

[Cite as *Vulgamore v. Vulgamore*, 2017-Ohio-4114.]

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

MANDIE KAY VULGAMORE, :
 :
 Plaintiff-Appellee, : Case No. 16CA876
 :
 vs. :
 ORVILLE MARTIN VULGAMORE, : DECISION AND JUDGMENT ENTRY
 :
 :
 Defendant-Appellant. :

APPEARANCES:

Anthony A. Moraleja, Waverly, Ohio, for appellant

Rick L. Faulkner, Wheelersburg, Ohio, for appellee

CIVIL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-24-17
PER CURIAM.

{¶ 1} This is an appeal from a Pike County Common Pleas Court judgment that granted a divorce to Mandie Kay Vulgamore, plaintiff below and appellee herein, and Orville Martin Vulgamore, defendant below and appellant herein. Appellant raises the following assignments of error for review:

FIRST ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY NOT APPLYING [R.C.]
5815.31 AS TO ANY PROPERTY HELD IN A REVOCABLE

LIVING TRUST IN WHICH THE GRANTOR OF THE TRUST WAS A PARTY TO A DIVORCE.”

SECOND ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY DENYING A MOTION IN LIMINE REQUESTING TO EXCLUDE EVIDENCE THAT PURSUANT TO [R.C.] 5815.31 WAS IRRELEVANT AT TRIAL TO DIVIDE MARITAL PROPERTY.”

THIRD ASSIGNMENT OF ERROR:

“THE TRIAL COURT ERRED BY NOT EQUITABLY DIVIDING THE RETIREMENT ACCOUNT OF APPELLEE.”

{¶ 2} The parties married in 1979. During their marriage, the parties formed Vulgamore Farm LLC, and each formed revocable living trusts. Also during the marriage, the parties acquired several parcels of real estate, with ownership ultimately resting in either the trusts or Vulgamore Farm.

{¶ 3} On August 27, 2013, appellee filed a complaint for divorce. Appellant subsequently answered and filed a counterclaim for divorce. Before trial, appellant filed a motion in limine that requested the trial court to exclude any evidence concerning the trust assets. Appellant asserted that R.C. 5815.31 mandates exclusion of trust assets when a trial court effects a property division in a divorce proceeding. The trial court overruled appellant’s motion in limine.

{¶ 4} On July 14, 2016, the trial court granted the parties a divorce. The court awarded appellant (1) all of the real estate the parties acquired during the marriage, except for the property used as the parties’ marital residence (\$176,500); (2) all but two of the motor and recreational vehicles (\$114,100); (3) a life insurance policy (\$1,411.32); and (4) an ice box and a wardrobe

(\$900). The court awarded appellee (1) the marital residence (\$82,500); (2) all of the money contained in her checking and savings accounts (approximately \$4,000); (3) her deferred compensation (\$34,192.44) and State Teachers Retirement System (\$389,045.84) funds; (4) two motor vehicles (\$20,000); and (5) several items of personal property (\$4,995). The court further ordered appellant to pay the debts associated with (1) the real estate awarded to him (\$68,000), and (2) certain credit accounts (\$77,256). The court also ordered appellee to be responsible for the debts associated with (1) the marital residence (\$82,851.69), (2) one of the motor vehicles (\$11,095.02), and (3) the credit cards in her name (\$20,382.89). The court determined that both parties would remain liable for a \$45,506.78 deficiency judgment entered in a foreclosure action.

{¶ 5} In reaching its decision, the trial court concluded that appellant engaged in financial misconduct. The court found that in 2013, Vulgamore Farm (with appellant as its president) sold property without accounting to appellee for the proceeds. The court thus attributed the profit realized from the sale, \$268,000, to appellant. The court attributed \$17,000 to appellee as a result of a separate transaction that realized a profit. The court additionally determined that the parties had not adhered to the formalities of the trusts and thus found that the trust property should be treated as marital property. This appeal followed.

{¶ 6} In his first assignment of error, appellant argues that the trial court erred by failing to exclude the trust assets from the property division. In his second assignment of error, appellant asserts that the trial court erred by denying his motion in limine to exclude the trust property as evidence in the divorce proceeding. In his third assignment of error, appellant contends that the trial court abused its discretion by awarding appellee all of the funds contained in her deferred compensation and STRS accounts. Because appellant's three assignments of

error raise interrelated issues regarding the trial court's property division, for ease of discussion we consider them together.

A

STANDARD OF REVIEW

{¶ 7} Trial courts enjoy broad discretion when dividing marital property in a divorce proceeding. *E.g., Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131, 541 N.E.2d 597 (1989); *Elliott v. Elliott*, 4th Dist. Ross No. 05CA2823, 2005–Ohio–5405, ¶17. Accordingly, an appellate court will not reverse a trial court's decision regarding the allocation of marital property and debt absent an abuse of that discretion. *Elliott* at ¶17. An “abuse of discretion” means that the court acted in an “unreasonable, arbitrary, or unconscionable” manner or employed “a view or action that no conscientious judge could honestly have taken.” *State v. Kirkland*, 140 Ohio St.3d 73, 2014–Ohio–1966, 15 N.E.3d 818, ¶67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008–Ohio–4493, 894 N.E.2d 671, ¶23. Moreover, a trial court generally abuses its discretion when it fails to engage in a “sound reasoning process.” *State v. Morris*, 132 Ohio St.3d 337, 2012–Ohio–2407, 972 N.E.2d 528, ¶14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990). Additionally, “[a]buse-of-discretion review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court.” *State v. Darmond*, 135 Ohio St.3d 343, 2013–Ohio–966, 986 N.E.2d 971, ¶34. Moreover, a court that is reviewing whether a trial court abused its discretion when dividing marital property must view the property division in its entirety and consider the totality of the circumstances. *Briganti v. Briganti*, 9 Ohio St.3d 220,

222, 459 N.E.2d 896 (1984); accord *Byers v. Byers*, 4th Dist. Ross No. 09CA3124, 2010–Ohio–4424, ¶19; *Elliott* at ¶17.

B

R.C. 3105.171

{¶ 8} Although trial courts possess broad discretion to divide marital property, the Ohio Revised Code requires trial courts to divide marital and separate property equitably between the parties. R.C. 3105.171(B). In most cases, this requires the court to divide the marital property equally. R.C. 3105.171(C)(1). If, however, an equal division would produce an inequitable result, the court must divide the property equitably. *Id.*

{¶ 9} Additionally, “[a]lthough R.C. 3105.171 does not explicitly address the division of marital debt * * * marital debt is subject to allocation as part of the property distribution and that debt allocation is guided by the same equitable factors contained in R.C. 3105.171.” *Polacheck v. Polacheck*, 9th Dist. Summit No. 26551, 2013–Ohio–5788, ¶18; accord *Machesky v. Machesky*, 4th Dist. Ross No. 10CA3172, 2011–Ohio–862, ¶10, quoting *Smith v. Emery-Smith*, 11th Dist. Geauga No.2009–G–2941, 2010–Ohio–5302, ¶45 (stating that “[a] trial court must take into account marital debt when dividing marital property”); *Elliott* at ¶25; *Samples v. Samples*, 4th Dist. Washington No. 02CA21, 2002–Ohio–544. Thus, a trial court should also equally divide marital debt, unless an equal division would be inequitable.

{¶ 10} R.C. 3105.171(F) sets forth a list of factors that a trial court shall consider in order to ensure an equitable division of the parties’ marital property:

- (1) The duration of the marriage;
- (2) The assets and liabilities of the spouses;
- (3) The desirability of awarding the family home, or the right to reside in

the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

(4) The liquidity of the property to be distributed;

(5) The economic desirability of retaining intact an asset or an interest in an asset;

(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

(9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;

(10) Any other factor that the court expressly finds to be relevant and equitable.

C

PROPERTY CLASSIFICATION

{¶ 11} R.C. 3105.171(B) places a mandatory duty upon trial courts to “determine what constitutes marital property and what constitutes separate property.” *Bibbee v. Bibbee*, 4th Dist. Athens No. 15CA38, 2016-Ohio-5188, 2016 WL 4079746, ¶22; *Girton v. Girton*, 4th Dist. Athens No. 08CA30, 2009-Ohio-4458, ¶6. R.C. 3105.171(A)(3)(a) defines “marital property” as:

(i) All real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

(ii) All interest that either or both of the spouses currently has in any real or personal property, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage;

(iii) Except as otherwise provided in this section, all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage;

(iv) A participant account, as defined in section 148.01 of the Revised Code, of either of the spouses, to the extent of the following: the moneys that have

been deferred by a continuing member or participating employee, as defined in that section, and that have been transmitted to the Ohio public employees deferred compensation board during the marriage and any income that is derived from the investment of those moneys during the marriage; the moneys that have been deferred by an officer or employee of a municipal corporation and that have been transmitted to the governing board, administrator, depository, or trustee of the deferred compensation program of the municipal corporation during the marriage and any income that is derived from the investment of those moneys during the marriage; or the moneys that have been deferred by an officer or employee of a government unit, as defined in section 148.06 of the Revised Code, and that have been transmitted to the governing board, as defined in that section, during the marriage and any income that is derived from the investment of those moneys during the marriage.

R.C. 3105.171(A)(6)(a) defines “separate property” as

all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

(i) An inheritance by one spouse by bequest, devise, or descent during the course of the marriage;

(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;

(iii) Passive income and appreciation acquired from separate property by one spouse during the marriage;

(iv) Any real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code;

(v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement;

(vi) Compensation to a spouse for the spouse’s personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets;

(vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by

clear and convincing evidence to have been given to only one spouse.

D

R.C. 5815.31

{¶ 12} In addition to the foregoing marital and separate property definitions contained in R.C. 3105.171(A), appellant asserts that R.C. 5815.31 required the trial court, as a matter of law, to exclude the trust assets. Appellant contends that R.C. 5815.31 “clearly states that the trial court should have kept all property owned by the parties’ trusts in the trusts, and followed the mandatory direction of the statute for ‘any provision in the trust conferring any beneficial interest of special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked.’” Thus, he argues that the trial court erred by denying his motion in limine and by considering the trust assets when dividing the parties’ property.

1

Motion in Limine

{¶ 13} We initially observe that a trial court’s decision regarding a motion in limine is an interlocutory order that is not subject to appellate review. A decision on a motion in limine “is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue,” and “[i]n virtually all circumstances finality does not attach.” *State v. Grubb*, 28 Ohio St.3d 199, 201-202, 503 N.E.2d 142 (1986). Consequently, “a ruling on a motion in limine may not be appealed.” *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, 816 N.E.2d 1049, ¶34 (2004); *Wallace v. S. Ohio Med. Ctr.*, 4th Dist. Scioto No. 10CA3383, 2011-Ohio-3570, 2011 WL 2852673, ¶34. Instead, the party filing a motion in limine must object to or proffer the evidence at trial in order to preserve the issue for appellate review. *Gable* at ¶34; accord Evid.R. 103(A). If a party properly preserves the evidentiary issue, an appellate court then will review the correctness of the trial court’s decision regarding

the admissibility of the evidence at trial, rather than the in limine ruling. *Tyler v. State Farm Ins. Co.*, 4th Dist. Adams No. 03CA765, 2004-Ohio-1225, 2004 WL 504593, ¶19, citing *Wray v. Herrell*, Lawrence App. No. 93CA08 (Feb. 24, 1994), and *State v. Hapney*, 4th Dist. Washington Nos. 01CA30 & 01CA31, 2002-Ohio-3250, ¶55.

{¶ 14} In the case at bar, without a transcript,¹ we are unable to determine whether appellant preserved the R.C. 5815.31 issue by objecting during the trial. Both parties, however, raised the issue in their post-trial memoranda. Additionally, we note that appellee did not assert on appeal that appellant failed to properly preserve the issue. Under these circumstances, we therefore assume that appellant properly preserved the R.C. 5815.31 issue.

