[Cite as *Banchefsky v. Banchefsky*, 2010-Ohio-4267.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Debra K. Banchefsky,	:	
Plaintiff-Appellee,	:	
		No. 09AP-1011
v.	:	(C.P.C. No. 08DR01-0259)
Robert B. Banchefsky,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 9, 2010

Grossman Law Offices, and *Andrew S. Grossman*, for appellee.

Gary J. Gottfried Co., *L.P.A.*, and *Gary J. Gottfried*, for appellant.

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

SADLER, J.

{¶1} Defendant-appellant, Robert B. Banchefsky ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce terminating the marriage of appellant and plaintiff-appellee, Debra K.

Banchefsky ("appellee"). Because the trial court committed no reversible error, we affirm that judgment.

{¶2} The parties were married on January 13, 1985 and had two children during the marriage. At present, both children are beyond the age of majority; however, only the older child is emancipated. The younger child is not emancipated due to developmental disabilities.

{¶3} During the marriage, the parties resided in Bexley, Ohio. Appellee is employed as a speech and language pathologist. Appellant is a licensed practicing dentist and, during most of the marriage, was the sole shareholder of a dental practice known as Eastside Family Dental, Inc. ("Eastside Family Dental").

{¶4} On January 23, 2008, appellee filed a complaint for divorce, naming both appellant and Eastside Family Dental as defendants. Appellant filed an answer and counterclaim on February 14, 2008; Eastside Family Dental did not file an answer. Upon motion of appellant, the trial court joined Raymond James Financial Services, Inc. ("Raymond James") as a third-party defendant; Raymond James filed an answer on April 29, 2008. Upon the parties' separate motions, the court issued standard temporary restraining orders pertaining to financial issues. In addition, the court, through a magistrate, issued temporary orders.

{¶5} On October 16, 2008, appellant filed a motion for modification of the temporary restraining orders to allow appellant to sell his dental practice. On May 19, 2009, the parties filed an agreed judgment entry modifying the temporary restraining orders to allow appellant to proceed with the sale. On May 21, 2009, appellant sold the practice to another dentist for $580,000 pursuant to an Asset Purchase Agreement

("APA"). The APA specifically included the sale of the trade name "Eastside Family Dental," along with the telephone and facsimile numbers, e-mail addresses, websites, and web address for Eastside Family Dental. In addition, the APA included a non-competition clause precluding appellant from practicing dentistry within a ten-mile radius of Eastside Family Dental for five years, except as an associate of Eastside Family Dental. The APA further provided that appellant would work as an independent contractor for Eastside Family Dental for a period of time not to exceed six months following the sale.

{¶6} Thereafter, the divorce proceeded to trial over several days in June, August, and September 2009. On September 28, 2009, the trial court filed a Decision and Judgment Entry Decree of Divorce. Therein, the court granted the parties a divorce, divided the marital property, determined that the parties are obligated to support the younger child beyond the age of majority, allocated parental rights and responsibilities for that child, ordered appellant to pay spousal support of $6,000 per month plus processing charge, and ordered appellant to pay child support in the amount of $1,500 per month plus processing charge. In addition, the court released the other defendants from the case.

{¶7} Appellant timely appeals, assigning five errors for our review:

1. **The trial court erred and abused its discretion when it concluded that Appellant was voluntarily underemployed.**

2. **The trial court erred and abused its discretion when it calculated and averaged Appellant's income pursuant to R.C. §3119.05(H) for the reason that Appellant's income was neither inconsistent nor unpredictable.**

3. **The trial court erred and abused its discretion when it imputed income to Appellant [t]o determine his child support and spousal support obligations.**[1]

4. **The trial court erred and abused its discretion when it ignored undisputed expert testimony and divided the sale proceeds from Appellant's dental practice with personal goodwill included as a marital asset subject to division.**

5. **The trial court erred and abused its discretion for the reason that it failed to equitably allocate the parties' assets when it allocated to Appellant as martial [sic] assets: (1) the difference between funds expended by Appellant to pay off an automobile and the current value of the automobile; and (2) the current value of the same automobile.**

{¶8} Appellant contends in his first assignment of error that the trial court erred in concluding he was voluntarily underemployed. In calculating child support, a trial court must determine the parents' income. Pursuant to R.C. 3119.01(C), income for child support purposes is defined to include the sum of the parents' gross income and "any potential income of the parent." R.C. 3119.01(C)(5)(b). Potential income includes imputed income the court determines the parent would have earned if fully employed based upon the criteria set forth in R.C. 3119.01(C)(11)(a)(i) through (x). However, before a trial court may impute income to a parent, it must first find that the parent is

[1] Appellant's brief contains a discrepancy with regard to the wording of the third assignment of error. On page ii, under "Table of Contents," appellant sets forth the third assignment of error as: "[t]he trial court erred and abused its discretion when it imputed income to Appellant [t]o determine his child support and spousal support obligations" and references page 13 of the brief as the starting point of the argument. Page 13 replicates the language set forth under the "Table of Contents." However, on page vi, under the "Statement of the Assignments of Error," appellant sets forth the third assignment of error as "[u]pon concluding that Appellant was voluntarily underemployed, the trial court erred and abused its discretion in determining Appellant's support obligations when it averaged Appellant's income over a three year period." As the wording of the third assignment error on pages ii and 13 more accurately reflects appellant's argument as set forth in the body of appellant's brief, we adopt that language in our statement of appellant's third assignment of error. We further note that appellee duplicates that language in her response to appellant's third assignment of error and responds to the argument accordingly.

voluntarily unemployed or underemployed. *Apps v. Apps,* 10th Dist. No. 02AP-1072, 2003-Ohio-7154, ¶48. Whether a parent is voluntarily unemployed or underemployed is a determination within the trial court's discretion and will not be disturbed absent an abuse of discretion. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. "[T]he trial court must weigh the facts and circumstances of each particular case in determining whether a parent is voluntarily underemployed." *Bruno v. Bruno,* 10th Dist. No. 04AP-1381, 2005-Ohio-3812, ¶16, citing *Rock.*

{¶9} Here, the trial court concluded that appellant was voluntarily underemployed. The court found that appellant was the sole shareholder of Eastside Family Dental for over 20 years, practicing for much of that time primarily in the area of cosmetic dentistry, and that for the three years preceding trial, i.e., 2006, 2007, and 2008, he earned $279,144, $369,961, and $287,288, respectively, from the dental practice. The court further determined that appellant unilaterally decided to sell his dental practice during the course of the litigation. The court further noted that appellant continues to practice dentistry as an independent contractor for Eastside Family Dental, and that appellant projected his gross income of $150,000 to $170,000 for 2009, from which appellant must pay all of his own expenses, including taxes, malpractice insurance, and personal expenses.

{¶10} The court noted that appellant attributed his decreased income solely to the fact that the general downturn in the economy has resulted in a significant decrease in the number of cosmetic dentistry procedures he performs. The court recognized that the decrease in cosmetic procedures performed by appellant was partially responsible for the decrease in appellant's income; however, the court also found that appellant's decision to

sell the practice resulted in his no longer receiving additional income generated by other employees of the practice.

{¶11} The court also discussed appellant's "curious" testimonial demeanor when questioned about his intention and/or his ability to continue working at Eastside Family Dental. (Decision and Judgment Entry, 33.) The court found appellant's testimony to be conflicting regarding his conversations with the dentist who purchased the practice as to whether appellant would continue his independent contract beyond the six-month timeframe set forth in the agreement. Indeed, the court stated that it "was left with the sense that the Defendant would be welcomed to extend his independent contract with Dr. Saunders [sic]. However, for reasons that are not clear, Defendant indicated personal and professional ambivalence as to whether he will stay employed in this capacity or not." (Decision and Judgment Entry, 33.)

{¶12} Appellant challenges the trial court's characterization of the sale of the dental practice as unilateral, arguing that both parties agreed to sell it. In support of this argument, appellant cites the May 19, 2009 Agreed Judgment Entry modifying the temporary restraining orders to allow the sale of the practice. Appellant contends that the trial court should not have considered the decision to sell the practice in determining whether appellant is voluntarily underemployed. We disagree.

{¶13} Appellee testified that during the marriage she and appellant never discussed the possibility of selling the practice, and that appellant initiated the sale of his own accord after the divorce proceedings commenced. Appellee further testified that although she was not in favor of selling the practice, she ultimately permitted it through the agreed entry. The trial court expressly found appellee's testimony regarding her

involvement or, more precisely, her lack of involvement in the decision to sell the practice to be credible.

{¶14} Furthermore, as appellee notes, the Agreed Judgment Entry provides that "[b]y agreeing to allow the sale of the practice pre-decree, neither party is waiving any arguments they may have relative to the practice, specifically including but not limited to the following: the extent to which indebtedness associated with the practice was an appropriate business expense; the classification of the proceeds, or any portion thereof, as marital or separate property; the extent to which a sale of the practice was a reasonable business decision in light of (a) the economy in general and (b) the fact that the Court has yet to rule on the division of property or the issue of support." (May 19, 2009 Agreed Judgment Entry Modifying the Court's Temporary Restraining Order, 2-3.) In addition, the Agreed Judgment Entry provides that "[a]lthough the practice has been sold the trial court shall consider [appellant's] earnings from East Side Family Dental in setting a support order." (May 19, 2009 Agreed Judgment Entry Modifying the Court's Temporary Restraining Order, 3.) The parties thus agreed that appellee could assert all arguments pertaining to the sale of the practice, presumably including the parties' respective involvement in the decision to sell. In addition, pursuant to the terms of the Agreed Judgment Entry, the parties agreed, and the trial court accordingly ruled, that appellant's earnings from his dental practice must be considered by the court in fashioning a support order. By extension, those earnings must be considered in determining whether appellant was voluntarily underemployed. We also note that the trial court found no evidence indicating that appellant was either physically or mentally incapable of maintaining his dental practice. Appellant does not dispute the court's

finding in this regard. Accordingly, the trial court properly considered appellant's decision to sell the practice in determining whether he was voluntarily underemployed.

{¶15} Appellant further argues that the trial court abused its discretion in finding him to be voluntarily underemployed because the non-competition clause in the APA effectively precludes him from being employed to his full capacity for a period of five years. We disagree. As noted above, the non-competition clause precludes appellant from practicing dentistry within a 10-mile radius of Eastside Family Dental for a period of five years, except as an associate of Eastside Family Dental. At trial, appellant conceded that the non-competition clause does not prohibit him from opening another dental practice or working as an independent contractor for another dentist more than ten miles from Eastside Family Dental. Thus, contrary to appellant's assertion, the non-competition clause in the APA does not preclude appellant from being employed to his full potential.

{¶16} The trial court weighed the facts and circumstances in the instant case and concluded that appellant was voluntarily underemployed. Upon thorough review of the record, we cannot find that the trial court abused its discretion in so concluding. Accordingly, we overrule the first assignment of error.

{¶17} In his second assignment of error, appellant contends the trial court abused its discretion in averaging appellant's income from his dental practice because: (1) he no longer held that employment and such employment cannot be duplicated; and (2) his income from his dental practice was neither inconsistent nor unpredictable. Once a parent is found to be voluntarily underemployed, the court may then impute income to the parent. In the present case, the court imputed income of $312,131 to appellant. The

court arrived at this figure by averaging appellant's income from appellant's dental practice for the three-year period preceding the 2009 trial.

{¶18} R.C. 3119.05(H) provides that, "[w]hen the court * * * calculates gross income, the court * * * when appropriate, may average income over a reasonable period of years." See also *Rhoades v. Priddy-Rhoades,* 10th Dist. No. 06AP-740, 2007-Ohio-2243, ¶11. A trial court's decision to employ income averaging under R.C. 3119.05(H) will not be reversed absent an abuse of discretion. Id., citing *Scott G.F. v. Nancy W.S.,* 6th Dist. No. H-04-015, 2005-Ohio-2750.

{¶19} Appellant cites numerous cases for the proposition that it is inappropriate to employ income averaging when income decreases significantly due to job loss and is not expected to rise again. In *McGuire v. McGuire,* 4th Dist. No. 01CA2789, 2002-Ohio-1061, the court concluded that the trial court erred by averaging the obligor's income when the income did not fluctuate, but, instead, had decreased significantly due to a disabling injury. In *Johnson v. Huddle,* 4th Dist. No. 03CA19, 2004-Ohio-410, the court found income averaging inappropriate where the obligor's income did not fluctuate within his job, but, instead, dropped precipitously due to job loss and would not rise again until he located a new job. Appellant urges that his transition from business owner to independent contractor is analogous to the circumstances in *McGuire* and *Johnson* in that his income dropped sharply due to a change in employment status and is not expected to rise again. As such, appellant contends the trial court abused its discretion in averaging his income from his dental practice for the three years preceding the 2009 trial and, instead, should have utilized his income from his employment as an independent contractor. We disagree.

{¶20} Initially, we note that the *Johnson* court intimated that income averaging is appropriate in unemployment or underemployment situations where, as here, there has been a finding that the obligor is voluntarily unemployed or underemployed. Further, as noted above, the trial court concluded that appellant unilaterally decided to sell his dental practice. The trial court also noted that the May 19, 2009 Agreed Judgment Entry required the court to consider appellant's prior income from his dental practice for support determination purposes. In accordance with the Agreed Judgment Entry, the court considered appellant's income from his dental practice. Because the practice sold in May 2009, the trial court examined appellant's income from the three years preceding the sale.

{¶21} This court has determined that income averaging is particularly appropriate where income is unpredictable or inconsistent. *Marquard v. Marquard* (Aug. 9, 2001), 10th Dist. No. 00AP-1345. Appellant suggests that in so holding, we effectively foreclosed income averaging in cases where income is neither unpredictable nor inconsistent. We do not agree. As noted, a trial court has considerable discretion in calculating income for purposes of determining child support, and this discretion extends to the use of income averaging in appropriate circumstances. In any event, in this case, appellant's income from his dental practice was inconsistent over the three years preceding the sale. As noted above, in 2006, 2007, and 2008, appellant earned $279,144, $369,961, and $287,288, respectively. Appellant argues that his 2007 income was simply an anomaly, but offers no explanation for this proposition.

{¶22} Finally, appellant contends that the trial court abused its discretion in including in his earnings used in the average an amount for the personal use of appellant's 2005 BMW. Appellant argues that no evidence establishes that appellant's

use of that automobile was for personal, rather than business, purposes. We disagree. At trial, appellee presented Plaintiff's Exhibit 42, a detailed statement identifying personal expenses for 2008, including automobile expenses, paid through the use of Eastside Family Dental's business credit card. Appellee testified that upon receipt in discovery of the monthly statements for the credit card, she categorized each of the expenses as personal or business based upon "25 years of married life." (Tr. 319.) We also note that appellee testified that she worked in the dental practice periodically during the marriage, which presumably provided appellee insight into the types of personal expenses for which the business credit card was used. The court, noting that the parties disagreed about whether certain credit card expenditures were personal or business, ultimately concluded that the automobile expenses identified in Plaintiff's Exhibit 42 were personal rather than business related. The court apparently found appellee's testimony on this issue to be credible. It is well-settled that the trial court, as the trier of fact, is the sole judge of witness credibility and, as such, may believe or disbelieve all or part of any witness' testimony. *Ruben v. Ruben* (July 26, 1983), 10th Dist. No. 82AP-914. This court is not permitted to substitute its judgment for that of the trial court in ruling on witness credibility. Id. Accordingly, we find that, contrary to appellant's assertion, there is evidence to support the trial court's finding in this regard. In addition, we note that appellant does not argue that he provided documentary evidence or testimony disputing appellee's evidence.

{¶23} For all these reasons, we conclude that income averaging was an appropriate and fair method to assess appellant's gross income. Accordingly, we cannot say that the trial court abused its discretion in the use of averaging to calculate appellant's income. We thus overrule the second assignment of error.

{¶24} Appellant's third assignment of error contends the trial court erred in imputing income to him. As noted above, the trial court properly found appellant to be voluntarily underemployed. The amount of income to be imputed to a parent found to be voluntarily underemployed is a question of fact, not to be disturbed absent an abuse of discretion. *Rock* at 112. Pursuant to R.C. 3119.01(C)(11)(a), when imputing income to a parent, the trial court must consider: (i) the parent's prior employment experience; (ii) the parent's education; (iii) the parent's physical and mental disabilities, if any; (iv) the availability of employment in the geographic area in which the parent resides; (v) the prevailing wage and salary levels in the geographic area in which the parent resides; (vi) the parent's special skills and training; (vii) whether there is evidence that the parent has the ability to earn the imputed income; (viii) the age and special needs of the child for whom child support is being calculated under this section; (ix) the parent's increased earning capacity because of experience; and (x) any other relevant factor.

{¶25} Appellant argues that the trial court was required to consider the statutory mandates of R.C. 3119.01(C)(11)(a) instead of employing income averaging pursuant to R.C. 3119.05(H). Appellant provides no case citation for his proposition that the two statutes are mutually exclusive, and we decline appellant's invitation to hold as such. Moreover, we note that at least one Ohio appellate court has determined that calculating gross income by averaging income over a reasonable period of years for purposes of imputing income in connection with a child support order is a decision within the trial court's discretion. *Moore v. Moore,* 175 Ohio App.3d 1, 2008-Ohio-255, ¶77-79.

{¶26} Appellant's primary argument is that the trial court failed to consider the factors set forth in R.C. 3119.01(C)(11)(a). Although the trial court did not expressly refer

to R.C. 3119.01(C)(11)(a), a thorough review of the trial court's judgment reveals that the court considered the factors set forth in the statute, as it explicitly provided facts relevant to several of the factors.

{¶27} Appellant concedes that the trial court properly considered R.C. 3119.01(C)(11)(a)(i) [the parent's prior employment experience], R.C. 3119.01(C)(11)(a)(ii) [the parent's education], R.C. 3119.01(C)(11)(a)(iii) [the parent's physical and mental disabilities], and R.C. 3119.01(C)(11)(a)(vi) [the parent's special skills and training], and set forth relevant facts substantiating its findings. Although appellant does not allude to it, we also note that the trial court properly considered R.C 3119.01(C)(11)(a)(viii) [the age and special needs of the child for whom support is being calculated].

{¶28} Appellant also concedes that the trial court considered R.C. 3119.01(C)(a)(vii) [whether there is evidence that the parent has the ability to earn the imputed income], as the court concluded that there was "significant evidence that [appellant] is capable of earning the income imputed by this Court." (Decision and Judgment Entry, 37.) However, appellant disputes the court's finding, arguing that no evidence established that appellant was capable of owning and operating another dental practice that would create the opportunity to earn the level of income imputed to appellant. Appellant argues that the only evidence presented on this factor directly contradicts the trial court's finding. Appellant maintains that the non-competition clause effectively precludes him from operating a business that would be as profitable as his former business because he is prohibited from doing so for five years within a 10-mile radius of Eastside Family Dental. However, as noted above, appellant conceded at trial

that the non-competition clause does not foreclose him from owning his own dental practice more than 10 miles from Eastside Family Dental. The evidence at trial established that appellant operated a successful dental practice for over 20 years and is both physically and mentally capable of again operating a lucrative dental practice. Although appellant's witnesses testified that cosmetic and general dentistry incomes have generally declined as a result of the current downturn in the economy, we presume that the economy will eventually rebound and that both cosmetic and general dentistry practices will once again thrive in the future.

{¶29} Appellant further contends that because the court acknowledged that no evidence was presented on two of the statutory factors, R.C. 3119.01(C)(11)(a)(iv) [the availability of employment in the geographic areas in which the parent resides] and R.C. 3119.01(C)(11)(a)(v) [the prevailing wage and salary levels in the geographic area in which the parent resides], the court could not have considered those factors, and thus abused its discretion in failing to do so. We disagree.

{¶30} We note initially that appellant is correct in asserting that the trial court acknowledged that no evidence was presented as to either of these factors; however, the court went on to state that appellant "made it clear that he is searching for employment outside of the Columbus Ohio area." (Decision and Judgment Entry, 37.) Thus, the court did consider these factors, at least to the extent that they may not have been applicable.

{¶31} Moreover, this court has considered the argument appellant propounds. In *Chapman v. Chapman,* 10th Dist. No. 05AP-1238, 2007-Ohio-1414, the plaintiff argued that although the trial court cited R.C. 3119.01(C)(11)(a) in its decision, it abused its discretion by failing to consider job opportunities and salary levels in his community.

Referencing R.C. 3119.01(C)(11)(a)(iv) and (v), the plaintiff asserted that no testimony or evidence was presented on the issues of employment availability or the prevailing wage and salary levels in his geographic area. Plaintiff argued that the trial court could not simply ignore the fact that no evidence was presented as to these two factors. The plaintiff maintained that the trial court's inability to consider all of the R.C. 3119.01(C)(11)(a) factors resulted from the defendant's failure to meet her burden of providing evidence on the issue of prevailing wages and opportunities in the community.

{¶32} This court determined that the plaintiff's argument wrongly "relie[d] upon the assumption that defendant had the burden of presenting evidence as to each factor set forth in R.C. 3119.01(C)(11)(a), and the failure of defendant to meet that burden precluded the trial court from imputing income to him." Id. at ¶12. We averred that R.C. 3119.01(C)(11)(a) does not provide that evidence must be presented as to each factor in order for the trial court to impute income. Id. We further stated, however, that "the absence of testimony regarding the employment availability or wage and salary levels in a particular geographic area certainly is a factor a trial court must consider in determining whether, and in what amount, to impute income." Id. We ultimately determined that the facts as cited by the trial court in its analysis of the application of R.C. 3119.01(C)(11)(a) provided a sufficient basis for the trial court to impute income to the plaintiff for purposes of determining child support. Id.

{¶33} Upon thorough review of the record in the instant case, we cannot conclude that the trial court's application of R.C. 3119.01(C)(11)(a) was deficient. Appellant concedes that the trial court properly considered several of the factors, and argues only that the court did not consider the factors pertaining to prevailing wages and job

opportunities in the community. The fact that no one testified regarding these factors did not preclude the trial court from imputing income to appellant. Appellant does not explain how an explicit consideration of those factors was material to the trial court's analysis and how consideration of those factors would have altered the trial court's determination. Furthermore, R.C. 3119.01(C)(11)(a)(x) permits the trial court to consider "any other relevant factor," thereby permitting the court to assess evidence that does not expressly correspond to the enumerated factors. Indeed, the court here expressly considered the fact that appellant unilaterally decided to sell his dental practice and make a "major career change." (Decision and Judgment Entry, 37.) Accordingly, we find that the trial court did not abuse its discretion in imputing income of $312,121 to appellant for purposes of calculating child support.

{¶34} Finally, appellant argues that since the trial court erred in imputing income to him for child support purposes, it correspondingly erred in imputing that same income to him for spousal support calculation purposes. Having determined, however, that the trial court did not abuse its discretion in imputing income of $312,121, the court appropriately imputed that same income to appellant for purposes of calculating spousal support. For all these reasons, we overrule appellant's third assignment of error.

{¶35} Appellant's fourth assignment of error contends that the trial court abused its discretion in disregarding his expert's testimony regarding the value of his separate property interest in Eastside Family Dental. Appellant maintains that he presented uncontroverted expert testimony that the value of his separate property interest in Eastside Family Dental was $215,500. Appellant argues that the trial court ignored this

evidence and concluded, without evidentiary support, that the value of his separate property interest was only $15,000.

{¶36} In *Hood v. Hood,* 10th Dist. No. 09AP-764, 2010-Ohio-3618, ¶13-15, this court set forth the standard for reviewing property divisions in domestic relations cases:

> A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf,* 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. In divorce proceedings, the trial court must classify property as marital or separate property, determine the value of the property, and divide the marital and separate property equitably between the spouses. R.C. 3105.171(B); *Roberts v. Roberts,* 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶16. We review a trial court's classification of property as marital or separate under a manifest weight of the evidence standard and will affirm if some competent, credible evidence supports the classification. *Taub v. Taub,* 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15. We will uphold a trial court's valuation and division of property absent an abuse of discretion. *Roberts* at ¶16; *Middendorf* at 401. * * * If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion. *Middendorf* at 401, citing *Ross v. Ross* (1980), 64 Ohio St.2d 203.
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> "Marital property" includes "[a]ll real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both of the spouses during the marriage" and "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i) and (ii). By contrast, "separate property" includes "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage" and "[p]assive income and appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(ii) and (iii).
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> A party requesting that an asset be classified as separate property bears the burden of tracing that asset to his or her separate property. *Dunham v. Dunham,* 171 Ohio App.3d 147, 2007-Ohio-1167, ¶20, 26. When parties contest whether

> an asset is marital or separate property, there is a presumption that the asset is marital property, unless proven otherwise. *Miller v. Miller,* 7th Dist. No. 08 JE 26, 2009-Ohio-3330, ¶20. An appellate court's job is not to reweigh the evidence but to determine whether there was competent, credible evidence to support the trial court's findings. *Dunham* at ¶27.

{¶37} As noted above, appellant sold Eastside Family Dental for $580,000 pursuant to the APA executed on May 21, 2009. The parties do not dispute that the sale was an arm's-length transaction and that the sale price reflected the fair market value of the practice.

{¶38} The APA specially allocated the $580,000 sale price as follows:

Dental and Office Furniture	$126,000
Dental Supplies	$ 3,000
Patient Records	$ 20,000
Covenant-Not-To-Compete	$ 15,000
Goodwill	$416,000

{¶39} Appellant contends that the trial court should have awarded him $215,500 of the sale proceeds as separate property, which, according to appellant, represents the amount of personal goodwill directly attributable to him. In support of his argument, appellant relies on the testimony of his business valuation expert, Brian Russell, whom he engaged to analyze the sale price of the practice, and more specifically, the enterprise versus personal component of the goodwill portion of the sale, and to provide an opinion regarding those matters. Russell reviewed a business valuation report prepared by another business analyst prior to the sale, along with other relevant documentation, including the APA. In addition, Russell asked appellant to complete a self-reporting goodwill questionnaire and professional practice background questionnaire. In addition to his testimony, Russell submitted a report relative to his opinion.

{¶40} Russell defined "personal goodwill" as "the amount of goodwill that is specifically attributable to the individual and personal attributes of Dr. Banchefsky as an individual." (Tr. 649.) According to Russell, personal goodwill is a function of earnings from patients who patronize the individual practitioner as opposed to the practice. In contrast, Russell defined "enterprise or business goodwill" as "that goodwill that would go along with the business practice itself and could be sold with or without Dr. Banchefsky." (Tr. 649.) Russell averred that enterprise goodwill is a function of earnings from patients who patronize a practice rather than an individual practitioner.

{¶41} Russell subtracted the value of the tangible property (furniture, supplies, and records), $149,000, from the total sale price of $580,000. Russell opined that the remainder of the sale price, $431,000, should be applied to enterprise and personal goodwill. Russell opined that the amount assigned in the APA to appellant's non-competition clause, $15,000, was an arbitrary designation and that the appropriate allocation for appellant's willingness not to compete is $215,500, which takes into account all of appellant's personal goodwill attributes. In reaching his conclusion, Russell applied the Multiattribute Utility Model ("MUM"), a tool Russell averred is utilized and accepted in the business valuation profession as an objective method of quantifying and weighing the impact of the various characteristics and attributes of personal and enterprise goodwill in assessing the fair market value of a business.

{¶42} The trial court acknowledged the utility of the MUM in determining the impact an individual's departure might have on the fair market value of a business. However, the court determined that application of the MUM was neither appropriate nor necessary in the instant case, as the practice had actually been sold in an arm's-length

transaction, and the terms of the sales contract included a non-competition clause and assigned a value to appellant's willingness not to compete. The trial court thus declined to find the value of personal goodwill as determined by the MUM to be appellant's separate property. The court noted that appellant sold the name Eastside Family Dental and was paid $15,000 for a covenant-not-to-compete. The court found that "[t]o the extent that monies paid to [appellant] in this sale were specifically valued and identified for [appellant's] covenant-not-to-compete, they do not constitute marital property and in fact are [appellant's] separate property." (Decision and Judgment Entry, 23.) The court determined the value of the marital portion of the gross sales proceeds to be $565,000 and the value of appellant's separate portion of the gross sales proceeds to be $15,000.

{¶43} Appellant contends the trial court erred and abused its discretion in disregarding Russell's expert testimony in favor of its own interpretation of the sales contract. We disagree. R.C. 3105.171 expresses no specific way for the trial court to determine valuation. *Focke v. Focke* (1992), 83 Ohio App.3d 552, 554. Thus, an appellate court will uphold "a trial court's determination of valuation which is based upon competent, credible evidence absent a showing of an abuse of discretion." *Moro v. Moro* (1990), 68 Ohio App.3d 630, 637.

{¶44} We agree with the trial court's conclusion that although the MUM may be useful in determining the fair market value of a business, its application and use is inappropriate in the instant case. Here, there was an actual, not hypothetical, sale of appellant's dental practice. There is no dispute that the APA, a two-party contract governing the sale of the practice, was an arm's-length transaction. The APA includes a breakdown and classification of the total purchase price of the practice, including the

value assigned to the covenant-not-to-compete. As such, it was simply unnecessary to determine the value of the covenant-not-to-compete through use of a business model pertaining to the hypothetical sale of a hypothetical business.

{¶45} A covenant-not-to-compete is considered a nonmarital asset. *Brown v. Brown* (Dec. 2, 1993), 10th Dist. No. 93AP-634, citing *Blodgett v. Blodgett* (Oct. 19, 1988), 9th Dist. No. 13547. The trial court thus properly found the $15,000 value of the covenant-not-to-complete included in the APA to be appellant's separate property. Accordingly, we overrule the fourth assignment of error.

{¶46} Appellant's fifth assignment of error argues that the trial court abused its discretion in allocating to him as a marital asset the current value of appellant's 2005 BMW, along with the difference between the amount he paid, through his business checking account, to pay off the car and its current value.

{¶47} The evidence at trial established that appellant is the titled owner of the car, which he purchased for $25,610 while the divorce was pending. (Plaintiff's Exhibit 5.) Appellant financed the purchase by obtaining a loan. At the time of trial, the car was valued at $16,340. Appellant utilized his business checking account to pay off the loan in its entirety, in the amount of $24,539. As part of its equitable distribution of assets, the trial court attributed the entire $24,539 to appellant. The court noted that appellant made the unilateral decision to pay off the balance owed. The court concluded that "equity demands that the [appellant] be deemed to have control of the difference between the funds expended and the current value of the automobile. The difference of $8,199 shall also be allocated to the [appellant] for purposes of equalization of marital assets and liabilities herein." (Decision and Judgment Entry, 17.)

{¶48} Appellant contends that when the trial court allocated to him the difference between the payoff amount and the equity value, the court failed to account for the fact that appellant satisfied a marital obligation by paying off the loan. Appellant asserts that had he not done so, the parties would still have had a significant debt associated with the car. Appellant contends that the trial court's allocation of the payoff difference to him effectively charges him with a marital debt twice. We disagree. Appellant purchased the car during the pendency of the divorce proceedings, and no evidence suggests that appellee approved the purchase or was even aware of it. Appellant acknowledged that the car was a depreciating asset. The trial court's allocation of the payoff difference simply places the depreciation on appellant's side of the ledger. Under the circumstances, we cannot find that the trial court abused its discretion is doing so. The fifth assignment of error is overruled.

{¶49} Having overruled each of appellant's five assignments of error, we hereby affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

KLATT and FRENCH, JJ., concur.

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