**[Cite as *Snyder v. Snyder*, 2009-Ohio-5292.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

| | | |
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| THOMAS R. SNYDER | : | JUDGES: |
| | : | |
| | : | Hon. W. Scott Gwin, P.J. |
| Plaintiff-Appellant | : | Hon. John W. Wise, J. |
| | : | Hon. Patricia A. Delaney, J. |
| -vs- | : | |
| | : | Case No. 2008CA00219 |
| CYNTHIA A. SNYDER | : | |
| | : | |
| | : | |
| Defendant-Appellee | : | O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 00483 |
| JUDGMENT: | AFFIRMED |
| DATE OF JUDGMENT ENTRY: | September 28, 2009 |

APPEARANCES:

For Plaintiff-Appellant:

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For Defendant-Appellee:

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*Delaney, J.*

{¶1} Plaintiff-Appellant Thomas R. Snyder appeals the August 25, 2008 decree of divorce entered by the Stark County Court of Common Pleas, Domestic Relations Division. Defendant-Appellee is Cynthia A. Snyder.

## STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee were married on December 29, 1989. Two children were born as issue of the marriage: A.S., born February 16, 1995 and V.S., born September 27, 1998.

{¶3} Appellant's marriage to Appellee was his second marriage. Appellant married Sharron M. Snyder on June 12, 1982. Ms. Snyder filed a complaint for divorce in the Stark County Court of Common Pleas, Domestic Relations Division, against Appellant and based upon that complaint and subsequent hearing, the trial court filed its memorandum of law, containing its findings of fact and conclusions of law, on December 20, 1989. The trial court filed the final decree of divorce on January 8, 1990, ten days after the marriage of Appellant and Appellee.

{¶4} Appellant filed a complaint for divorce against Appellee on April 19, 2007. A three-day trial was held on the matter and on August 25, 2008, the trial court issued its judgment entry granting Appellant's divorce. The trial court imputed income to Appellant in the amount of $32,500 and found Appellee's income to be $65,000. Appellee was designated residential parent and legal custodian of the children. The trial ordered Appellant to pay $710.65 per month child support and ordered Appellee to pay Appellant $1,500 per month in spousal support for five years.

{¶5} It is from this decision Appellant now appeals.

{¶6} Appellant raises nine Assignments of Error:

{¶7} "I. THE TRIAL COURT LACKED JURISDICTION TO PROCEED WITH THIS CASE AND THE SAME SHOULD BE DISMISSED DENOVO [SIC] BY THIS COURT DUE TO THE FACT NO MARRIAGE EVER EXISTED BETWEEN THE PARTIES AND WAS VOID-AB-INITIO BECAUSE AT THE TIME OF THE PARTIES [SIC] MARRIAGE THE APPELLANT THOMAS WAS STILL MARRIED TO HIS FORMER WIFE SHARRON SNYDER.

{¶8} "II. THE TRIAL COURT LACKED JURISDICTION TO DECIDE AND FURTHER ABUSED ITS DISCRETION BY IMPROPERLY IMPUTING INCOME TO THE APPELLANT IN AN UNREASONABLE AMOUNT UNSUPPORTED BY ANY COMPETENT AND CREDIBLE EVIDENCE.

{¶9} "III. THE TRIAL COURT LACKED JURISDICTION TO DECIDE AND ABUSED ITS DISCRETION BY ORDERING AN INSUFFICIENT AMOUNT OF SPOUSAL SUPPORT TO APPELLANT BASED ON THE IMPROPERLY IMPUTED INCOME.

{¶10} "IV. THE TRIAL COURT LACKED JURISDICTION TO DECIDE AND ABUSED ITS DISCRETION BY IMPROPERLY IMPUTING INCOME TO THE APPELLANT WITHOUT A SPECIFIC FINDING THAT THE APPELLANT WAS VOLUNTARILY UNEMPLOYED OR UNDEREMPLOYED.

{¶11} "V. THE TRIAL COURT LACKED JURISDICTION TO DECIDE AND ABUSED ITS DISCRETION BY ORDERING APPELLANT TO PAY AN EXCESSIVE AMOUNT OF CHILD SUPPORT BASED UPON THE IMPROPERLY IMPUTED INCOME.

{¶12} "VI. THE TRIAL COURT LACKED JURISDICTION TO DETERMINE AND FURTHER ABUSED ITS DISCRETION IN FINDING THAT $1,626.00 PAID BY PERSONAL CHECK ON JANUARY 5, 1990 TO APPELLANT'S PREVIOUS WIFE, SHARRON M. SNYDER, FOR HER INTEREST IN THEIR MARITAL REAL ESTATE, ISSUED SEVEN (7) DAYS AFTER HIS MARRIAGE AT BAR, THAT BEING DECEMBER 29, 1989, CONSTITUTED MARITAL FUNDS OF THE MARRIAGE AT BAR, THUS JUSTIFYING A SET OFF AGAINST HIS PRE-MARITAL EQUITY IN THE PRE-MARITAL PILOT KNOBB REAL ESTATE WHEN IN FACT APPELLANT WAS STILL MARRIED TO SHARRON M. SNYDER WHEN HE ISSUED THE CHECK FROM HIS PERSONAL AND INDIVIDUAL CHECKING ACCOUNT TO HER.

{¶13} "VII. THE TRIAL COURT LACKED JURISDICTION TO DETERMINE AND FURTHER ABUSED ITS DISCRETION BY AWARDING APPELLANT'S PRE-MARITAL RESIDENCE TO APPELLEE AND BY DISREGARDING, IGNORING AND FAILING TO AWARD THE APPELLANT HIS PASSIVE APPRECIATION ON THE EQUITY HE ENJOYED FROM HIS PRE-MARITAL RESIDENCE WHICH ACCUMULATED DURING THE COURSE OF THE MARRIAGE AT BAR.

{¶14} "VIII. THE TRIAL COURT LACKED JURISDICTION TO DETERMINE AND FURTHER ABUSED ITS DISCRETION IN SETTING OFF THE APPELLANT'S FUTURE EXPECTANCY OF HIS SOCIAL SECURITY AGAINST THE APPELLEE'S STATE TEACHER'S RETIREMENT.

{¶15} "IX. THE TRIAL COURT ABUSED ITS DISCRETION IN ORDERING THAT APPELLANT THOMAS HAVE TO PAY FOR HIS OWN ATTORNEY FEES

WITHOUT ANY CONTRIBUTION TOWARD THE SAME FROM THE APPELLEE CYNTHIA.

I.

{¶16} Appellant argues in his first Assignment of Error that the trial court lacked jurisdiction to grant his divorce complaint because Appellant had a living wife at the time of the marriage from which he now seeks a divorce.

{¶17} As stated above, Appellant was previously married to Sharron M. Snyder. Ms. Snyder filed a complaint for divorce and while the trial court issued its memorandum of law on Ms. Snyder's complaint on December 20, 1989, the trial court did not file its divorce decree until January 8, 1990. Appellant and Appellee were married on December 29, 1989, before the divorce decree was filed.

{¶18} In Appellant's complaint for divorce, Appellant alleged gross neglect of duty, extreme cruelty, ill treatment and incompatibility against Appellee. Appellant did not raise the issue of the filing date of Appellant's previous divorce until he filed the present appeal, because he stated that he did not discover the issue until the time of the appeal.

{¶19} This Court recognizes that it is well established that a bigamous marriage is void ab initio and of no legal purpose. One who is already married has no capacity to enter into another marriage contract, either ceremonial or common law. *Johnson v. Wolford* (1927), 117 Ohio St. 136 cited by *Darling v. Darling* (1975), 44 Ohio App.2d 5.

{¶20} However, the Ohio Legislature has recognized that although a second marriage may be void, a party to that marriage still may obtain a divorce.

{¶21} R.C 3105.01, establishing the available grounds for divorce, provides in part:

{¶22} "The court of common pleas may grant divorces for the following causes:

{¶23} "(A) Either party had a husband or wife living at the time of the marriage from which the divorce is sought; * * *".

{¶24} The Ohio Supreme Court in *Eggleston v. Eggleston* (1952), 156 Ohio St. 422, in construing the predecessor statute to R.C. 3105.01, declared "[s]ection 11979, General Code, authorizing the granting of a divorce where "either party had a husband or wife living at the time of the marriage from which the divorce is sought," provides an exclusive remedy in cases involving that situation. Id. at syllabus one. See also, *Bubsey v. Oleyar*, 8th Dist. Nos. 76266, 76267, 2000 WL 680447 (a divorce may be granted even though one party lacked the capacity to marry because that party had a husband or wife living at the time of the later marriage).

{¶25} In this case, Appellant's divorce complaint alleged the parties were married, and he invoked the jurisdiction of the domestic relations court to determine the claims for relief set out therein. The irregularity that Appellant now complains, that the parties were not married, could have been raised in the complaint as separate grounds for the divorce. Appellant failed to do so. Therefore, we find Appellant has waived those grounds and cannot raise it now by collateral attack.

{¶26} We therefore overrule Appellant's first Assignment of Error and every Assignment of Error thereafter that asserts the trial court lacked subject matter jurisdiction.

II., III., IV., V.

{¶27} We will address Appellant's second, third, fourth and fifth Assignments of Error together. Appellant argues the trial court abused its discretion in imputing annual income to the Appellant in the amount of $32,500 and thereafter erred in determining child support and spousal support based upon that amount.

{¶28} We recently summarized in *Marsh v. Weston*, 5th Dist. No. 2007-CA-00102, 2008-Ohio-1069, ¶19, that our standard of review of decisions of a domestic relations court relating to child support, spousal support and property division, is generally an abuse of discretion standard. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128.

{¶29} In calculating child support, a trial court is permitted to impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. R.C. 3119.01(C)(11). This Court stated in *Farrell v. Farrell*, 5th Dist. No. 2008-CA-0080, 2009-Ohio-1341, ¶ 20: "In deciding if an individual is voluntarily under employed or unemployed, the court must determine not only whether the change was voluntary, but also whether it was made with due regard to obligor's income-producing abilities and his or her duty to provide for the continuing needs of the child. *Woloch v. Foster* (1994), 98 Ohio App.3d 86, 649 N.E.2d 918. A trial court does so by weighing the circumstances of each particular case. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 616 N.E.2d 218."

{¶30} In determining spousal support, a trial court, may, in its discretion, impute income to a party based on the party's earning ability even if it is determined that a party has no income, depending on the facts and circumstances of each case. R.C. 3105.18(C)(1)(a) and (b); *Weller v. Weller*, 11th Dist. No. 2001-G-2370, 2002-Ohio-7125, ¶ 47.

{¶31} In addressing these issues, the trial court stated:

{¶32} "5. The husband is 48 years of age and is in fair physical health, having been diagnosed with bilateral carpal tunnel and tendonitis. He works as a substitute teacher and teacher's aide. He is a high school graduate and has an Associate Degree in Electrical Engineering and Communications. He has a Bachelor Degree in Psychology from Walsh University. He is currently pursuing his MBA degree and is approximately half completed.

{¶33} "He was previously employed by Ryder Manufacturing and the Hoover Company where he was employed between August of 1979 and 2003. He resigned from his job at the Hoover Company to attend college. During this period of time, the parties' son, Alex, also suffered from severe depression and suicidal ideation and the husband withdrew from college during that period of time to assist with the child.

{¶34} "The husband has submitted to an occupational wage evaluation which concludes that he has an earning potential based upon his experience, education and qualifications to earn between $32,500 and $79,227. Currently, the husband does some part-time substitute teaching on a very minimal basis and as a teacher's aid. The children are of school age and there appears to be no reason why either parent would be required to remain in the home for their care; nor does there appear to be any other

valid reason for the husband not to be employed full-time with the potential of completing his MBA during the courses which are offered in the evening. As such, for purposes of calculating child support and spousal support, the Court finds it appropriate to impute a wage potential to the husband at the lower end of the occupational wage evaluation spectrum, being $32,500."

{¶35} Judgment Entry, August 25, 2008.

{¶36} Appellant first argues the trial court erred in failing to explicitly find that he was either voluntarily unemployed or voluntarily underemployed. We disagree.

{¶37} As stated above, the trial court stated "nor does there appear to be any other valid reason for the husband not to be employed full-time". We agree with our colleagues in the Seventh District Court of Appeals that there is no "magic language" requirement in deciding if an individual is voluntarily under employed or unemployed. *Winkelman v. Winkelman*, 7th Dist. No. 07 DC 255, 2008-Ohio-6557, ¶ 22. We find the trial court's statement to be sufficient to comply with the requirement of R.C. R.C. 3119.01(C)(11) that a finding of voluntary unemployment or underemployment be made before imputing income for child support purposes.

{¶38} Appellant next contends the trial court erred in determining the amount of imputed income, which was $32,500. We disagree.

{¶39} Upon review of the record, this finding is supported by competent, credible evidence. The trial court relied upon the occupational wage evaluation report (Appellant's trial exhibit 45); Appellant's lengthy and stable work history; and Appellant's voluntary decision to leave the Hoover Company to pursue a master's degree and provide household services.

{¶40} The trial court found it appropriate to impute a wage potential "at the lower end of the occupational wage spectrum" and in doing so, expressly recognized that Appellant could work full-time employment and still complete his post-graduate degree.

{¶41} Upon review of the record, we simply cannot find the trial court abused its discretion in determining the imputation of income, which then determined the appropriate amount of child and spousal support. Considering the parties' modest standard of living and the parties' obligation to financial support their two children, we find credible, competent evidence to support the trial court's decision.

{¶42} Furthermore, the trial court expressly stated that it had "considered all of the spousal support factors and finds that spousal support is appropriate and reasonable". This Court has previously held that a trial court need not acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C), and we may not assume that the evidence was not considered. *Hutta v. Hutta* (2008), 177 Ohio App.3d 414, 2008-Ohio-3756, ¶ 27. We find that the trial court's decision includes sufficient information regarding the 14 factors listed in R.C. 3105.18(C) to enable us to find the award of spousal support was fair, equitable and in accordance with the law.

{¶43} Appellant's second, third, fourth and fifth Assignments of Error are overruled.

VI.

{¶44} In his sixth assignment of error, Appellant claims that a check in the amount of $1,626.00 that he wrote to his first wife on January 8, 1990 in order to purchase her interest in the marital residence (6948 Pilot Knob), should not be considered martial funds of the Appellant and Appellee. Appellant contends that since

his second marriage is void ab initio, the trial court should not have treated the $1,626.00 as martial property and therefore his pre-martial property interest the home should have increased from $9,706 to $11,332.00.

{¶45} As noted earlier, the trial court has considerable discretion in fashioning an equitable division of marital property. We further note that Appellant did not raise this issue before the trial court and therefore has waived the right to challenge the same on appeal.

{¶46} Appellant's sixth Assignment of Error is overruled.

VII.

{¶47} Appellant argues in his seventh assignment of error that the trial court erred in not awarding Appellant appreciation on his pre-marital portion of the Pilot Knot property. Appellee responds Appellant failed to sufficiently identify and trace the existence of this amount over the course of the parties' eighteen year marriage.

{¶48} Upon review, we conclude Appellant failed to identify or demonstrate in the record the amount of appreciation on his pre-marital separate property interest in the home.

{¶49} Accordingly, we find the trial court did not abuse its discretion in not awarding Appellant this amount.

{¶50} Appellant's seventh Assignment of Error is overruled.

VIII.

{¶51} Appellant next argues the trial court erred in "setting off" the amount Appellant will receive in social security benefits from Appellee's state teacher's retirement (STRS) benefit.

{¶52} In regards to the parties' retirement funds, the trial court found as follows:

{¶53} "The parties shall divide equally by DOPO, the marital portion of the wife's STRS pension plan. * * * The wife is presently a member of STRS and has retirement benefits. Husband is hereby awarded 50% of the marital portion of the Wife's accrued monthly pension benefit under the plan. * * * When the husband begins receiving social security benefits or at age 65, whichever is sooner, the amount paid to Husband from Wife's STRS benefit will be reduced by one-half of the marital portion of the Husband's social security primary insurance amount (PIA). * * *".

{¶54} The trial court also awarded Appellant all of his interest in his pension from the Hoover Company ($30,461.00) and social security benefits ($54,359.00).

{¶55} It is well-established that pension benefits accumulated during the marriage are assets subject to property division in a divorce action. *Erb v. Erb* (1996), 75 Ohio St.3d 18, 20. However, social security benefits, under federal law, are separate property and are not subject to division by a trial court. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 7. At least two appellate courts have held that the fact one party will receive social security benefits may be considered by the a trial court in determining how to divide the other party's pension plan, particularly in situations were one party did not make social security contributions due to a membership in a state sponsored retirement plan. *Grody v. Grody*, 10th Dist. No. 07AP-690, 2008-Ohio-4682, ¶ 18; *Walker v. Walker*, 2nd Dist. No. 06-CA-23, 2007-Ohio 331, ¶ 4. Both appellate courts recognize that the issue of whether an offset of social security retirement benefits should be made from public retirement benefits rests within the sound discretion of the trial court. *Walker*, supra, at ¶ 19; *Grody,* supra, at ¶ 4.

{¶56} Under the facts and circumstances of this case, we find the trial court did not abuse its discretion in setting off Appellant's future expectancy of social security from the martial portion of Appellee's STRS retirement.

{¶57} Appellant's eighth Assignment of Error is overruled.

IX.

{¶58} Appellant's last assignment of error pertains to the trial court's decision to order each party to pay his or her own attorney fees and costs.

{¶59} R.C. 3105.73(A), provides in pertinent part:

{¶60} "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."

{¶61} An award of attorney's fees lies within the sound discretion of the trial court and will only be reversed upon a showing that the court abused its discretion. *Dunbar v. Dunbar* (1994), 68 Ohio St.3d 369, 371627 N.E.2d 532.

{¶62} In considering the request for attorney's fees, the trial noted the provisions of R.C. 3105.73 and determined an award of fees was not appropriate. Although Appellant was not employed full-time during the divorce proceedings, we cannot say the trial court abused its discretion in denying his request for attorney fees in light of the liquid assets Appellant received in the property division, including savings and stocks, which could be available for payment of such fees.

{¶63} Accordingly, we overrule Appellant's ninth Assignment of error.

{¶64} All of Appellant's Assignments of Error having been overruled, the judgment of the trial court is affirmed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

**[Cite as *Snyder v. Snyder*, 2009-Ohio-5292.]**

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

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| THOMAS R. SNYDER | : | |
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| CYNTHIA A. SNYDER | : | |
| | : | |
| | : | Case No. 2008CA00219 |
| Defendant-Appellee | : | |

For the reasons stated in our accompanying Memorandum-Opinion on file, the appeal of the Stark County Court of Common Pleas, Domestic Relations Division, is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE