

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Deborah J. Long,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 11AP-510
	:	(C.P.C. No. 08DR-12-4797)
Joseph M. Long,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 31, 2012

Andrew S. Grossman, and Alyson B. Miller, for appellee.

Collins & Slagle Co., LPA, Philip M. Collins, and Ehren W. Slagle, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

CONNOR, J.

{¶ 1} Defendant-appellant, Joseph M. Long, appeals from a judgment entry and decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations.

{¶ 2} Joseph and plaintiff-appellee, Deborah J. Long, married on January 30, 1993. At the time Deborah was 27 years old and worked full-time as a registered nurse. Joseph was 31 years old, held his medical degree, and was completing a prolonged five-year period of residency, having switched specialties from surgery to anesthesiology during the course of his residency. The parties have four children together, born in 1993, 1994, 1996, and 1998.

{¶ 3} Deborah filed her complaint for divorce on December 31, 2008. By the time the matter went to trial in May 2010, the parties, through stipulation and agreement, resolved many issues. They agreed on a shared parenting plan and the distribution of the parties' assets and liabilities, although Joseph asserts on this appeal that this last stipulation addressed only distribution and not valuation of the items. The parties also stipulated to their respective incomes. Issues reserved for determination by the court at trial included the amount of child support, allocation of the children's uncovered medical and activity expenses, identification of a custodian for the children's college fund, allocation of guardian ad litem fees, attorney fees, and spousal support.

{¶ 4} With respect to those issues addressed in this appeal, the trial court set child support at \$3,500 per month payable by Joseph to Deborah, and spousal support of \$13,000 per month for nine years. The trial court ordered Joseph to pay Deborah \$37,500 toward her attorney fees above and beyond any amounts he had already paid toward these expenses.

{¶ 5} Some motion practice and a premature appeal to this court followed the trial court's judgment. On May 10, 2011, the court granted a Civ.R. 60(A) motion for relief from judgment filed by Joseph to correct certain errors and omissions in the trial court's initial judgment, primarily to incorporate stipulations and the shared parenting plan submitted by the parties. The trial court's judgment is now final, and Joseph brings the following three assignments of error:

I. FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO CONSIDER THE PARTIES' RETIREMENT BENEFITS AND RELATIVE ASSETS AND LIABILITIES IN DETERMINING SPOUSAL SUPPORT AS REQUIRED BY OHIO REV. CODE § 3105.18(C)(1)(d) AND (i).

II. SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT MADE AN ORDER OF ATTORNEYS' FEES WHEN THERE WAS NO REQUEST FOR AN AWARD AS PART OF TEMPORARY ORDERS PURSUANT TO OHIO R. CIV. P.

75(N), AND AN AWARD IS NOT EQUITABLE PURSUANT TO OHIO REV. CODE § 3105.73.

III. THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO DETERMINE THE REASONABLENESS OF THE ATTORNEYS' FEES ORDERED PURSUANT TO PROF. COND. R. 1.5(a).

{¶ 6} Joseph's first assignment of error asserts that the trial court abused its discretion because it did not consider the comparative value of retirement benefits and other assets and liabilities when setting spousal support. The trial court has broad discretion to determine the proper amount of spousal support based on particular facts and circumstances of the party of the case. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67 (1990). That discretion is not unlimited, and the court must be guided by the factors set forth in R.C. 3105.18: the relative income and earning abilities of the parties; the age and health of the parties; anticipated retirement benefits of the parties; the duration of the marriage; the opportunity to seek employment when a party is custodian of a minor child of the marriage; the relative assets and liability of the parties after distribution of marital and separate property; the contribution of each party to the education, training, or earning ability of the other; the time, expense, and opportunity for one party to acquire education, training, or experience to increase his or her earning potential; the tax consequences of an award of spousal support; lost income potential for either party resulting from that party's devotion of effort to marital responsibilities; and any other factor the court expressly finds to be relevant and equitable. *Meeks v. Meeks*, 10th Dist. No. 05AP-315, 2006-Ohio-642, ¶ 42. The trial court, however, is not required to expressly comment on each of these statutory factors. The record need only reflect that the court considered them when making its award. *Id.*, citing *McClung v. McClung*, 10th Dist. No. 03AP-156, 2004-Ohio-240, ¶ 21.

{¶ 7} In the present case, Joseph argues that the trial court abused its discretion because it failed to properly and fully consider the relative retirement benefits available to the parties and their relative assets and liabilities after distribution of the marital and separate property.

{¶ 8} Joseph first argues that, while the parties did stipulate to a division of retirement benefits, assets and liabilities, they did not stipulate to the value of these. Joseph expressly does not contend that the property division was inequitable, only that the actual value of the distributed assets was not fully considered because the trial court did not recite the cash value of these assets in detail and apply the resulting detailed financial analysis in its conclusions when setting spousal support.

{¶ 9} Unfortunately, Joseph has repeated the trial court's alleged error when briefing this matter on appeal. Joseph only generally alleges that "(1) Deborah received real estate that had a significant amount of its mortgage paid by Joseph, and the real estate that Deborah received is much less expensive to maintain than the real estate Joseph received; (2) Joseph was stuck paying for a 1,000,000+ home and all of its utilities and taxes; (3) Deborah received all of her retirement plus \$50,000 of Joseph's retirement; (4) each party received vehicles; and (5) each party assumed debt." (Appellant's brief, at 9-10.) This lack of financial precision, of itself, would lead us to conclude that Joseph's assignment of error is not fully developed and supported by detailed argument as required by App.R. 16(A)(7). We will nonetheless undertake a review of the factors relied on by the trial court when setting spousal support in this case.

{¶ 10} Pursuant to the income stipulation of the parties, Deborah holds requisite degrees and professional qualifications to work as a registered nurse and earns \$26.21 per hour working as a nurse at Children's Hospital, working 32 hours per week for an annual income of \$43,613. Deborah testified that she works slightly less than full time due to certain health conditions that were extensively addressed in the trial court's decision but will not be detailed here as they are not contested by Joseph. During the three-year period of 2007-2009, Joseph earned an average income of \$573,988 per year. Deborah's age, health, and existing professional qualifications make it unlikely that she can, or should, undertake further training or otherwise pursue an increase in income. Joseph's income is established and unlikely to decrease. The trial court noted that, even after the exchange of spousal support, Joseph will retain 65 percent of the parties' aggregate

income while Deborah receives 35 percent.¹ While Joseph retains the expense of a substantially more expensive residence (\$1,000,000 versus \$400,000), he also retains the benefit and enjoyment thereof. The marriage, as noted by the trial court was a relatively long-term one, and while the parties enjoyed a high standard of living, they appear to have saved only modestly. Outside of the retirement accounts, Joseph does not identify any separate source of funds that would impact the relative net worth of the parties and the spousal support computation. Because the retirement accounts, by their nature, are not best used for living expenses of persons still well within their working years, absent additional reason for considering these we find no abuse of discretion on the part of the trial court in declining to examine these in detail as a component of current income.

{¶ 11} The parties appear, by their own description, to have enjoyed a luxurious standard of living while married. The two younger children attend parochial school at moderate cost; the children take lessons in various disciplines and play sports. The two older children are enrolled in public school. Deborah did not work outside the home during the marriage, working as a homemaker and caregiver for their children, presumably due to her lower earning potential and to Joseph's admittedly intense work schedule. While the trial court did not particularize its assessment of the parties' relative assets after property division, neither has Joseph on appeal. Each party received vehicles, and each party assumed a modest amount of debt. We further note that the trial court ordered spousal support with a duration of nine years from the entry of judgment, rather than permanent spousal support. For all the foregoing reasons, we find that the trial court did not err in its determination of spousal support in this case, and Joseph's first assignment of error is overruled.

{¶ 12} Joseph's second assignment of error asserts that the trial court erred when it ordered Joseph to pay \$37,500 toward Deborah's attorney fees. Joseph argues that there was no basis for an award of attorney fees under the temporary orders issued by the

¹ This figure does not quite coincide with the average income figures employed elsewhere by the court. There is some suggestion that the court may have taken projected bonuses into account, as these were the object of some dispute in connection with temporary orders issued by the magistrate.

magistrate in the case, and no basis for an award of attorney fees pursuant to R.C. 3105.73 in the final judgment.

{¶ 13} With respect to the temporary orders, the magistrate initially denied Deborah's request for \$25,000 in attorney fees. Deborah then filed a motion to modify the temporary order, but did not specifically mention the attorney fees issued. The motion to modify was reserved for hearing with the balance of the case before the judge at the final hearing, where the court's decision disposing of the motion to modify does not mention attorney fees. It appears from the record, therefore, that the trial court did not award attorney fees in the present case based upon any award in the temporary orders or any requests for the modification thereof. Joseph's arguments on appeal with respect to this issue are therefore not pertinent.

