

[Cite as *Elder v. Elder*, 2009-Ohio-4868.]

COURT OF APPEALS  
FAIRFIELD COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

DEBRA L. ELDER	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	
	:	Case No. 2008-CA-74
STEPHEN L. ELDER	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Fairfield County Court of Common Pleas, Domestic Relations Division, Case No. 06DR549

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 11, 2009

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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*Gwin, P.J.*

{¶1} Defendant-appellant Stephen Elder appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, which granted a divorce to him and plaintiff-appellee Debra Elder, divided the marital property between the parties, and established spousal support. Appellant assigns three errors to the trial court:

{¶2} “I. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY INCLUDING THE APPELLANT’S ‘OVERTIME COMPENSATION’ IN ITS DECISION ON THE AMOUNT OF SPOUSAL SUPPORT.

{¶3} “II. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY REFUSING TO FIND THAT OCTOBER 15, 2006 WAS THE DEFACTO DATE OF TERMINATION OF THE MARRIAGE.

{¶4} “III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR BY ORDERING SPOUSAL SUPPORT FOR A FIXED TERM OF 10 YEARS.”

{¶5} The trial court found the parties were married in Columbus, Ohio, on November 3, 1984, and produced one child, who was emancipated prior to the divorce. Although the parties separated in October, 2006, the court found the marriage ended on the date of final hearing, April 25, 2008. The court valued the parties’ marital and separate assets and the parties do not dispute the division of property. The trial court computed the parties’ respective incomes, and it is the award of spousal support that is the crux of the appeal.

{¶6} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to alimony orders, now termed spousal support, in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Id.* at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Med. Board*, (1993), 66 Ohio St.3d 619, 621.

I

{¶7} In his first assignment of error, appellant argues the court abused its discretion in computing his income for purposes of spousal support. He argues appellee works a forty-hour work week with no overtime, while he, a truck driver, is forced by the nature of his job to work somewhere between 622 and 1400 hours of overtime per year. Appellant is compensated on the basis of miles traveled, not on an hourly or daily rate. Appellant also receives a meal allowance from his employer. The trial court found appellant's annual income is \$79,122.00, arriving at this number by averaging appellant's income from 2003 through 2007.

{¶8} The court found appellee had been absent from the workforce for some time in order to raise the parties' daughter. The court found this had detrimental impact on her current income. Appellee's income at the time of the final hearing was \$28,704.00 per year.

{¶9} Appellant presented a formula to the trial court, utilized by his employer to compute his vacation pay. Appellant urges if the court had applied the formula he

proposed, it would have concluded appellant's base pay at approximately \$57,000. Under the employer's formula, appellant worked 622 of overtime in 2007, and 910 hours in 2006.

{¶10} Appellant argues because of the nature of his employment, he spent 1,400 hours per year more than appellee did at her job, and he was only compensated for about half those hours. He urges it was an abuse of discretion of the trial court to include all the overtime pay in computing the award of spousal support, because to do so forces him to endure a significant impingement on his life style to support appellee, who works no overtime.

{¶11} Appellant cites us to *Carey v. Carey*, Clark Co. App. No. 2002-CA-109, 2004-Ohio-770, for the proposition that a court may include reasonable overtime earnings in computing support awards, but it is an abuse of discretion to fashion an order compelling an obligor to work an onerous amount of overtime. *Id.* at paragraph 17, citing *Silver v. Silver* (Sept. 24, 1993), Clark App. No. 2985. The *Carey* court found imposing a sixty-hour work week on the husband was unreasonable in light of the husband's age and health. The court of appeals ordered the trial court to recalculate the husband's spousal support obligation using a fifty-hour work week, which the husband had agreed was reasonable. The court acknowledged that courts have struggled with the issue of regular overtime.

{¶12} Appellant also cites us to *Zornes v. Zornes*, Clermont Co. App. No. CA2005-05-042, 2006-Ohio-877. The *Zornes* court discussed *Carey*, *supra*, at some length, and distinguished it on the basis that in *Zornes*, the evidence showed appellant regularly worked a substantial amount of overtime, and in fact, his overtime pay

constituted close to one-half of his annual income. *Id.* at paragraph 21-22. Although the appellant in *Zornes* testified he intended to cut back on his overtime, the court deferred to the magistrate's finding this was not credible. The court concluded the trial court did not err in including overtime pay in the child support calculation. We should note, however, *Zorne* deals with R.C. 3119.05, which specifically directs how overtime should be factored into child support.

{¶13} Finally, appellant cites us to *Dodson v. Dodson*, Stark Co. App. No. 2001CA00327, 2002-Ohio-3091, wherein we found no abuse of discretion for a court to include income from a long-standing practice of working overtime or at a second job into the calculation for spousal support, given that the obligee spouse was disabled and had not asked for a share of the obligor's pension. The *Dodson* case is based on the particular facts and circumstances of the case.

{¶14} Appellee argues appellant testified he intends to continue working as he has been. He concedes the excess hours he works are the result of his routes, including overnight runs to New Jersey and St. Louis. As in *Zornes*, *supra*, appellant's long hours appear to be an integral part of the job, and comprise a substantial portion of his income. The trial court reserved jurisdiction over the amount of spousal support, and appellant can return to the court should his circumstances change.

{¶15} We find the trial court did not abuse its discretion in averaging his total wages over the past five years. The first assignment of error is overruled.

## II.

{¶16} In his second assignment of error, appellant urges the trial court abused its discretion in refusing to find that October 15, 2006 was the defacto date of the termination of the marriage.

{¶17} Appellant cites us to *Dill v. Dill*, 179 Ohio App.3d 14, 2008-Ohio-5310, 900 N.E.2d 654, wherein the Third District Court of Appeals set out the factor a court may apply to determine whether it should find a date other than the final hearing date as the end of the marriage for purpose of property division. The court stated: “Several factors should guide a trial court when determining whether a de facto termination of marriage date is equitable, including, but not limited to whether (1) the parties separated on less than friendly terms, (2) the parties believed the marriage ended prior to the hearing, (3) either party cohabited with another person during the separation, (4) the parties were intimately involved during the separation, (5) the parties lived as husband and wife during the separation, (6) the parties maintained separate residences, (7) the parties utilized separate bank accounts or were/were not financially intertwined (with the exception of temporary orders), (8) either party attempted to reconcile, (9) either party retained counsel, and (10) the parties attended social functions together or vacationed together. \*\*\* No one factor is dispositive; rather, the trial court must determine the relative equities on a case-by-case basis.” *Id.* at paragraph 11, citations deleted.

{¶18} The parties in *Dill* had been separated for more than ten years by the final hearing. The appeals court discussed prior cases at some length, among them *Gullia v. Gullia* (1994), 93 Ohio App.3d 653, 639 N.E.2d 822 (three years separation before the final hearing); *Rogers v. Rogers*, (September 2, 1997) 10th Dist Nos. 96APF10-1333

and 96APF01-67, (four year separation prior to the final hearing); and *Crowder v. Crowder* (Aug. 5, 1999), 10th Dist. No. 98AP-1124 (seven year separation before the final hearing). The *Dill* court found the length of time the parties were separated appeared to be a significant factor in determining the defacto end of the marriage. *Dill* at paragraph 12, citations deleted.

{¶19} Here the parties had been separated for about 18 months at the time of the final hearing. The parties' finances were intertwined and they made several joint decisions regarding the payment of bills. They were equally responsible for the real estate taxes and maintenance costs of the marital residence and both were involved in the selection of a realtor to sell the property. We conclude the trial court did not abuse its discretion in determining the marriage ended on the date of the final hearing, rather than at the time the parties separated.

{¶20} The second assignment of error is overruled.

### III

{¶21} Appellant's third assignment of error asserts the court abused its discretion in ordering spousal support for a fixed term of ten years, based, appellant argues, upon its rejection of the defacto date for determining the termination of the marriage, and instead using the date of the final hearing. Appellant urges because the trial court computed the duration of the marriage to be longer, this extended the length of time appellant will pay spousal support. The trial court retained jurisdiction over the amount of spousal support, but not the duration.

{¶22} Appellant cites us to the OSBA's 2006 proposed amendment to the Revised Code, which would set guidelines for computing spousal support based upon the length of the marriage.

{¶23} The proposed amendment is not the law in Ohio, and our standard of reviewing the court's decision is the abuse of discretion standard. Even the proposed amendment does not call for a specific fixed percentage, but rather gives a range as a guideline. Contrary to appellant's assertion, there is no "magic number" of years which alters the way courts approach this issue.

{¶24} Neither the record nor the law supports appellant's argument that if the court had found the marriage had been 18 months shorter, appellant's support obligation would have been shorter than the ten years the court ordered. We find the court did not abuse its discretion in ordering ten years of spousal support, particularly because the court retained jurisdiction over the amount.

{¶25} The third assignment of error is overruled.

{¶26} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Fairfield County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JULIE A. EDWARDS

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