

[Cite as *Troutwine v. Troutwine*, 2010-Ohio-994.]

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

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THOMAS E. TROUTWINE	:	
Plaintiff-Appellant	:	C.A. CASE NO. 2009 CA 14
vs.	:	T.C. CASE NO. 2006-DR-0935
	:	(Civil Appeal from
NANCY A. TROUTWINE	:	Common Pleas Court,
Defendant-Appellee	:	Domestic Relations)

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O P I N I O N

Rendered on the 12<sup>th</sup> day of March, 2010.

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GRADY, J.:

{¶ 1} Thomas Troutwine appeals from a final judgment and decree of divorce. Thomas<sup>1</sup> raises four assignments of error on appeal.

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<sup>1</sup> For purposes of clarity and convenience we will refer to the parties by their first names.

Before addressing these assignments of error, we will dispose of Thomas's motion to strike Nancy's appellate brief.

{¶ 2} Thomas points out that Nancy did not comply with App.R. 16(A)(7) and (D) and Loc. App.R. 9, because she failed to cite to the record and attach copies of unreported opinions to her appellate brief. We agree with Thomas that Nancy's brief fails in those respects. For purposes of judicial economy, however, we will consider Nancy's brief to the extent that it provides relevant citations and argument. Therefore, Thomas's motion to strike is overruled. However, counsel is cautioned to pay closer attention in the future to complying with the Rules of Appellate Procedure.

#### FIRST ASSIGNMENT OF ERROR

{¶ 3} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ORDERED SPOUSAL SUPPORT WITHOUT CONSIDERING THE EDUCATION AND EARNING ABILITY OF THE APPELLEE AND FAILED TO IMPUTE INCOME ACCORDINGLY."

#### THIRD ASSIGNMENT OF ERROR

{¶ 4} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ARBITRARILY ADJUSTED THE APPELLANT'S UNCONTROVERTED EXPENSES."

{¶ 5} We will review the first and third assignments of error together because they are related to the trial court's award of spousal support. We review a trial court's award of spousal support under an abuse of discretion standard. *Hittle v. Hittle*,

181 Ohio App.3d 703, 2009-Ohio-1286, at ¶9 (citation omitted).  
“‘Abuse of discretion’ has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary.

{¶6} “A decision is unreasonable if there is no sound reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue *de novo*, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.” *AAAA Enterprises, Inc v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶7} The factors that the court must consider in determining whether to award spousal support and, if it does, the nature, amount, terms of payment, and duration of support ordered are set out in R.C. 3105.18(C)(1)(a) through (m), the last of those being any other factor that the court finds to be relevant and equitable.

“The court must evaluate the evidence germane to each applicable factor, and then weigh the need of either party for support against the other party’s ability to pay.” *Hittle*, 2009-Ohio-1286, at ¶8, citing *Layne v. Layne* (1992), 83 Ohio App.3d 559.

{¶8} The trial court ordered Thomas to pay Nancy spousal support in the sum of \$350.00 per month for a period of nine years.

Thomas argues that the trial court abused its discretion in awarding this amount of spousal support by (1) failing to impute additional income to Nancy based on her education in manual communication; (2) failing to impute additional income to Nancy based on the potential rental value of her separate property; (3) reducing the amount of rent Thomas listed on his estimate of monthly expenses; and (4) failing to take into account the \$150.00 Thomas listed as monthly medical expenses. We will address each of these arguments in turn.

#### Nancy's Education

{¶9} The trial court considered all of Nancy's current, limited income, but did not impute any additional income based on the associate's degree in manual communication that Nancy obtained in 2005. At the evidentiary hearing, Thomas introduced evidence demonstrating the average, annual salary earned by manual interpreters, according to the Bureau of Labor Statistics. Nancy testified that the salary shown is not available to her because she lacks the necessary skills, and that she therefore lacks the certification required. Thomas conceded that he did not know whether the salary shown pertained to jobs that required the certification that Nancy lacks. Based on Nancy's testimony, the

trial court could reasonably reject the evidence of Nancy's potential earnings that Thomas offered. Therefore, the trial court did not abuse its discretion in failing to impute additional income to Nancy based on her associate's degree in manual communication.

#### Potential Rental Value

{¶ 10} Thomas argues that the trial court should have imputed additional income to Nancy to reflect rent she potentially could collect from her separate property in which their son resided at the time of their divorce. However, Thomas failed to present any evidence showing the amount of income the property reasonably should generate from rent. Therefore, the trial court did not abuse its discretion in not imputing rental income to Nancy.

#### Thomas's Rent

{¶ 11} Thomas's living expenses are relevant to his ability to pay spousal support. Thomas claimed a monthly rental expense of \$850. The court found that amount is "excessive, taking into account that he resides with his girlfriend and shares expenses with her." (Dkt. 27, p. 26). The record shows that the girlfriend is Thomas's "landlord" to whom he pays the \$850 monthly rental. The court credited Thomas with only one-half that amount, \$425, in determining his ability to pay support.

{¶ 12} The trial court reasonably concluded that, inasmuch as

he shares living expenses with his live-in girlfriend and landlord, it would be unreasonable to give Thomas the benefit of the one-half Thomas pays to her benefit. The finding is both relevant to Thomas's ability to pay spousal support and equitable. Therefore, the trial court did not abuse its discretion when it reduced Thomas's claimed monthly rental expense by one-half.

#### Thomas's Estimated Medical Expenses

{¶ 13} Thomas claimed that he spends \$150 for monthly medical expenses. The court found that the amount is "not ... reasonable, taking into account that he is in relatively good health." (Dkt., p. 26). Thomas testified that he has had skin cancer treatment, but he failed to link the \$150 monthly medical expenses to this treatment, or explain what types of treatment or medical costs were included within the \$150 monthly medical expenses. Based on the record before us, the trial court reasonably could reject Thomas's unsupported estimate regarding his monthly medical expenses.

{¶ 14} The first and third assignments of error are overruled.

#### SECOND ASSIGNMENT OF ERROR

{¶ 15} "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REDUCED THE VALUE OF ASSETS FOR THE APPELLEE BUT NOT THE APPELLANT ALTHOUGH THE SAME CIRCUMSTANCES APPLIED."

{¶ 16} The trial court determined that the amount Thomas had

expended from his bank account during the pendency of the divorce proceedings is marital property, and the court credited that amount to the value of marital property Thomas was awarded as an asset.

However, the court did not likewise identify as marital property a like amount that Nancy expended during the same time period, or credit her award with that amount as an asset.

{¶ 17} R.C. 3105.171(A)(3)(a)(i) defines "marital property" to include: "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." "During the marriage" means "the period of time from the date of the marriage through the date of the final hearing in an action for divorce," except that if the court determines that either of those dates "would be inequitable, the court may select dates that it considers equitable in determining marital property." R.C. 3105.171(A)(2).

Further, if a spouse has engaged in financial misconduct, including dissipation of assets, the court may compensate the offended spouse with a distributive award or a greater share of marital assets. R.C. 3105.171(E)(3).

{¶ 18} Both parties testified that they spent funds from their respective personal bank accounts to pay their living expenses following their separation. Having been exhausted, those funds

were not marital assets the court could divide because they were not property or an interest therein which either spouse "currently owned." The court did not find that an earlier date would be more equitable in determining marital property. Also, no misconduct or dissipation of marital assets was found. Therefore, the trial court had no statutory authority to divide the amounts that Nancy and Thomas had spent from their respective bank accounts, or to credit either with that amount in dividing the marital property.

Rather, only the amounts remaining in these bank accounts could have been divided as marital property.

{¶ 19} The second assignment of error is sustained.

#### FOURTH ASSIGNMENT OF ERROR

{¶ 20} "THE TRIAL COURT'S DETERMINATION THAT THE APPELLEE'S DISABILITY RETIREMENT BENEFITS WERE HER SEPARATE PROPERTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 21} The trial court found that Nancy received disability benefits in the amount of \$800 per month and that "[t]hese disability benefits are not divisible, as a marital asset between the parties, rather, they are a form of compensation for Ms. Troutwine's personal injury, pursuant to O.R.C. 3105.171 and the benefits are therefore her separate property." (Dkt. 27, p. 21).

{¶ 22} While retirement benefits earned during the marriage are divisible as marital property, disability benefits are not.

R.C. 3105.171(A) (3) (a); *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 178, n.3. “[D]isability benefits ‘are not marital property unless they are accepted by the retiree in lieu of retirement pay.’” *Young v. Young*, Clark App. Nos. 08-CA-59, 08-CA-61, 2009-Ohio-3504, at ¶31 (citation omitted). “When disability benefits are accepted in lieu of retirement pay, ‘they are marital property to the extent that the disability benefit includes the retirement pay value.’” *Id.*, citing *Messer v. Messer*, Darke App. No. 1570, 2002-Ohio-4196, at ¶8.

{¶ 23} At the December 11, 2007 evidentiary hearing, Nancy testified:

{¶ 24} “THE COURT: Is this disability in lieu of any old age retirement benefits that you would be entitled to through the Post Office?

{¶ 25} “THE WITNESS: Yes.” (Tr. 36-37).

{¶ 26} While the remainder of the record before us is somewhat confused regarding whether the \$800 monthly payments Nancy receives are benefits payable on account of a disabled condition or are disability benefits in lieu of retirement, Nancy specifically testified that they were disability benefits in lieu of retirement.

Given Nancy’s testimony, the trial court abused its discretion in finding that Nancy’s disability benefits are not in lieu of retirement. Therefore, these benefits should be considered

marital property rather than separate property, "to the extent that the disability benefit includes the retirement pay value."

*Young*, 2009-Ohio-3504, at ¶31.

{¶ 27} The fourth assignment of error is sustained. The judgment of the trial court will be affirmed, in part, and reversed, in part, and the cause will be remanded for further proceedings consistent with this Opinion. Because spousal support may be awarded only after a division of marital property, R.C. 3105.18(B), the revisions of the court's marital property award our remand orders will necessarily require the court to also enter a new order regarding spousal support.

DONOVAN, P.J. and BROGAN, J. concur.

Copies mailed to:

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Hon. Thomas J. Capper