{¶ 14} Joseph further argues that an award of attorney fees was not equitable under R.C. 3105.73, which provides that a court may award all or part of one party's attorney fees to be paid by the other if the court finds equitable. In determining whether such an award is equitable, the court will consider the parties' marital assets and income, prevailing orders of temporary spousal support during the litigation, the conduct of the parties in litigation, and any other appropriate and relevant factor. R.C. 3105.73(A). When reviewing whether an award of attorney fees pursuant to R.C. 3105.73 is equitable, we will not reverse the trial court's decision absent an abuse of discretion. *Parker v. Parker*, 10th Dist. No. 05AP-1171, 2006-Ohio-4110, ¶ 36.

{¶ 15} The trial court's decision on this question focuses particularly on the parties' conduct during the litigation. The trial court found that Joseph's "bitterness, stubbornness and bullying has prolonged this litigation." (Judgement Entry-Decree of Divorce at 28.) The court noted that Joseph had repeatedly contacted Deborah's attorney directly, rather than going through his own attorney, even after he was advised that it was inappropriate to do so. The court also noted Joseph's evasiveness during cross-examination, his admitted appropriation of certain marital assets at the time of separation, and certain conduct toward the couple's children that required appointment of a guardian ad litem in the case.

{¶ 16} We first observe that, after reviewing the record in detail, none of the specific incidents of conduct referred to by the trial court are particularly egregious when compared to what, sadly, can be viewed as common in the context of emotionally charged divorce proceedings. Nonetheless, the trial court was in the best position to assess their impact on the case and the extent to which these incidents disrupted or delayed the matter. "Conduct supporting an award of attorney's fees may include * * * actions that unnecessarily prolong the proceedings." *Sullivan v. Sullivan*, 6th Dist. No. L-09-1022, 2010-Ohio-3064, ¶ 66, citing *Doody v. Doody*, 11th Dist. No. 2006-L-200, 2007-Ohio-2567, ¶ 63, and *McCord v. McCord*, 10th Dist. No. 06AP-102, 2007-Ohio-164, ¶ 18.

{¶ 17} Despite the fact that the parties, to Joseph's credit, managed to settle a number of contentious issues before going to trial, the court could consider the overall tenor of litigation and the extent to which Joseph's conduct may have otherwise prolonged the matter and increased costs through actions and conduct not specifically recognized in orders rendered by the court. Deborah points on appeal, for example, to difficulties in resolving the parties' tax filings for 2009. Counsel informally agreed to have a neutral third-party accountant analyze the parties' finances and recommend the filing method and status. Joseph then, as appears in his tax returns for 2009, did not follow the recommended method. Deborah testified that she incurred additional attorney fees to resolve some issues arising from this. (Tr. 27-32.)

{¶ 18} While the court's award of attorney fees does not otherwise address the equitable factors, we note that the trial court could have based the award, aside from Joseph's conduct during litigation, upon the relative disparity in income between the parties that subsisted after the spousal support award in the case. This would have established that Joseph had a better capacity to pay any remaining attorney fees than Deborah. We accordingly find that the award of attorney fees was equitable pursuant to R.C. 3105.73(B). Joseph's second assignment of error is overruled.

{¶ 19} Joseph's third assignment of error asserts that the trial court erred in awarding fees without making the determination that the amount was reasonable. Again, the financial context for this argument is incompletely developed. It appears in this case that the trial court awarded attorney fees based upon the amount charged by Deborah's

attorney to that date, approximately \$50,000, and subtracted the \$12,500 already paid by Joseph. The trial court accepted the statement of account into evidence and took testimony from Deborah that she was satisfied with the quality of her representation.

{¶ 20} Joseph now complains that the trial court did not receive any expert testimony regarding the reasonableness of the attorney fees in the case. The trial court, however, is not required to hear such testimony and may rely on its own knowledge and experience to determine the reasonableness of the amount claimed. *McCord* at ¶18, citing *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, ¶ 44 (10th Dist.). Given the trial court's greater familiarity with the progress of the matter before it and its inherently superior position to observe the relative conduct of the parties and counsel, the trial court was in a good position to assess the effectiveness of counsel and the reasonableness of fees. Moreover, counsel for Joseph did not attack the reasonableness of fees when the matter came up for hearing, and the matter is arguably waived on appeal in any event. In accordance with the foregoing, Joseph's third assignment of error is overruled.

{¶ 21} In summary, the three assignments of error of appellant Joseph M. Long are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed in all respects.

Judgment affirmed.

BROWN, P.J., and SADLER, J., concur.
