

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DOMINIC ALTIER	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2014CA00124
SHANTAY ALTIER	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2013DR01291

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: April 20, 2015

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Gwin, P.J.

{¶1} Appellant appeals the June 20, 2014 judgment entry of the Stark County Court of Common Pleas, Domestic Relations Division, granting the parties a divorce, dividing marital and separate property, and awarding spousal support.

Facts & Procedural History

{¶2} Appellant Dominic Altier (“Husband”) and appellee Shantay Altier (“Wife”) were married on May 20, 2008. The couple has no children together, but Wife has five children. The parties separated in November of 2013. Husband filed his complaint for divorce on November 22, 2013. Wife filed an answer and counterclaim on January 7, 2014. A trial was held in the matter on June 18, 2014. The parties had several stipulations, including how to divide any benefits Husband had from the Navy, certain credit cards being pre-marital debt, certain assets being Husband’s pre-marital assets, and the division of Husband’s 401(k) retirement account. In addition, at trial, both parties agreed to sell the marital home at 8542 Landsdale Avenue and split the proceeds. The parties agreed that the fair market value of the property was approximately \$150,000.

{¶3} Husband is in good physical and mental health. Husband graduated from high school and attended some college classes. Husband is currently employed as a mechanic at Performance Technologies, a subsidiary of Chesapeake Oil and Gas. He earns \$21.50 per hour for regular time pay of approximately \$44,720 per year. However, he has worked considerable overtime in the past year. His most recent pay stub prior to trial, dated June 7th, shows year to date regular pay of \$18,911.75, overtime pay of \$14,169.03, and straight overtime of \$1,446 plus pay for holidays and

jury duty for a year to date gross pay through June 7th of \$40,055.07. Husband's testimony confirmed that his year-to-date pay in June was \$40,055.07. Husband receives an annual bonus that varies in amount, but was \$1,500 for 2014. Husband stated this is the most money he has ever earned. Husband has health insurance through his employment.

{¶4} Husband testified that he does not believe Wife is currently earning to the maximum of her ability. Husband stated he was against Wife going back to school because he was unemployed at the time. Further, that he did not benefit from Wife's returning to school.

{¶5} Husband testified he did know of a First Bank credit card, never used it, and had no reason to believe that the card was used to purchase marital assets. However, on cross-examination, Husband testified that during the course of the marriage, both parties incurred debts without the consent of the other and that he did not always ask or tell Wife when he used credit cards during their marriage. Husband stated he did not receive any of the funds that Wife withdrew from the Navy Federal Credit Union account in November of 2013.

{¶6} Husband stated that since the parties separated in November of 2013, he has been paying the mortgage and utilities for Wife. Husband testified that he lives with his father and does not pay rent to live there. Since Husband filed the divorce, he paid down several of his credit cards.

{¶7} Wife has severe migraine headaches and suffers from narcolepsy. These conditions are under control with medication, which is costly. Wife testified she is ok as long as she has medical insurance and is under a doctor's care for her conditions. She

stated that she takes two medications for her migraines and one for her narcolepsy. In addition, wife receives injections once every three weeks for her migraines, which costs \$3,000 per treatment if she had to pay out-of-pocket. Wife is currently covered under Husband's health insurance and is not sure of the cost of health insurance after she can no longer remain on his policy. However, Wife will have to pay health insurance premiums after the divorce is finalized because her current employer does not offer health insurance. Wife testified that if she cannot obtain medical insurance, she cannot afford her medications and if she does not have her medications, it affects her ability to work.

{¶8} Wife obtained a GED in 2002 and received her cosmetology license in November of 2013, which allows her to do hair, nails, and skin. Wife testified that she applied multiple places, including various salons, to obtain employment. Wife recently found a job at Merle Norman doing nails, where she earns 70% of the services she provides. However, Wife testified that she has no clientele and had only one appointment in the past few weeks from which she earned \$21.00. Wife was previously employed, most recently at Longhorn Steakhouse as a hostess where she earned \$15.00 per hour and worked an average 32 hours per week. Wife quit this job to attend cosmetology school. Prior to that, Wife was employed at Frito Lay earning \$16 per hour. Wife testified that she feels she is physically capable of working in a salon while on her medications. Wife received \$10,171 for child support in 2013 and also receives food stamps.

{¶9} Wife testified that Husband put her name on an account at Navy Federal Credit Union during their marriage and gave her a debit card. Wife stated in November

of 2013, she withdrew \$1,872 from a Navy Federal Credit Union account and did not split it with Husband. With regards to the First Bank credit card, Wife testified to the balance of \$4,848.85 and stated she was making monthly payments toward that amount. Wife testified she had the First Bank card when she was together with Husband, but the credit cards she had from Discover Bank and Kohl's she opened since the parties separated.

{¶10} Husband called witness Victor Valli ("Valli"), Director of Human Resources at Community Services of Stark County. Valli completed an occupational wage evaluation on Wife and concluded she was qualified to be a cosmetologist. Further, that she could make approximately \$21,715 per year as a cosmetologist. Rodney Dimmerling testified that he appraised the personal property at the Landsdale home. Donna Altier, Husband's step-mother, testified regarding the debt owed on the Jeep Liberty.

{¶11} The trial court issued a judgment entry of divorce on June 20, 2014. The trial court reviewed the figures submitted by Husband and stated that if Husband's overtime continues, he is on target to earn approximately \$90,000 in 2014. Further, that Husband's income this year is approximately double what he earned in the previous few years. The trial court reviewed each Husband's (\$4,664) and Wife's (\$3,500) monthly expense statements and determined that both expenses are inflated. Wife's was high because hers included food and living expenses for her and her four children who live with her and that Husband is not required to support Wife's children. Husband's was high because it included rent, utilities, food, and living expenses for a family of six (Wife, Husband, and her four children) rather than him alone.

{¶12} Husband and Wife disputed the value and debt with regards to a 2002 Jeep Liberty and the trial court found the value of the vehicle was \$6,200 and the debt owed to Husband's step-mother is \$1,500. The trial court found that the parties' marital debts included: Wife's school loans (\$10,200), a Bank of America Visa (\$1,100), a Citi Card (\$3,757), Navy Federal (\$11,201) and a First Bank account (\$4,849).

{¶13} The trial court granted the parties a divorce based upon incompatibility. With regards to the division of marital property, the trial court stated it considered the relevant factors of R.C. 3105.171 and found that each party should take the marital assets or debts as listed in his/her column on an attached property distribution list. On the property distribution list, the trial court included each asset or debt (2002 Jeep Liberty, debt on Jeep Liberty, 2010 Jeep Patriot, Community One checking, Navy Credit checking, Navy Credit savings, school loan, First Bank credit card, Bank of American Visa, household goods, furniture, Citi Card, Navy Federal Credit debt, and funds held in attorney's trust) and assigned it to either Husband or Wife. The trial court distributed a debt of \$10,322 to Husband and a debt of \$4,468 to Wife. The trial court acknowledged that the division was not equal, but determined this was equitable and noted that Wife has to obtain and pay for health insurance.

{¶14} In addition, the trial court stated it considered all the spousal support factors and found that spousal support from Husband to Wife was appropriate and reasonable in the amount of \$2,000 per month for twenty (20) months. The trial court specifically stated that it could "modify the amount or terms of this spousal support order upon the change of circumstances of a party, which includes, but is not limited to, any

increase or involuntary decrease in the party's wages, salary, overtime, bonuses, living expenses, or medical expenses."

{¶15} Husband appeals the June 20, 2014 judgment entry of the trial court and assigns the following errors:

{¶16} "I. THE TRIAL COURT'S DETERMINATION THAT CERTAIN DEBT WAS MARITAL WAS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶17} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING A GREATER SHARE OF THE MARITAL PROPERTY TO WIFE.

{¶18} "III. THE TRIAL COURT'S SPOUSAL SUPPORT AWARD AMOUNTED TO AN ABUSE OF DISCRETION. "

I.

{¶19} Husband first argues the trial court's determination that the First Bank credit card balance is marital debt is against the manifest weight of the evidence.

{¶20} Marital debt is "any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose." *Ketchum v. Ketchum*, 7th Dist. Columbiana No. 2001 CO 60, 2003-Ohio-2559, citing Turner, Equitable Division of Property (2d Ed. 1994). "Trial court decisions on what is presently separate and marital property are not reversed unless there is a showing of an abuse of discretion." *Vonderhaar-Ketron v. Ketron*, 5th Dist. Fairfield No. 10CA22, 2010-Ohio-6593. Although Ohio's divorce statutes do not generally articulate debt as an element of marital and separate property, the rules concerning marital assets are usually applied to marital and separate debt as well. *Id.*

{¶21} The characterization of property as separate or marital is a mixed question of law and fact, and the trial court's ruling must be supported by sufficient credible evidence. *Globokar v. Globokar*, 5th Dist. Stark No. 2009-CA-00138, 2010-Ohio-1737. 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. *Id.* We will not reverse the trial court's judgment as being against the manifest weight of the evidence if some competent, credible evidence supports the court's judgment. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶22} In this case, Husband testified that he did not know of a First Bank credit card, never used it, and had no reason to believe that the card was used to purchase marital assets. Wife testified to the balance of the First Bank card as \$4,848.85, stated she was making monthly payments towards that amount, and that she had the First Bank card when she was together with Husband. In her testimony regarding credit card debt, Wife also stated that while she had the First Bank card when the parties were together, she opened credit cards from Discover Bank and Kohl's after the parties separated.

{¶23} Husband asserts that his testimony, combined with the fact that Wife never specifically stated that she used the card during the marriage, is sufficient to establish that the debt was not a marital debt. However, the trier of fact is vested with the authority to weigh the evidence and assess the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of syllabus (1967). Further, on cross-examination, Husband testified that during the course of the marriage, both parties incurred debts without the consent of the other and that he did not always

ask or tell Wife when he used credit cards during their marriage. In addition, Husband submitted no testimony or evidence as to when the First Bank card was used, for what it was used, or the balance of the card before, after, or during the marriage.

{¶24} The trial court is in the best position to determine the credibility of the witnesses. It was within the trial court's discretion to weigh the testimony in the absence of documentation regarding when the card was used, for what the card was used, or the balance of the card, and make its decision accordingly. See *Oliver v. Oliver*, 5th Dist. Tuscarawas No. 2012 AP 11 0067, 2013-Ohio-4389. Husband failed to meet his burden of proving the traceability of the debt. Husband's first assignment of error is overruled.

II.

{¶25} Husband argues the trial court abused its discretion by awarding a greater share of the marital property to Wife, as the trial court assigned \$10,322 in debt to Husband and \$4,468 in debt to Wife. Husband contends the future medical and insurance expenses of Wife is not a sufficient reason for an inequitable division of the marital debts.

{¶26} The trial court is vested with broad discretion in determining the appropriate scope of these property awards. Although its discretion is not unlimited, it has authority to do what is equitable. *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 541 N.E.2d 597 (1989). A trial court's decision allocating marital property and debt will not be reversed absent an abuse of discretion. *Id.* An abuse of discretion is more than a mere error; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140

(1983). An unequal division does not in and of itself constitute an abuse of discretion. *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988). Further, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978).

{¶27} R.C. 3105.171(B) requires equitable distribution of marital and separate property. R.C. 3105.171(C) mandates an equal division of marital property, unless such would be inequitable under the circumstances. In dividing marital assets, and in deciding whether to order an unequal award, a trial court must consider all relevant factors, including those listed in R.C. 3105.171(F). On appellate review, 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*, 9 Ohio St.3d 220, 222, 459 N.E.2d 896 (1984).

{¶28} In this case, the trial court stated that, in making its division of marital property, it considered "all relevant factors," including those contained in R.C. 3105.171. Further, the trial court attached to its judgment entry a "Property Distribution List," in which the trial court specifically listed each asset and debt of the parties, with values attached, and distributed each asset or debt to either Husband or Wife. The trial court also specifically noted that Wife must obtain and pay for her own health insurance.

{¶29} We find there is competent and credible evidence to support the trial court's decision. The trial court stated it considered the relevant factors listed in R.C. 3105.171(F) and listed many of these factors in its findings of fact in the judgment entry, such as the duration of the marriage, the assets and liabilities of the parties, the fact that

the parties agreed to sell the marital home and split any proceeds, and the retirement benefits of Husband from a 401(k). R.C. 3105.171(F)(10) also provides that the trial court may consider “any other factor that the court expressly finds to be relevant and equitable,” which the trial court did in this case by taking into consideration Wife’s need to obtain and pay for health insurance.

{¶30} Wife testified that she has severe migraine headaches and suffers from narcolepsy. These conditions are under control with medication (two medications for migraines and one for narcolepsy), which is costly. Wife receives injections every three weeks for her migraines, which costs \$3,000 per treatment if she had to pay out-of-pocket. Wife testified she is ok as long as she has medical insurance and is under a doctor’s care for her conditions. Wife will have to pay health insurance premiums after the divorce is finalized because her current employer does not offer health insurance. Wife testified that if she cannot obtain medical insurance, she cannot afford her medications and if she does not have her medications, it affects her ability to work. As noted above, the trier of fact is vested with the authority to weigh the evidence and assess the credibility of the witnesses. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 121, paragraph one of syllabus (1967).

{¶31} Based upon our review of the record, we find the trial court took into consideration the relevant factors in its division of marital assets and debts. Considering the totality of the circumstances, we find the trial court did not abuse its discretion in its distribution of assets and liabilities. Husband’s second assignment of error is overruled.

III.

{¶32} Husband finally argues the trial court erred and abused its discretion in its award of spousal support given his monthly income. Husband contends with the amount of spousal support ordered Wife is able to easily pay her monthly expenses, while he cannot meet his monthly expense payment.

{¶33} We review the trial court's decision relative to spousal support under an abuse of discretion standard. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990). To find an abuse of discretion, this court must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Further, a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978).

{¶34} R.C. 3105.18(C)(1) provides that a trial court may award spousal support when it is "appropriate and reasonable." R.C. 3105.18(C)(1) 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 include: (a) income of the parties, from all sources * * *; (b) the relative earning abilities of the parties; (c) the ages and the physical, mental, and emotional conditions of the parties; (d) the retirement benefits of the parties; (e) the duration of the marriage; (f) the extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home; (g) the standard of living of the parties established

during the marriage; (h) the relative extent of education of the parties; (i) the relative assets and liabilities of the parties; (j) the contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party; (k) the time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience * * *; (l) the tax consequences, for each party, of an award of spousal support; (m) the lost income production capacity of either party that resulted from that party's marital responsibilities; and (n) any other factor that the court expressly finds to be relevant and equitable.

{¶35} In its judgment entry, the trial court specifically stated it considered all the relevant factors of R.C. 3105.18 in determining that spousal support is appropriate and reasonable. In this case, we find no abuse of discretion in the trial court's decision regarding spousal support and our review of the record reveals the presence of credible evidence supporting the trial court's determinations. The parties were married for approximately five years. Husband is in good health, while Wife has migraines and narcolepsy. While her conditions are under control with medication, she will have to obtain and pay for health insurance or else she will not be able to afford the medications. Husband is a mechanic, has earned \$40,055.07 through June of 2014, and is on target to earn \$90,000 in 2014. Wife has a cosmetology license and currently has no clientele, but the occupational wage evaluator called by Husband estimated Wife could earn approximately \$21,715 per year as a cosmetologist in the area. While Husband is paying the mortgage and utility expenses for Wife since the separation, Husband has

been living with his father and not paying rent since the separation. The trial court noted that Wife will lose her insurance coverage as a consequence of the divorce.

{¶36} The trial court further noted that both Husband's and Wife's expenses were inflated. Husband's expenses were inflated because he included rent, utilities, food, and living expenses for a family of six. Wife's expenses were inflated because Wife included expenses for her children and Husband is not required to support Wife's children. Though Husband argues that the trial court's award of spousal support does not allow him to pay his expenses while it allows Wife to pay hers, it appears that Husband's calculations do not include his substantial overtime pay that he currently earns. R.C. 3105.18 does not specifically require the trial court to consider overtime pay when determining a party's income but the statute does direct the court to consider the party's income "from all sources." Here, the record is clear that Husband earned a substantial amount of overtime for the first six months of 2014 and this overtime represents a substantial portion of his income. See *Lanzilotta v. Lanzilotta*, 1st Dist. Hamilton Nos. C-120796, C-120835, 2013-Ohio-4050. With this overtime, Husband can meet his monthly expenses including spousal support. Wife, however, struggles to find steady employment and must obtain and pay for health insurance to cover her medications so that she can continue working. Even if Husband's expert witness is correct that Wife can earn approximately \$21,715 per year, there is still a significant disparity between her salary and Husband's \$90,000 per year salary.

{¶37} In addition, the trial court specifically retained jurisdiction to modify the amount or terms of the spousal support order should circumstances change, including an involuntary decrease in wages, salary, bonuses, living expenses, or medical

expenses. Thus, should the circumstances change, Husband can return to the trial court upon the proper motion. *Dodson v. Dodson*, 5th Dist. Stark No. 2001CA00327, 2002-Ohio-3091; *Elder v. Elder*, 5th Dist. Fairfield No. 2008-CA-74, 2009-Ohio-4868. Accordingly, Husband's third assignment of error is overruled.

{¶38} Based on the foregoing, the June 20, 2014 judgment entry of the Stark County Common Pleas Court, Domestic Relations Division, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur