joint account. Appellant testified that all except about $150.00 of such money was spent. Appellant also testified that she could earn $140,000.00 a year if she ran the restaurant.

{¶54} A Judgment Entry/Decree of Divorce was filed on August 13, 2008. The trial court awarded appellant the marital residence, which the court valued at $140,000.00, and appellee the restaurant property. The trial court also ordered that each party retain possession of any vehicles in their possession and awarded the restaurant to appellee. In the Decree, the trial court also ordered appellee to pay spousal support to appellee in the amount of $500.00 a month for four years.

{¶55} Appellant now raises the following assignments of error on appeal;

{¶56} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THE VALUE OF THE ASSETS AND LIABILITIES OF THE PARTIES; THE DECISION OF THE TRIAL COURT IN REGARD THERETO WAS ALSO AN ABUSE OF DISCRETION AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶57} "II. THE COURT ERRED AS A MATTER OF LAW, ABUSED ITS DISCRETION, AND RENDERED A DECISION CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE IN NOT CONSIDERING AND ADDRESSING WIFE'S SEPARATE PROPERTY.

{¶58} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW, ABUSED ITS DISCRETION, AND RENDERED A DECISION CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, AS IT RELATES TO ITS DIFFERENCE [SIC] TREATMENT OF THE EXPERT EVIDENCE: THE VALUATION OF THE MANNA, AND WIFE'S EARNING ABILITY.

{¶59} "IV. THE TRIAL COURT ERRED AS A MATTER OF LAW, ABUSED ITS DISCRETION, AND RENDERED A DECISION CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE IN DETERMINING THE AMOUNT AND DURATION OF SPOUSAL SUPPORT.

{¶60} V. THE TRIAL COURT'S DECISIONS RELATING TO THE DISPOSITION OF THE NORTH THIRD STREET PROPERTY AND THE SOUTH HAMPTON ROAD PROPERTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, WAS AN ABUSE OF DISCRETION, AND WAS NOT IN THE BEST INTEREST OF THE CHILDREN.

{¶61} "VI. THE TRIAL COURT DECISION RELATING TO THE DISPOSITION OF THE MANNA RESTAURANT WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, AND WAS AN ABUSE OF DISCRETION.

{¶62} "VII. THE TRIAL COURT ERRED IN RENDERING A DECISION RELATING TO THE HOUSEHOLD GOODS AND FURNISHINGS.

{¶63} "VIII. THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT DIVIDING THE TAX REFUNDS OF THE PARTIES.

{¶64} "IX. THE TRIAL COURT'S DECISION RELATING TO PARENTING ISSUES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND WAS AN ABUSE OF DISCRETION."

I

{¶65} Appellant, in her first assignment of error, argues that the trial court made a number of errors in its division of assets and liabilities.

{¶66} A trial court has broad discretion in dividing marital assets and liabilities in a divorce action. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. Accordingly, an appellate court is limited to a determination of whether, under the totality of the circumstances, the trial court abused its discretion in dividing the property. *Holcomb v. Holcomb* (1989), 44 Ohio St .3d 128, 131, 541 N.E.2d 597, 599. The term "abuse of discretion" implies more than just an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

{¶67} Appellant first argues that the trial court erred in its disposition of the parties' two leased motor vehicles. The trial court, in the Decree, stated, in relevant part, as follows:

{¶68} "The parties shall retain possession of any vehicle presently in their possession. The parties shall hold the other harmless on any debt or costs regarding these vehicles. Each vehicle is leased. The parties shall be responsible for any and all

costs of financial obligation regarding their respective leased vehicle. The Court finds it equitable to consider any cost equalized."

{¶69} Appellant now argues that the trial court ignored evidence that appellant, during the divorce, had leased a new vehicle, increasing his monthly debt by approximately $150.00, and that appellant's leased vehicle has a deficiency as a result of mileage.

{¶70} However, we find that the trial court's decision was not arbitrary, unconscionable or unreasonable. As is stated above, appellant testified that if she continued her current usage, she would owe money at the time the lease expired. There was no evidence that such a deficiency existed at the time of the hearing or would ever exist. We concur with appellee that any claimed deficiency was, therefore, purely speculative. Moreover, at the trial, appellee testified that he was forced to get a new vehicle after his old vehicle lease expired.

{¶71} Appellant next argues that the trial court erred in accepting appellee's testimony as to the balance in the restaurant checking account and in his own checking account. Appellant notes that, despite a subpoena, appellee did not provide any records to the trial court to substantiate his testimony. However, the weight of the evidence and credibility of witnesses are issues left to the sound discretion of the trial court. *Galloway v. Kahn,* Franklin App. No. 06AP-140, 2006-Ohio-6637, discretionary appeal not allowed by 2007-Ohio-1986, at ¶ 29, citing *White v. White,* Gallia App. No. 03CA11, 2003-Ohio-6316, at ¶ 15. The underlying rationale is that the trier of fact is better situated than an appellate court to view the witnesses and to observe their demeanor, gestures, and voice inflections and to use those observations to weigh and

assess credibility. *Id.* Accordingly, the trier of fact is free to believe all, part, or none of the testimony of any witness who appears before it. *Id.* The trial court, therefore, was free to accept appellee's testimony.

{¶72} Appellant next contends that the trial court erred in allocating to appellant a $25,000.00 Chase account that was no longer in existence as of the time of trial. As is stated above, appellant agreed that she withdrew such money from their joint account after the divorce action was commenced. Appellant now argues that the trial court should not have considered the $25,000.00 because the trial court considered the same during the temporary orders phase of the proceedings. Appellant argues, therefore, that she was "charged" with such money twice.

{¶73} However, as memorialized in an Agreed Entry filed on September, 6, 2007, the parties agreed that appellant could use the remaining cash she had on hand for legal expenses and expert witness fees. The parties further agreed that the trial court could "review and determine the funds which each party had available to him/her, and to consider the use of those funds in determining the final property division."

{¶74} Appellant, with respect to the Chase account, also argues that the trial court erred in valuing such account as of January 2007, when the complaint fro divorce was filed. Appellant notes that the trial court, in the Decree, held "[t]he period of 'during the marriage' of the parties is found to encompass the dates of December 30, 1994, to the date of the final hearing March 10, 2008." According to appellant, because the trial court did not value the Chase account as of March 10, 2008, it had to give its reasons for not using such date.

{¶75} However, from our review of the record, it is apparent that the trial court valued the Chase account as of January of 2007, because that is the last time that the trial court found the same to be a marital account. As is stated above, in late December of 2006, appellant withdrew $25,000.00 from the Chase account. It is also apparent that the trial court determined that appellant used the same for non-marital, personal uses. In short, the Chase account ceased to be a marital account as of January of 2007, and we find, on such basis, that the trial court did not err in valuing such account of January of 2007.

{¶76} Appellant also argues that the trial court erred in allocating to appellant $20,000.00 in cash. As is stated above, appellee testified that the parties kept $20,000.00 in cash in a barrel in the basement of their house and that $10,000.00 of that money was given to them by his mother. According to appellee, appellant took all of the money when she moved out of the marital home and showed him the money once after she moved out. Appellant, in turn, testified that she did not take the money when she moved out of the marital home. When asked about the $10,000.00 that appellee testified was given to them by his parents, appellant testified that appellee's parents "presented [the money] to us, it was a gift that was presented to me." Volume 3 of March 12, 2008, hearing at 421. (Emphasis added). Her testimony was, therefore, inconsistent. Moreover, when asked, she was unable to say where the money went. The trial court, as trier of fact, was in the best position to assess credibility. Based on appellee's testimony and on appellant's testimony that the money was given "to us", we find that the trial court did not err in determining that the money was marital property.

We further find that the trial court did not err in determining that appellee was the more credible witness with respect to who had the $20,000.00.

{¶77} In her first assignment of error, appellant argues that the trial court erred in valuing the restaurant. This issue shall be addressed in conjunction with appellant's third assignment of error.

{¶78} Appellant also argues that the trial court erred in using a date other than the date of the final hearing for valuation of the liabilities of the parties, and, as required by law, failed to give its reasons for doing so. Appellant's brief states, "In essence, as to personal liabilities, the court required each party to pay his/her debts from the date the divorce was filed (i.e., those liabilities were 'valued' as of January, 2007)." We find this argument does not comply with App. R. 16(A)(7). The appellant does not set forth the part of the record on which she relies to show these debts were valued as of January, 2007. In addition, there are no specifics as to which debts are being referred to. Therefore, we decline to address this portion of appellant's argument.

{¶79} Appellant also argues that the trial court abused its discretion in ordering each party to pay their respective attorney fees. At the trial, appellant asked the trial court to reimburse her for $42,444.95 in attorney fees. Appellee's legal fees were approximately $24,796.00.

{¶80} An award of attorney's fees lies within the sound discretion of the trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359, 481 N.E.2d 609. R.C. 3105.73(A) reads as follows: "In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, 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."

{¶81} Testimony was adduced at the March 2008 trial that appellant had been receiving $900.00 a month tax free in child support from appellee and that appellee had been paying all of appellant's regular necessary monthly expenses. There was also testimony that appellant made no effort to find employment. Based on the foregoing, we find that the trial court did not abuse its discretion in ordering each party to pay their own fees.

{¶82} Appellant's first assignment of error is, therefore, overruled.

II

{¶83} Appellant, in her second assignment of error, argues that the trial court erred in failing to credit her with $11,000.00 of separate property. We disagree.

{¶84} As is stated above, appellant testified that when the parties married, she brought into the marriage an automobile accident settlement in the amount of $25,000.00. Appellant argues that approximately $11,000.00 of that money was used to purchase the marital residence and that the trial court erred in failing to credit her with such amount because it was her separate property.

{¶85} A trial court has broad discretion in dividing marital assets and liabilities in a divorce action. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. Accordingly, an appellate court is limited to a determination of whether, under the totality of the circumstances, the trial court abused its discretion in dividing the property. *Holcomb v. Holcomb* (1989), 44 Ohio St .3d 128, 131, 541 N.E.2d 597, 599. The term

"abuse of discretion" implies more than just an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142.

{¶86} Ohio Revised Code 3105.171(A)(6)(a) defines separate property as "(ii) Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage."

{¶87} However, "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." (Emphasis added.) R.C. 3105.171(A)(6)(b). Therefore, traceability is central when determining whether separate property has "lost its separate character" after being commingled with marital property. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300, 1302. The party seeking to establish an asset as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property. *Peck* at 734.

{¶88} When asked what happened to the $25,000.00, appellant testified that some of the money was put into the original Euro-Pac checking account and "some" of it was used as a down payment on the marital home. Appellant also testified that $10,000.00 was put into the Ameritrade count and that she purchased a Jeep Cherokee with the money. As noted by appellee, appellant never testified that approximately $11,000.00 was used as a down payment on the marital home and appellant's testimony as to where the funds went was inconsistent. Moreover, appellant presented no documentation or evidence regarding the tracing of the money. We find that appellant did not meet her burden of proof, by a preponderance of the evidence, to

trace the asset to separate property. Accordingly, the trial court did not abuse its discretion by failing to credit appellant with the $11,000.00 as separate property.

{¶89} Appellant's second assignment of error is, therefore, overruled.

III

{¶90} Appellant, in her third assignment of error, argues, in essence, that the trial court's valuation of the restaurant and determination as to appellant's earning ability were against the manifest weight of the evidence.

{¶91} At trial, appellant called Timothy McDaniel, who is a shareholder in a CPA firm and its director of evaluation services, to testify as to the restaurant's value. Appellee objected to such testimony on the basis that he had just received McDaniel's report that morning at 6:00 a.m. The trial court reserved ruling on appellee's objections to such expert.

{¶92} McDaniel testified at trial that he was contacted three weeks before trial about valuing the restaurant and that he was given tax returns and monthly statements listing mostly expenditures for the restaurant for the last fiscal year. McDaniel testified that he would have liked to look at "the actual profit and loss statements, the monthly plus---profit and loss statements. I would like to look at detail, general ledger. You know details about credit cards and ---so forth." Volume 3 of Transcript of March 11, 2008, hearing at 476-477. Such information was not available. He determined the fair market value of the restaurant to be $120,000.00.

{¶93} However, McDaniel was not provided with the monthly expenditures for July and did not know how much credit card debt was associated with the restaurant. He testified on cross-examination that he did not know if the restaurant debt included

any mortgages or notes on the property and was unsure what made up the restaurant's debt. In discussing the valuation of the restaurant, the trial court, in its August 13, 2008 Judgment Entry, stated, in relevant part, as follows:

{¶94} "The Court at trial reserved ruling on the plaintiff's objections to the defendant's restaurant valuation expert Mr. Timothy McDaniel.

{¶95} "The Court finds that Mr. McDaniel's testimony is admissible, but shall be given little weight.

{¶96} "This valuation was performed literally at the last minute and was performed without necessary information necessary to a reliable valuation. The Court finds that, as this was a central issue in the case that any valuation of said business should have been executed much earlier so that the necessary elements of the valuation could have been gathered and thoroughly received. Both sides had an important interest in valuation of said business.

{¶97} "The Court finds that this valuation was not complete. Further, any report should have been shared with the other side weeks, not hours before the trial Either party should have had this asset valued much earlier in the case."

{¶98} We find that the trial court did not abuse its discretion in giving little weight to McDaniel's valuation. Such decision was not arbitrary, unconscionable or unreasonable.

{¶99} Appellant further argues that the trial court erred in valuing the restaurant at $9,000.00. Appellant notes that appellee did not have the restaurant, with the exception of the equipment which was valued at $9,000.00, valued. The parties stipulated at trial that the equipment was worth $9,000.00. Appellant also notes that

appellee did not even have the liquor license valued even though he admitted that the same had value.

{¶100} However, there was testimony adduced at the hearing that the restaurant had significant debts and financial obligations. Appellee testified that the restaurant owed Phisco $8,500.00, that the restaurant had a Chase business line of credit with a balance of $96,455.99 as of January 25, 2008, and that the restaurant had a National City loan with a balance of over $24,000.00 as of January 10, 2008. Testimony also was adduced that the restaurant had a Visa business account with a balance of approximately $11,000.00. The trial court, in determining the value, noted that the restaurant had significant debts and financial obligations. We find that the trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶101} Appellant also challenges the trial court's finding, based upon the report and testimony of Bruce Growick, Ph.D., that appellant was capable of earning at least $34,000.00 a year. Growick, in his report (Exhibit 32), indicated that the median annual salary for females between the ages of 35 and 40 with only a high school diploma was $33,945.00, but that appellant could earn significantly more. Growick, in his report, found that appellant was above average intelligence and that she had high verbal and clerical skills.

{¶102} Appellant notes that Growick's opinion was based on only one interview with her that lasted about an hour and a half. Appellant also notes that, except for the restaurant, she has not been employed outside the home since 1994 that the most she ever earned (in 1994) was $14,963.00, and that, in all other years, with the exception of 1991 when she earned $8,918.00, her income was less than $3,000.00. Appellant also

stresses that her total social security earnings since she started working equal $34,456.00 and that she only has a high school education.

{¶103} However, at the hearing, appellant herself testified at length as to her abilities regarding public relations, advertising and marketing in terms of the restaurant. She also testified that she handled human resources for the restaurant and assisted in redesigning its website. Testimony also was adduced that she has some college credits and that, although she did not graduate from high school until she was twenty-three, she did so because of an unplanned pregnancy. Significantly, we note that appellant herself testified that she was capable of running the restaurant herself if it was awarded to her and earning $40,000.00. We find based upon the foregoing, that the trial court did not err in finding that appellant was capable of earning at least $34,000.00 a year.

{¶104} Appellant also argues that the trial court erred when it put so much weight on Growick's report, regarding appellant's earnings abilities, when it put so little on McDaniel's, who was her expert witness regarding the business evaluation. Appellant notes that she did not receive Growick's report, in its entirety, until after the trial had commenced and that the trial court gave little weight to her business evaluation expert witness's report in large part because it was of the last minute. Accordingly, to appellant, "the trial court ignored the one expert in part, because of the 'timing issue' yet accepted the other expert's testimony on a different issue, even though there were the same 'timing issues.'"

{¶105} However, we find that appellant's detailed testimony as to her abilities alone and her past earning history supports the court's imputation of $34,000.00 in salary to her. Moreover, the principal reason that the trial court put so little weight on

Timothy McDaniel's valuation report was because it was incomplete and prepared without the necessary information.

{¶106} Appellant's third assignment of error is, therefore, overruled.

IV

{¶107} Appellant, in her fourth assignment of error, argues that the trial court erred in only awarding her spousal support in the amount of $500.00 a month for four years. We disagree.

{¶108} A review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶109} R.C. 3105.18(C)(1)(a) through (n) sets forth the factors a trial court must consider in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms of payment and duration of spousal support. These factors are:

{¶110} "(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;

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

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

{¶113} “(d) The retirement benefits of the parties;

{¶114} “(e) The duration of the marriage;

{¶115} “(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;

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

{¶117} “(h) The relative extent of education of the parties;

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

{¶119} “(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;

{¶120} “(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;

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

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

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

{¶124} Testimony was adduced that appellant is thirty-nine years old and appellee is forty and that appellant has a GED and some college credits while appellant has a high school diploma and three years of college. Neither party has pension benefits.

{¶125} Based on the vocational report of Bruce Growick, which is discussed above, the trial court found that appellant was capable of working and imputed income to appellant in the amount of $34,000.00. We note that appellant testified at trial as to her numerous abilities and that she was capable of running the restaurant herself and earning $40,000.00. She further testified that she would either work or go to school. The trial court, based on the earning history of the restaurant, imputed income to appellee in the amount of $43,000.00. As is stated above, appellee's income between 2001 and 2007 ranged from a low of $23,540.00 in 2007 to a high of $40,666.00 in 2001.

{¶126} While appellant argues that the trial court erred in ignoring evidence that she would like to attend college if she was not awarded the restaurant, she had not investigated how much college would cost.

{¶127} Based on the foregoing, we find that the trial court did not abuse its discretion in awarding appellant spousal support in the amount of $500.00 a month for four years. The trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶128} Appellant's fourth assignment of error is, therefore, overruled.

V

{¶129} Appellant, in her fifth assignment of error, argues that the trial court abused its discretion in awarding the restaurant property (the second and third floors above the restaurant) to appellee while awarding the marital residence to her. We disagree.

{¶130} An abuse of discretion occurs when the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶131} As is stated above, appellant, with the parties' minor children, was residing above the restaurant (the loft) during the pendency of this action while appellee was residing in the marital home. Appellant specifically requested that the loft be awarded to her. Appellant specifically emphasized that she was almost exclusively responsible for the renovations and improvements that were made to such property and that the children would be able to go downstairs to the restaurant and visit their father if she was awarded the loft.

{¶132} The trial court, in awarding the loft to appellee, stated that "[i]t does not make sense for him to be running a restaurant with his ex spouse as his landlord, and with [appellant] living above the restaurant. There should be a clear break between these parties." We find that, given the contentious history between these parties and the long hours that appellee works in the restaurant, the trial court's decision was not arbitrary, unconscionable or unreasonable. In so finding, we note that, during the pendency of this case, appellant was found in contempt for violating temporary restraining orders that prohibited her from entering appellee's residence. We further

note that the children resided in the marital home prior to 2006 and that they had friends in the neighborhood where the marital home is located.

{¶133} Appellant's fifth assignment of error is, therefore, overruled.

VI

{¶134} Appellant, in her sixth assignment of error, argues that the trial court abused its discretion in awarding the restaurant to appellee. We disagree.

{¶135} As is stated above, in order to find an abuse of discretion, we must find that the trial court decision was arbitrary, unconscionable or unreasonable. *Blakemore*, supra.

{¶136} Appellant, in support of her argument, contends that the trial court erred in not awarding the restaurant to her to because she was critical to the operation of the restaurant. At the hearing, appellant testified that she was intricately involved in the restaurant. As is stated above, appellant testified that she acted as a public relations and marketing person for the restaurant and that she worked in the restaurant in 2006, including during Friday and Saturday nights when the restaurant was busiest. She also testified that she interviewed and trained restaurant staff and adopted polices as to dress codes, background checks and other matters. Appellant also testified that she overhauled the restaurant website in 2006. She further testified that despite the restraining order preventing her from having any involvement with the restaurant, she continued promoting the restaurant in 2007. Appellant also emphasizes that revenues for the restaurant have been decreasing under appellee's control.

{¶137} However, in addition to appellee's own testimony, which is cited above, testimony was adduced at the hearing that appellee was the chef and was responsible

for the day-to-day operations of the restaurant. At the January 2008 hearings, Craig Connor testified that he started working at the restaurant since the beginning as a server and that "[a]bsolutely everything that entails running that restaurant, [appellee] is involved in… he acts as head chef;… he takes care of the business aspect, the bill---the bills, he knows everything that entails running that restaurant." Volume I of Transcript of January 2008, hearings at 121-122. In contrast, when questioned about appellant's involvement, Connor testified that appellant would hostess every once in a while on busy nights and occasionally fill a few water glasses. Brianne Hannah testified at the same hearings that she started working at the restaurant in June of 2003 as a server and that without appellee, who was there everyday, the restaurant could not exist.

{¶138} Furthermore, testimony was adduced that appellee was, as noted by the trial court, the face of the restaurant and its main attraction. Stanley Hortz testified that he was a customer of the restaurant and ate there a couple of times a month because of appellee's cooking, which he testified was the "attraction". Volume I of Transcript of January 2008 hearings at 152. He testified that if appellee were no longer the chef, he would eat there less often. The following is an excerpt from his testimony:

{¶139} "A. Well, when - - - when we first started going there, Rami [appellant] acted on weekends at least, as a hostess. So she would greet you at the door, take you to the table, she would come over and hobnob with you. She was always dressed very nicely. And then as time progressed, it was kind of like she gave up that hostess job and had a couple of other people in there that did it, and then they left and Rami was back there. But she was not dressed as nicely as she was before, and she would still seat you and then she might come over and sit down with you and talk for fifteen or

twenty minutes or whatever. That's the experience with Rami." Volume I of Transcript of January 2008, hearings at 153.

{¶140} He further testified that he became uncomfortable when appellant started talking about her problems with appellee. Similarly, Brianne Hannah testified that, when her family came into the restaurant, appellant would sit with them and talk about uncomfortable issues such as religion and her problems with appellee. Hannah testified that if appellant took over the restaurant, she would not remain as an employee.

{¶141} Based on the foregoing, we find that the trial court's decision to award the restaurant to appellee was not arbitrary, unconscionable or unreasonable.

{¶142} Appellant's sixth assignment of error is, therefore, overruled.

VII

{¶143} Appellant, in her seventh assignment of error, argues that the trial court erred in rendering a decision as to the household goods and furnishings.

