[Cite as *Breedlove v. Breedlove*, 2008-Ohio-4887.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

Linda D. Breedlove,	:	
	:	
Plaintiff-Appellee	:	Case No. 08CA10
	:	
v.	:	DECISION AND JUDGMENT ENTRY
	:	
Roy Leo Breedlove,	:	
	:	**Released 9/15/08**
Defendant-Appellant.	:	

APPEARANCES:

Nancy E. Brum, Marietta, Ohio, for Appellant.

Anita L. Newhart, Marietta, Ohio, for Appellee.

Harsha, J.

{¶1} Roy L. Breedlove appeals the judgment of the trial court in this divorce action and contends that the trial court abused its discretion in awarding Linda D. Breedlove spousal support. He contends that the trial court failed to review the necessary statutory factors and failed to detail the facts it relied upon in determining that a monthly spousal support award of $2,000 was appropriate. He also argues that the award of spousal support was "excessive." However, Mr. Breedlove failed to provide us with a full transcript of the divorce proceedings and failed to provide us with a permissible substitute for the transcript as authorized by App.R. 9(C). Because the record as it appears before us does not affirmatively demonstrate that the trial court abused its discretion in awarding spousal support, we must presume the trial court acted appropriately. Accordingly, we affirm its judgment.

I. Facts[1]

{¶2} Linda and Roy Breedlove married each other twice. They originally married in September 1971, and divorced in October 1997. Two months later, they married again, and they separated in May 2007. After Ms. Breedlove filed a complaint for divorce, Mr. Breedlove filed an answer.

{¶3} Ms. Breedlove is fifty-six years old and has been placed on regular medications due to various ailments. Prior to obtaining her massage therapist license, she had no post-secondary education. At various times throughout the marriage, she worked in unskilled low-paying jobs.

{¶4} Mr. Breedlove is sixty-one years old. Prior to their marriage, Mr. Breedlove served in Vietnam, and the parties agree that his disability benefits from the Veteran's Administration ("VA") are a premarital asset. Mr. Breedlove has health problems, including neuropathy in both legs, arthritis, a degenerated lower back, and diabetes, and he has been diagnosed with prostate cancer twice. In addition, he has suffered a mental breakdown, and he requires regular medication. Due to his physical and mental health, he has been placed on Social Security Disability and has applied for and received disability through his union retirement program. He receives $2,699 per month in VA benefits, $1,860 per month in Social Security Disability benefits, and an additional sum from the United Association of Plumbers and Pipefitters ("UA"); there was no testimony concerning the amount of monthly benefit from the UA. Also, Mr. Breedlove testified that his VA benefits would likely be reduced because recent testing

[1] As noted below, we do not have a full transcript properly before us. Thus, the following facts are based on the record as it appears before us.

showed that his prostate cancer was in remission and because he will lose $235 of his monthly check once he is legally divorced.

{¶5} During the marriage, the parties purchased real estate for $80,000; the property has a mortgage with an outstanding balance of approximately $124,254. After Ms. Breedlove left the marital residence, Mr. Breedlove continued to live in the home and made the monthly payments for the mortgage, taxes, and insurance. Mr. Breedlove also signed a student loan for their adult daughter for approximately $33,000.

{¶6} Following a trial in November 2007, the trial court awarded the parties a divorce. The trial court issued its findings of fact and conclusions of law, and a termination entry adopting the court's findings was filed in February 2008. The trial court divided Mr. Breedlove's UA pension equally between the parties and split the balance of Mr. Breedlove's Individual Retirement Account at Chase Bank. The trial court ordered Mr. Breedlove to continue to make the payments of the mortgage, taxes, and insurance of the parties' marital real estate until the property is sold. The court ordered that if the parties realize a net gain on the sale, Mr. Breedlove would receive a sum equal to the principal reduction for the payments he has made since the parties' separation in May, 2007; then the balance of any net gain would be equally divided between the parties. The court ordered that each party would be responsible for the credit card debt and medical expenses in his/her respective names and also ordered that if the debt for their daughter's student loan is not remitted, the parties are equally responsible for the debt. The court also ordered their automobiles sold and the

proceeds and/or deficiencies divided equally.[2] Finally, the trial court awarded Ms. Breedlove spousal support in the amount of $2,000 per month and ordered that the award is subject to the continuing jurisdiction of the court. Mr. Breedlove appeals and presents one assignment of error:

> The Trial Court abused its discretion in awarding Plaintiff spousal support in the sum of $2,000 per month. The Trial Court abused its discretion in failing to review the statutory factors in ORC Section 3105.18 and detail the facts relied upon to determine that a spousal support award in the sum of $2,000 per month was appropriate.

II. Transcript

{¶7} Mr. Breedlove, as the appellant, bears the burden of showing error by reference to matters in the record. *Proctor v. Hall*, Lawrence App. No. 05CA3 & 05CA8, 2006-Ohio-2228, ¶20, citing *State v. Skaggs* (1978), 53 Ohio St.2d 162, 372 N.E.2d 1355. Where a transcript is unavailable or a proceeding is otherwise not recorded, an appellant may provide a settled or agreed statement of the proceeding as the record for review upon appeal. See App.R. 9(C) and (D), and *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. The appellant bears the burden of attempting to reconstruct the record with a narrative or statement prepared pursuant to App.R. 9 if the appellant intends to rely upon the missing portions of the transcript in his assignment of error. *Willis v. Martin*, Scioto App. No. 06CA3053, 2006-Ohio-4846, ¶23, citing *State v. Ward*, Gallia App. No. 03CA2, 2003-Ohio-5650; *State v. Drake* (1991), 73 Ohio App.3d 640, 647; 598 N.E.2d 115, and *State v. Davis* (1991), 62 Ohio St.3d 326, 347,

[2] The parties later agreed to a modification of the trial court's order; Ms. Breedlove retained the newer vehicle and the indebtedness thereon, while Mr. Breedlove received the older, lien-free vehicle.

581 N.E.2d 1362. When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm. *Knapp*, 61 Ohio St.2d at 199; *State v. Prince* (1991), 71 Ohio App.3d 694, 699, 595 N.E.2d 376. Thus, in the absence of an error on the part of a trial court affirmatively appearing on the record, the reviewing court must affirm the lower court's judgment. Id.

{¶8} Mr. Breedlove has not provided us with a full transcript of the proceedings below. Specifically, it does not include the direct examination of Ms. Breedlove. Additionally, he has not provided us with a permissible substitute for a transcript as authorized by App.R. 9(C). Thus, to the extent that his assigned error is dependant on our review of Ms. Breedlove's direct examination, we must affirm the lower court's judgment. Accordingly, we limit our review to determining whether an error on the part of the trial court in awarding spousal support affirmatively appears on the record before us.

III. Spousal Support

{¶9} "It is well-settled that trial courts enjoy broad discretion in awarding spousal support." *White v. White*, Gallia App. No. 03CA11, 2003-Ohio-6316, ¶21, citing *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. A court's decision to award spousal support will not be reversed on appeal absent an abuse of discretion. See *Bechtol v. Bechtol*, 49 Ohio St.3d 21, 24, 550 N.E.2d 178. Under the abuse of discretion standard of review, a reviewing court must affirm the decision of the trial court unless it is unreasonable, arbitrary, or

unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 140. Under this highly deferential standard of review, appellate courts may not freely substitute their judgment for that of the trial court. *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181. "Indeed, to show an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." *White*, supra, at ¶25, citing *Nakoff v. Fairview Gen. Hosp*. (1996), 75 Ohio St.3d 254, 256, 662 N.E.2d 1.

{¶10} Once a party requests it, the court may make an appropriate and reasonable spousal support award. R.C. 3105.18(B). In determining whether spousal support is "appropriate and reasonable," the court must consider the following factors:

> (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
>
> (b) The relative earning abilities of the parties;
>
> (c) The ages and the physical, mental, and emotional conditions of the parties;
>
> (d) The retirement benefits of the parties;
>
> (e) The duration of the marriage;
>
> (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
>
> (g) The standard of living of the parties established during the marriage;

> (h) The relative extent of education of the parties;
>
> (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
>
> (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
>
> (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
>
> (l) The tax consequences, for each party, of an award of spousal support;
>
> (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
>
> (n) Any other factor that the court expressly finds to be relevant and equitable.

See R.C. 3105.18 (C)(1).

{¶11} When making a spousal support award, a trial court must consider all statutory factors, and not base its determination upon any one of those factors taken in isolation. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197, paragraph one of the syllabus. While the trial court is given broad discretion regarding the determination of the appropriateness and reasonableness of an award of spousal support, it must consider the statutory factors enumerated above and must indicate the basis for a spousal support award in sufficient detail to enable a reviewing court to determine that the award complies with the law. *Kaechele,* 35 Ohio St.3d at paragraph two of the syllabus. *Kaechele* does not require the trial court to articulate the rationale or basis of its

spousal support decision in the decree as long as the record contains adequate support and detail to permit an appellate court to establish whether the award is fair and in accordance with the law. *Carman v. Carman* (1996), 109 Ohio App.3d 698, 704, 672 N.E.2d 1093. *Kaechele* and R.C. 3105.18(C), only require the trial court to reveal the basis for its award in either its judgment entry or the record. *Brown v. Brown*, Pike App. No.02AP689, 2003-Ohio-304, ¶10, citing *Carman*, supra. Also, the trial court is not required to comment on each statutory factor; rather, the record need only show the court considered them in making its award. *McClung v. McClung*, Franklin App. No. 03AP-156, 2004-Ohio-240, ¶21, citing *Carman*, 109 Ohio App.3d at 703.

{¶12} Here, in its findings of fact, the trial court stated:

> 6. * * * Wife is currently renting a home and has necessary and reasonable expenses as shown in her financial affidavit filed in this action and incorporated herein by reference.
>
> 9. The Plaintiff/wife is self employed as a massage therapist; she does not work full time and earns less than $100 per week from this employment. After expenses associated with her employments, her income has averaged about $2,060 per year for the last five (5) years. Other than her training in massage therapy, the wife has no other post secondary education or training. She is 56 years old, has no retirement benefits in her own name, has no independent assets or income from any other sources. At the time the parties were first married, the wife provided care for the parties' children and maintained the parties' household; as the children became more independent, she sought out supplemental income from non-skilled employment. Beside joint marital debt, the wife has credit card debt of $5,500 and hospital/medical expenses of approximately $1,000 in her name.
>
> 10. The wife is eligible for COBRA coverage for health insurance, but she will have no long term medical insurance except through a private policy. Because of the high cost of insurance through COBRA, she will have to obtain a private policy of insurance at a cost of $411.28 per month.

> 11. The wife will need spousal support to adequately maintain herself and household.
>
> 12. The husband is not working and has been found disabled both by the Veteran's Administration, from which he receives the sum of $2,699 per month, and the Social Security Administration; he believes that his entitlement from the VA may be reduced now that he has been found to be free of cancer; additionally, the funds would be further reduced (by $235 per month) once he no longer has a spouse. He has successfully survived multiple bouts with cancer. The fund received from the VA are as a result of his exposure to chemicals during his service in the our [sic] country's armed forces prior to the marriage and are, therefore, non-marital. He receives $1,860 per month for Social Security Disability. The Court cannot divide this income, but it may be considered when determining a division of the assets and liabilities and in computation of spousal support.

{¶13} Mr. Breedlove contends that the trial court failed to review the statutory factors and failed to set forth the facts to support the spousal support award. He argues that Ms. Breedlove is "much younger" than Mr. Breedlove and that her relative earning ability is greater than his earning ability since he cannot work due to his health. However, our review of the record shows that while the trial court did not specifically list or comment on the statutory factors, its entry sufficiently revealed the basis for its award. See *Kaechele,* 35 Ohio St.3d at paragraph two of the syllabus. A review of the trial court's entire entry shows that the trial court considered the income of the parties, the ages and the physical, mental, and emotional conditions of the parties; the retirement benefits of the parties; the duration of the marriage; the relative extent of education of the parties; and the relative assets and liabilities of the parties. See R.C. 3105.18(a)(c)(d)(e)(h) and (i). Thus, we reject Mr. Breedlove's contention that

the trial court abused its discretion in failing to review the statutory factors or in failing to detail the facts relied upon in determining spousal support.

{¶14} Moreover, we reject Mr. Breedlove's contention that the trial court erred in failing to find that Ms. Breedlove was "voluntarily underemployed." R.C. 3119.01(C)(11)(a) authorizes a court to impute income to a parent whom the court finds is voluntarily underemployed, for purposes of calculating child support. R.C. 3105.18, however, contains no like provision applicable to spousal support. Nonetheless, some courts have held that, upon the same finding, income may be imputed to either spouse in determining whether spousal support is reasonable and appropriate. See *Williams-Booker v. Booker*, Montgomery App. Nos. 21752, 21767, 2007-Ohio-4717, citing *Petrusch v. Petrusch* (March 7, 1997), Montgomery App. No. 15960. " * * *[W]hether a parent is voluntarily (i.e. intentionally) unemployed or voluntarily underemployed is a question of fact for the trial court. Absent an abuse of discretion that factual determination will not be disturbed on appeal." *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218. Based on the record before us, we cannot conclude that the trial court abused its discretion concerning the factual issue of Ms. Breedlove's alleged underemployment and spousal support. Rather, we believe that resolution of this issue is dependant upon a review of Ms. Breedlove's direct examination. Because Mr. Breedlove failed to provide us with the full transcript necessary for our resolution on this issue, we must presume the validity of the lower court's proceedings and conclude that its factual determination on this issue was correct.

{¶15} Finally, Mr. Breedlove contends that the monthly spousal support award of $2,000 is excessive. He argues that because his monthly income is approximately $4,262, the trial court essentially divided the parties' income equally when it awarded spousal support in the amount of $2,000; however, he argues that the trial court ordered him to pay the mortgage, taxes, and insurance on the house at a sum of $1,073 per month and that Ms. Breedlove only has to maintain her monthly car payment of $365. Thus, he contends that the trial court "saddled" him with an additional $700 of martial debt per month. We reject Mr. Breedlove's arguments.

{¶16} In its entry, the trial court specifically found that it could consider Mr. Breedlove's monthly VA and Social Security Disability benefits in its computation of spousal support. And because the spousal support award is approximately one half of the amount of Mr. Breedlove's monthly income, it appears that the trial court did in fact consider these benefits in determining an appropriate and reasonable spousal support award. Furthermore, the trial court found that Ms. Breedlove was renting a home and only ordered Mr. Breedlove, who continued to reside in the marital home, to make the payment of the mortgage, taxes, and insurance of the parties' marital real estate until the property is sold. And the court also ordered that if the parties realize a net gain on the sale, Mr. Breedlove was to first receive a sum equal to the principal reduction for the payments he has made since the parties' separation in May, 2007; the balance of any net gain would be equally divided between the parties. Accordingly, we cannot say that the trial court's spousal support was excessive

simply because Mr. Breedlove is temporarily responsible for paying approximately $700 per month for marital debt in connection with him living in the marital home until it is sold.

{¶17} Furthermore, we believe that Mr. Breedlove's argument that the award was "excessive" requires us to examine the full transcript, i.e., including Ms. Breedlove's direct examination, in order to ascertain whether the trial court abused its discretion in making the factual determination that $2,000 per month was appropriate and reasonable. Again, because Mr. Breedlove failed to provide us with the full transcript, we must presume the validity of the trial court's judgment.

{¶18} Therefore, we affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT EN TRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J.: Concurs in Judgment Only.
Kline, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.