2

Admitting Evidence

{¶ 15} Having determined that appellant properly preserved his objection to the trial court's consideration of evidence pertaining to the trust assets, we now may determine whether the trial court erred by admitting the evidence.

a

Standard of Review

{¶ 16} “Decisions involving the admissibility of evidence are reviewed under an abuse-of-discretion standard of review.” *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, 989 N.E.2d 35, ¶22, citing *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032; *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972

¹ On January 9, 2017, this court determined that we never authorized the record to be supplemented with the transcripts. We therefore struck the transcripts from the record.

N.E.2d 528, ¶19 (“It is well established that a trial court’s decision to admit evidence is an evidentiary determination within the broad discretion of the trial court and subject to review on an abuse-of-discretion standard.”). When, however, an appellant alleges that a trial court’s evidentiary ruling was “based on an erroneous standard or a misconstruction of the law,” an appellate court reviews the trial court’s evidentiary ruling using a *de novo* standard of review. *Wray v. Wessell*, 4th Dist. Scioto Nos. 15CA3724 and 15CA3725, 2016-Ohio-8584, 2016 WL 7912885, ¶13, citing *Morris* at ¶16, quoting *Castlebrook, Ltd. v. Dayton Properties Ltd. Partnership*, 78 Ohio App.3d 340, 346, 604 N.E.2d 808 (2nd Dist.1992); accord *Estate of Johnson* at ¶22 (reviewing admissibility of evidence by first examining whether, as a matter of law, statute applied, and then once threshold question concerning applicability of statute resolved, reviewing whether trial court abused its discretion); *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 909 N.E.2d 1237, 2009-Ohio-2496, ¶13 (stating that “[w]hen a court’s judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate”); *Wagner v. Roche Laboratories*, 85 Ohio St.3d 457, 460, 709 N.E.2d 162 (1999) (explaining that when “trial court decision being challenged did not involve the exercise of discretion, but was based on a question of law, no deference is afforded”); *Rohde v. Farmer*, 23 Ohio St.2d 82, 89, 262 N.E.2d 685 (1970) (“where a specific action, ruling or order of the court is required as a matter of law, involving no discretion, the test of ‘abuse of discretion’ should have no application”); *Shaffer v. OhioHealth Corp.*, 10th Dist. Franklin No. 03AP-102, 2004-Ohio-63, 2004 WL 35725, ¶6 (“however, where the trial court has misstated the law or applied the incorrect law, giving rise to a purely legal question, our review is *de novo*.”); Painter and Pollis, *Ohio Appellate Practice*, Appendix G (2015) (stating that although trial court

decisions involving the admission of evidence are generally reviewed as a discretionary matter, but they are “subject to *de novo* review if a clear legal rule obtains”).

{¶ 17} In the case at bar, appellant alleges that the trial court incorrectly applied the law by determining that R.C. 5815.31 did not mandate exclusion of the trust assets. The correct interpretation of this statute presents a question of law that we review independently and without deference to the trial court. *E.g.*, *State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶6; *State v. Bundy*, 2012-Ohio-3934, 974 N.E.2d 139, ¶46 (4th Dist.); *see Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010–Ohio–4505, 936 N.E.2d 481, ¶29, citing *MCI Telecommunications Corp. v. Pub. Util. Comm.*, 38 Ohio St.3d 266, 268, 527 N.E.2d 777 (1988) (stating that appellate courts have “complete and independent power of review as to all questions of law”).

b

Statutory Interpretation

{¶ 18} The Ohio Supreme Court recently explained the initial inquiry when a court interprets a statute as follows:

When we consider the meaning of a statute, our first step is always to determine whether the statute is “plain and unambiguous.” *State v. Hurd*, 89 Ohio St.3d 616, 618, 734 N.E.2d 365 (2000). If “the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation,” because “an unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus. Ambiguity, in the sense used in our opinions on statutory interpretation, means that a statutory provision is “capable of bearing more than one meaning.” *Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶16. Without “an initial finding” of ambiguity, “inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in

R.C. 1.49 is inappropriate.” *Id.*; *State v. Brown*, 142 Ohio St.3d 92, 2015-Ohio-486, 28 N.E.3d 81, ¶10.

Jacobson v. Karoey, — Ohio St.3d —, 2016-Ohio-8434, — N.E.3d —, ¶8.

{¶ 19} In the case at bar, therefore, we first review the statutory language to ascertain whether it is “plain and unambiguous.”

c

Statutory Language

{¶ 20} R.C. 5815.31 states:

Unless the trust or separation agreement provides otherwise, if, after executing a trust in which the grantor reserves to self a power to alter, amend, revoke, or terminate the provisions of the trust, a grantor is divorced, obtains a dissolution of marriage, has the grantor’s marriage annulled, or, upon actual separation from the grantor’s spouse, enters into a separation agreement pursuant to which the parties intend to fully and finally settle their prospective property rights in the property of the other, whether by expected inheritance or otherwise, the spouse or former spouse of the grantor shall be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. If the grantor remarries the grantor’s former spouse or if the separation agreement is terminated, the spouse shall not be deemed to have predeceased the grantor, and any provision in the trust conferring any beneficial interest or a general or special power of appointment on the spouse or former spouse or nominating the spouse or former spouse as trustee or trust advisor shall not be revoked.

{¶ 21} The statute does not plainly and unambiguously indicate that a trial court must exclude trust assets when effecting a property division in a divorce proceeding. Instead, the statute states that *after* a grantor is divorced or *after* the marriage otherwise terminates (not before or during a divorce or other marriage termination proceeding), then any provision conferring upon the former spouse a beneficial interest, a general or special power of

appointment, or nominating the spouse or former spouse as trustee or trust advisor shall be revoked. The plain language of the statute demonstrates that it applies following a divorce or other marriage termination,² not when a trial court effects a property division in a divorce or other marriage termination proceeding. Additionally, we point out that R.C. 3105.171(B) states: “For purposes of this section, the court has jurisdiction over all property, excluding the social security benefits of a spouse other than as set forth in division (F)(9) of this section, in which one or both spouses have an interest.” This statute seems to indicate that a court hearing a divorce has jurisdiction over a trust in which a spouse holds an interest. Moreover, appellant has not cited, and our research has not uncovered, any cases that apply the statute in the manner that he suggests. Instead, courts appear to consider trust assets when allocating property in a divorce proceeding. See generally *Dumas v. Estate of Dumas*, 68 Ohio St.3d 405, 414, 627 N.E.2d 978 (1994) (Resnick, J., dissenting) (“That Mr. Dumas created a trust to distribute property acquired during the marriage at his death would not have prevented Mrs. Dumas in the divorce proceedings from reaching the assets of the trust, inasmuch as the trust was funded with marital property. Thus, Mrs. Dumas interest would have been taken into account if the divorce had proceeded”); *Slutzker v. Slutzker*, 5th Dist. Stark No. 1994CA00108, 1994 WL 822539, *3 (agreeing with if trust assets excepted from divorce proceeding simply because trust holds title, “the result would be that in every divorce case an equitable share of marital assets could be avoided by simply setting up a trust”); *Friedman v. Friedman*, 9th Dist. Summit No. 14357, 1990

² We recognize that the statute also applies when the parties enter into a separation agreement that fully and finally settles their property rights. Because this provision is inapplicable to the case at bar, we have omitted the precise language from our opinion in order to avoid verbosity. Instead, solely for purposes of this opinion, we include it within our definition of “other marriage termination.”

WL 51998, *2 (stating that “[t]he matter of whether the assets in the inter vivos trust were marital property is the issue which was before the domestic relations court” and that probate court did not have subject matter jurisdiction over assets accumulated during marriage).

{¶ 22} In *Katz v. Katz*, 10th Dist. Franklin Nos. 13AP-409 and 13AP-417, 2014-Ohio-1255, 2014 WL 1347089, the husband asserted that the trial court erred by classifying trust assets as marital property. He claimed that the wife bore the burden to establish “that the properties which ostensibly belonged to a third party were marital.” *Id.* at ¶24. The appellate court disagreed and explained:

[T]here was no competent credible evidence that [the husband] purchased the assets with non-marital funds. There was, however, evidence that [the husband] purchased the properties during the marriage and entered “Larry Katz Trustee” on the deeds. Entering the word “trustee” on the deeds does not transform the character of the property. Title does not determine whether property is marital, and a trial court is not bound by the form of the title in distributing property. *DiNunzio v. DiNunzio*, 11th Dist. No.2005-L-124, 2006-Ohio-3888, ¶62.

Id.; accord R.C. 3105.171(H) (“Except as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property.”).

{¶ 23} Likewise, in *Letson v. Letson*, 11th Dist. Trumbull No. 95-T-5356, 1997 WL 663514, *5, the husband argued that the trial court erred by determining that his revocable *inter vivos* trust had been transmuted into marital property. The appellate court determined that “some competent, credible evidence” supported the trial court’s decision. The appellate court noted that the trial court found that the property was marital due to the husband’s “frequent blurring of the line between separate and marital property.” *Id.* at *4.

{¶ 24} Similarly, in the case at bar we believe that title is not determinative. *Leathem v. Leathem*, 94 Ohio App.3d 470, 473, 640 N.E.2d 1210, 1212, 1994 WL 543092 (3rd Dist.1994) (stating that holding title to property by one spouse individually does not determine whether the property is separate property or marital property). Simply because the trusts held title to certain parcels of real estate does not mean that the real estate is non-marital property. Turner, Division of Trusts in Divorce Cases, 15 No. 5 Divorce Litig. 85 (May 2003) (“In the settlor’s divorce case, since the trust is not property, it is not an independent entity in the same manner as a corporation or irrevocable trust. For all practical purposes, the settlor actually owns the trust assets. Those assets are therefore subject to direct classification and division.”). Instead, the relevant question is whether competent and credible evidence supports the trial court’s classification of the trust property as marital or separate property.

{¶ 25} In the case sub judice, appellant has not challenged the trial court’s finding that, during the marriage, the parties acquired the real estate that they placed in the trusts. We therefore need not consider whether competent and credible evidence supports the trial court’s classification of the trust assets as marital property. Furthermore, without a transcript, we would have no basis to conclude otherwise. Consequently, we disagree with appellant that R.C. 5815.31 mandated exclusion of the trust assets from the divorce proceeding.

{¶ 26} Accordingly, based upon the foregoing reasons, we overrule appellant’s first and second assignments of error.

E

RETIREMENT ASSETS

{¶ 27} In his third assignment of error, appellant asserts that the trial court abused its discretion by failing to equitably divide appellee’s retirement assets. In particular, appellant contends that awarding appellee all of her retirement assets constitutes an abuse of discretion.

{¶ 28} We again note that when an appellate court reviews a trial court’s property division in a divorce action, the appellate court must not consider any items in isolation, but rather, must consider the property division as a whole. *Briganti*, 9 Ohio St.3d at 222; *accord Sinkovitz v. Sinkovitz*, 4th Dist. Hocking No. 15CA18, 2016-Ohio-2861, ¶35. “The appropriate consideration is whether the trial court’s disposition of these items resulted in a property division, which, viewed in its entirety, was an abuse of discretion.” *Briganti*, 9 Ohio St.3d at 222.

{¶ 29} In the case at bar, we are unable to conclude that the trial court’s overall property distribution demonstrates an abuse of discretion. The parties accumulated slightly more than \$1.1 million in marital assets and approximately \$260,000 in marital debt. The trial court awarded appellant approximately \$568,325 in assets and awarded appellee approximately \$549,919 in assets.³ The court allocated to appellant approximately \$150,000 of debt, and to

³ In their appellate briefs, the parties agree upon these figures. We were unable to reach the same asset figures when reviewing the trial court’s decision. Our review shows that the court distributed the marital assets and debt as follows:

Appellee

Marital Assets:

Bridge Street Property	\$82,500
Malibu	\$11,500
Mariner	\$8,500
Checking account	\$750
Savings account	\$3,319
Deferred compensation	\$34,192.44
STRS	\$389,045.84

appellee approximately \$115,000 of debt. After subtracting the liabilities from the assets,

Profit from sale	\$17,000	
Personal property	\$4,995	
Total Assets	\$551,802.28	
 Marital Debt:		
Bridge Street Property	\$82,851.69	
Malibu	\$11,095.95	
Credit accounts	\$13,992.31	
		\$5,445.95
		\$742.23
		\$202.40
Total Debt	\$114,329.60	
Net	\$437,472.68	

Appellant

Marital Assets:

Real estate	\$176,500
Profit from sale	\$268,000
Vehicles	\$114,100
Life Insurance	\$1,411.32
Personal Property	\$900
Judgment	\$11,750
Total Assets	\$572,661.32

Marital Debts:

Mortgage	\$68,000
Credit accounts	\$77,256
Total Debt:	\$145,256
Net	\$427,405.32

We further point out that the court ordered both parties to remain liable for the deficiency judgment (\$45,506.78).

Although our calculations do not match the figures cited in the parties’ briefs, we will nevertheless use the parties’ agreed-upon figures. We further note that part of our inability to reach the same figures as the parties may result from the structure of the trial court’s opinion. The trial court’s decision does not contain a simple listing of its property distribution (like the listing in this footnote), but instead, distributes the property in paragraph form, i.e., “It is further ordered that [appellant] be, and hereby is, awarded the entirety of [her] Ohio Deferred Compensation Account * * *.” While we do not believe the trial court’s use of paragraphs is improper, it does render deciphering the property distribution more confusing than necessary.

appellant nets approximately \$423,069 and appellee nets approximately \$435,589. This \$12,520 difference, which amounts to approximately 1.5% of the net marital assets, is insufficient to show that the trial court's overall property division constitutes an abuse of discretion or is inequitable, especially when the trial court determined that appellant engaged in financial misconduct.

{¶ 30} R.C. 3105.171(E)(4) authorizes a trial court to make a distributive or greater award of marital property to one spouse upon a finding that the other spouse “has engaged in financial misconduct, including but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets.” The burden of proving financial misconduct is on the complaining spouse. *Jacobs v. Jacobs*, 4th Dist. Scioto No. 02CA2846, 2003–Ohio–3466, ¶25. “There must be a clear showing that the offending spouse either profited from the alleged misconduct or intentionally defeated the other spouse’s distribution of assets.” *Id.* at ¶23, citing *Wideman v. Wideman*, 6th Dist. Wood No. WD-02-30, 2003-Ohio-1858, ¶34; accord *Murphy v. Murphy*, 4th Dist. Lawrence No. 07CA35, 2008-Ohio-6699, 2008 WL 5265673, ¶45. “The decision of whether to make an award under this statute is reviewed for an abuse of discretion.” *Jacobs* at ¶22.

{¶ 31} In the case sub judice, appellant did not challenge the trial court’s finding that he engaged in financial misconduct. We therefore do not review that finding. Because the trial court found that appellant engaged in financial misconduct, the statute authorized it to make a greater award of marital property to appellee. Once again, we do not believe that the trial court abused its discretion by allocating a \$12,520 greater share to appellee. The trial court could

have rationally determined that appellant's failure to account to appellee for the sale of property that earned a profit justified awarding appellee a larger share of the marital assets.

{¶ 32} Accordingly, based upon the foregoing reasons, we overrule appellant's third assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Harsha, J., Abele, J. & Tyack, J.: Concur in Judgment & Opinion

For the Court

BY: _____
William H. Harsha, Judge

BY: _____
Peter B. Abele, Judge

BY: _____
*G. Gary Tyack, 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.

Judge G. Gary Tyack, Tenth
District Court of Appeals, sitting by assignment of the Ohio Supreme Court in the Fourth
Appellate District.