{¶144} On March 13, 2008, which was day four of the contested divorce trial, the parties and the trial court discussed the issue of personal property. Appellant's counsel indicated to the trial court that the parties could do an inventory of personal property within the next few days. The parties agreed that if the parties were unable to reach an agreement on such issue, they would submit depositions to the trial court on the issue of household goods and furnishings. Appellant now argues that the trial court erred in rendering a decision before any depositions had been filed.

{¶145} However, we note that the trial court did not issue its Judgment Entry until August 13, 2008, which is approximately five months after the hearing. We find that the

trial court did not err when, in the absence of depositions, it proceeded to divide the parties' personal property based on the evidence adduced at trial.

{¶146} Appellant's seventh assignment of error is, therefore, overruled.

VIII

{¶147} Appellant, in her eighth assignment of error, contends that the trial court erred in not dividing the tax refunds of the parties.

{¶148} The trial court, in its August 13, 2008, Judgment Entry, stated, in relevant part, as follows: "The parties shall cooperate in filing the appropriate tax returns for the year 2007. Said returns shall be prepared and filed so that each party receives the maximum tax benefit and/or tax liability. Any costs shall be split according to the income percentages on line 16 of the child support worksheet attached." (Emphasis added).

{¶149} Appellee, in his brief, argues that the trial court intended to distribute the tax refund in proportion to the parties' income and, in error, used "the term 'cost' instead of refund or ….simply dropped the words 'or refund' from the decision." We find that, pursuant to R.C. 3105.071, the trial court was required to divide such asset, but failed to do so even though it may have intended otherwise.

{¶150} Appellant's eighth assignment of error is, therefore, sustained.

IX

{¶151} Appellant, in her ninth and final assignment of error, argues that the trial court's decision as to parenting issues was against the manifest weight of the evidence and was an abuse of discretion.

{¶152} A trial court's establishment of a non-residential parent's visitation rights is within its sound discretion, and will not be disturbed on appeal absent a showing of an

abuse of discretion. *Appleby v. Appleby* (1986), 24 Ohio St.3d 39, 41, 492 N.E.2d 831; *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. The trial court's discretion over visitation in this situation is broader than the court's discretion regarding child custody matters. *Id.,* citing *State ex rel. Scordato v. George* (1981), 65 Ohio St.2d 128, 419 N.E.2d 4. Furthermore, the trial court must exercise its discretion in the best interest of the child. *Bodine v. Bodine* (1988), 38 Ohio App.3d 173, 175, 528 N.E.2d 973.

{¶153} The trial court, in the case sub judice, established a visitation schedule that did not give either parent a whole weekend visitation. Appellant now argues that, in doing so, the trial court ignored the recommendation of the Guardian Ad Litem and also failed to consider what was in the children's best interest. According to appellant, "[i]n determining the parenting schedule, the trial court's focus was what was best for [appellee] - - not what was in the best interest of the minor children.

{¶154} However, testimony was adduced at trial that Friday and Saturday are appellee's busiest nights in the restaurant. It is likely that if appellee was granted "whole weekend visitation", appellee would be forced to hire a babysitter to watch the children for a great deal of the time and would have minimal contact with them. This would neither be conducive to a stable parent-child relationship nor be in the best interest of the children.

{¶155} Appellant's ninth assignment of error is, therefore, overruled.

{¶156} Accordingly, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division is affirmed in part and reversed and remanded in part.

By: Edwards, P.J.

Farmer, J. and

Delaney, J. concur

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JUDGES

JAE/d0609

[Cite as *Lee v. Lee*, 2009-Ohio-5250.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

KYUNG JIN LEE	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
RAMI R. LEE	:	
Defendant-Appellant	:	CASE NO. 2008 CA 112

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas, Domestic Relations Division, is affirmed in part, and reversed and remanded in part. Costs assessed 90% to appellant and 10% to appellee.

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JUDGES