[Cite as *Eikleberry v. Eikleberry*, 2002-Ohio-985.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	**JUDGES:**
TONYA RENEE EIKLEBERRY	:	**Hon. William B. Hoffman, P.J.**
	:	**Hon. Sheila G. Farmer, J.**
Plaintiff-Appellee/Cross-Appellant	:	**Hon. John F. Boggins, J.**
	:	
-vs-	:	
	:	**Case No. 01COA01418**
ROBERT MARK EIKLEBERRY	:	
	:	
Defendant-Appellant/Cross-Appellee	:	**O P I N I O N**

CHARACTER OF PROCEEDING:	**Appeal from the Ashland County Court of Common Pleas, Domestic Relations, Case No. 00DIV10874**
JUDGMENT:	**Reversed and Remanded**
DATE OF JUDGMENT ENTRY:	**March 7, 2002**

APPEARANCES:

For Plaintiff-Appellee	**For Defendant-Appellant**
THOMAS L. MASON **153 W. Main Street** **Ashland, Ohio 44805**	**ROBERT N. GLUCK** **231 North Buckeye Street** **Wooster, Ohio 44691**

Hoffman, P.J.

{¶1} Defendant-appellant/cross-appellee Robert Mark Eikleberry ("husband") appeals the May 16, 2001 Decision and Judgment Entry of the Ashland County Court of Common Pleas, Domestic Relations Division, which approved and adopted the Magistrate's December 21, 2000 Decision, with reservations, as the decision of the court. Plaintiff-appellee/cross-appellant Tonya Renee Eikleberry ("wife") cross-appeals the same.

STATEMENT OF THE FACTS AND CASE

{¶2} Husband and wife were married on August 27, 1977. Three children were born as issue of said union, two of whom were still minors at the time of the divorce. Wife filed a Complaint for Divorce in the Ashland County Court of Common Pleas, Domestic Relations Division, on January 10, 2000. Husband filed an Answer and Counterclaim for Divorce. The matter proceeding for hearing before the magistrate on July 17, 2000.

{¶3} The following evidence was adduced at the magistrate's hearing. Prior to the parties' marriage, husband and wife chose property located at 758 Township Road 3414, Loudonville, Ohio ("residential real estate") as their desired residence. Mack Oil & Gas Co., a corporation owned by husband's father and brothers, purchased the real estate. On December 27, 1977, husband and wife entered into an agreement with Mack Oil & Gas Co. to purchase the real estate for $42,000. Husband worked for Mack Oil & Gas Co. at the time, and arrangements were made for the monthly house payments to be deducted from husband's paycheck. As a result of

husband and wife's failure to make a balloon payment in January, 1979, the purchase agreement was never consummated.

{¶4} Although the monthly payments continued to be withdrawn from husband's paycheck, Mack Oil & Gas Co. transferred the title of the residential real estate to Mary June Eikleberry, husband's mother, as part of the divorce settlement between husband's parents. Title was transferred to husband in November, 1993, following his mother's death. At the time, the real estate had a fair market value of $38,000. A mortgage in the amount of $13,500 remained on the property. Husband testified his mother's estate made the mortgage payments for approximately one year, after which he and wife took over the payments. The parties mortgaged the property for $14,593.07 in April, 1996, and again on May 4, 1999, for $15,243.85. At the time of the magistrate's hearing, a balance of $21,867.46 remained on the later two loans. The current fair market value of the residential real estate at time of hearing was $75,000. The magistrate determined the value of the marital portion of the residential real estate, before any deduction for debt was $37,000 (current fair market value less husband's premarital interest of $38,000, the fair market value in 1993).

{¶5} The magistrate filed his Decision on December 21, 2000. The magistrate gave wife the option to purchase husband's share of the residential real estate by paying husband $39,566.27, which represents the sum of husband's non marital interest in the property plus his one half share of the marital equity, $7,566.27, less his share of the mortgage debt, $6,000.

{¶6} The parties filed their respective objections to the magistrate's decision. Husband objected to the magistrate's determination the residential real estate is, in part, marital property, as well as the magistrate's computations, division, and rulings with respect to said property. Wife objected to the magistrate's failure to find the entire equity in the residential real estate to be marital property.

{¶7} The parities subsequently filed memoranda in support of their respective objections. Via Decision and Judgment Entry filed May 16, 2001, the trial court adopted the magistrate's decision with two reservations. The first reservation addressed each party's status with regard to his/her option to purchase the residential real estate. The second reservation addressed husband's health insurance. The first reservation as well as the trial court's characterization and division of the residential real estate are the sole issues of the appeal and cross-appeal.

{¶8} It is from the this entry husband appeals, raising the following assignments of error:

{¶9} THE COURT COMMITTED ERROR OF LAW TO THE PREJUDICE OF THE RIGHTS OF THE APPELLANT BY CONSIDERING THE ENTIRE INCREASE IN VALUE OF THE REAL ESTATE TO BE MARITAL.

{¶10} THE COURT ABUSED ITS DISCRETION IN FAILING TO AWARD SPOUSAL SUPPORT TO THE APPELLANT.

{¶11} THE COURT ABUSED ITS DISCRETION IN PROVIDING A PREFERENCE TO THE APPELLEE TO PURCHASE THE RESIDENTIAL REAL ESTATE.

{¶12} Wife has filed a cross-appeal from the same entry, raising as her sole

assignment of error:

{¶13} THE TRAIL COURT COMMITTED PREJUDICIAL ERROR BY NOT AWARDING THE PLAINTIFF-APPELLEE A GREATER INTEREST IN THE MARITAL PROPERTY.

APPEAL I
CROSS-APPEAL I

{¶14} Because husband's first assignment of error and wife's sole cross-assignment of error both challenge the trial court's determination of the parties' rights in the residential real estate, we shall address said assignments of error together. Husband maintains the trial court erred by classifying the entire increase in the value of the residential real estate as marital property. On the other hand, wife argues the trial court erred in failing to award her a greater interest in the residential real property.

{¶15} The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property.[1] "Separate property" may be converted to "marital property" through the process of transmutation.[2] Transmutation is a process by which an act or acts of one party, the original owner, converts separate property into marital property.[3] When a party challenges a finding of fact concerning the characterization of property, we review the trial court's decision as to that specific

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[1] ***Peck v. Peck*** **(1994), 96 Ohio App.3d 731, 734.**

[2] ***Stalnaker v. Stalnaker*** **(Dec. 20, 1999), Stark App. No.1999CA00059, unreported.**

[3] ***Black v. Black*** **(Nov. 4, 1996), Stark App. No.1996 COA 00052, unreported.**

finding under a manifest weight of the evidence standard.[4] Under this standard, we do not weigh the evidence or judge the credibility of witnesses. Our role is to determine whether the finding is supported by relevant, competent and credible evidence.[5]

{¶16} Husband contends the appreciation in the property was passive and not the result of the parties' joint labor and money; therefore, the trial court should have classified it as separate property. The record reveals marital property, i.e. the parties' incomes, was used to pay for the house as well as other living expenses. Wife testified regarding the improvements she made to the residence. We find this testimony provided competent, credible evidence upon which the trial court could find the appreciation in the home was marital property.

{¶17} We now turn to wife's assignment of error. Upon review of the record, we note the trial court did not mention the $13,500 mortgage owed on the property at the time of husband's inheritance. Husband acknowledged the existence of this mortgage as well as his obligation to repay it.[6] There is no evidence from which to determine whether the $38,000 market value of the property at the time of husband's inheritance is the value of the property after a discount for the mortgage existing at the time of inheritance. Due to this lack of evidence, we reverse the trial court's determination $38,000 is husband's separate property and remand the matter for

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[4]***Stalnaker v. Stalnaker*, *supra.***

[5]***C.E. Morris Co. v. Foley Construction* (1978), 54 Ohio St.2d 279, syllabus.**

[6]**Tr. of Magistrate's Hearing, July 17, 2000, at 155.**

redetermination thereof taking into consideration, if not previously done, the mortgage outstanding on the property at the time of husband's inheritance.

{¶18} Husband's first assignment of error is overruled. Wife's sole assignment of error on cross-appeal is sustained.

II

{¶19} In his second assignment of error, husband argues the trial court abused its discretion in failing to award him spousal support. In support of his assertion he is entitled to spousal support, husband submits wife has three times his earning ability; wife has a greater income; wife has retirement benefits, while husband does not; and wife was awarded the majority of the parties' assets.

{¶20} A review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard.[7] We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion.[8] In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable.[9] We must look at the totality of the circumstances in the case *sub judice* and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

{¶21} We find substantial evidence to support the trial court's decision not to award husband spousal support based upon a finding husband was voluntarily

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[7] ***Cherry v. Cherry*** **(1981), 66 Ohio St.2d 348.**

[8] ***Holcomb v. Holcomb*** **(1989), 44 Ohio St.3d 128.**

[9] ***Blakemore v. Blakemore*** **(1983), 5 Ohio St.3d 217.**

underemployed. The record reveals husband has a chronic, if not serious, problem with alcohol. Further, such problem interferes with his ability to maintain steady employment. Husband's income has decreased substantially over the years as his problem with alcohol has worsened. Husband's own behavior has prevented him from maintaining steady employment.

{¶22} Husband's second assignment of error is overruled.

III

{¶23} In his final assignment of error, husband asserts the trial court abused its discretion in giving wife the first option to purchase the residential real estate. We disagree.

{¶24} The record reveals the parties have lived in the residence since their marriage in 1977. The parties' three children were raised in the home and still resided there at the time of the divorce hearing. Wife was granted custody of the minor children. In light of these circumstances, we find the trial court did not abuse its discretion in giving wife preference to purchase the property.

{¶25} Husband's third assignment of error is overruled.

{¶26} The judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part and the matter remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, P.J.

Farmer, J. and

Boggins, J. concur

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JUDGES

[Cite as *Eikleberry v. Eikleberry*, 2002-Ohio-985.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

TONYA RENEE EIKLEBERRY	:	
	:	
Plaintiff-Appellee/Cross-Appellant	:	**JUDGMENT ENTRY**
	:	
-vs-	:	
	:	
ROBERT MARK EIKELBERRY	:	
	:	**CASE NO. 01COA01418**
Defendant-Appellant/Cross-Appellee		

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part and the matter remanded for further proceedings consistent with this opinion and the law. Costs assessed to appellant.

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JUDGES

MIDDENDORF, APPELLEE, *v.* MIDDENDORF, APPELLANT.

[Cite as *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397.]

Domestic relations — Equitable division of marital and separate property — Under R.C. 3105.171, an increase in the value of separate property due to either spouse's efforts is marital property.

Under R.C. 3105.171, an increase in the value of separate property due to either spouse's efforts is marital property.

(No. 97-261 — Submitted April 22, 1998 at the Seneca County Session — Decided July 29, 1998.)

APPEAL from the Court of Appeals for Shelby County, No. 17-96-5.

In December 1986, defendant-appellant Maximilian J. Middendorf ("Max") and plaintiff-appellee Patricia A. Middendorf ("Pat") were married. Max's three children from a previous marriage lived with Max and Pat after their marriage.

When he was married to Pat, Max was a livestock buyer for Middendorf Stockyard Company, Inc. ("the stockyard"). Max and his brother co-own the stockyard. Pat was self-employed as an interior decorator but discontinued her business after her marriage to Max.

During her marriage to Max, Pat undertook all the household duties including laundry, cleaning, ironing, shopping, and preparing meals. Due to the size of the family and their varied schedules, Pat would sometimes have to fix three separate meals per night. Pat also spent considerable time caring for the children.

Pat made some contributions to company functions. She prepared and participated in company Christmas parties. Pat would occasionally take business messages at home for Max and then relay them to him. Pat redecorated Max's offices, as well as their home.

On March 21, 1992, Max and Pat separated. On April 6, 1992, Pat filed for legal separation. Max answered and counterclaimed for divorce.

A hearing was commenced on December 1, 1992, before a referee for purposes of dividing the couple's property. During the hearing, both parties presented testimony from expert witnesses pertaining to the valuation of the stockyard and other assets held by Max.

On April 9, 1993, the referee issued a report. Relying on the definition of "marital property" in R.C. 3105.171(A)(3)(iii), the referee found that Max's interest in the stockyard was his separate property, and that "the Plaintiff has failed to provide this Court with sufficient evidence to determine the 'appreciation' of this asset during the term of the marriage. Obviously, if the Court has insufficient evidence before it to measure the growth of the Defendant's separate property, it simply cannot award the Plaintiff a proportionate share of that growth."

Both Max and Pat filed objections to the referee's report. After slightly modifying the report on a point not relevant to this appeal, the trial court overruled all objections and adopted the report.

The parties were granted a divorce on November 29, 1993.

Pat appealed and Max cross-appealed the trial court's decision. On June 8, 1994, the appellate court issued a judgment entry dismissing the appeal for lack of a final appealable order and remanding the cause to the trial court with instructions. Specifically, the appellate court found:

"[T]he court failed to place values on much of the marital property. It was determined by the trial court that any appreciation in the worth of Middendorf Stockyards during the parties' marriage was marital property. However, given the confusing state of the evidence on the valuation of the business, and the fact that the valuations were hundreds of thousands of dollars apart, we conclude that the

court should have required additional evidence on the valuation of [Max's] businesses."

On October 23 and 24, 1995, a magistrate heard the case on remand to determine, *inter alia*, whether there had been any appreciation of Max's interest in the stockyard during Max and Pat's marriage. On remand, the magistrate, on behalf of the court, hired an expert, Philip A. Brandt, a certified public accountant and attorney, to value the stockyard. Brandt testified that the value of Max's one-half interest in the stockyard in December 1986 was $201,389. Brandt testified that the value of Max's interest in December 1992 was $309,930, an increase of $108,541.

Daniel K. Thompson, a certified public accountant and attorney, testified on Max's behalf. Thompson testified that from December 1986 to December 1992, Max's interest in the stockyard increased in value by $88,746. The magistrate determined that Brandt's testimony was credible and, accordingly, he found that Max's share of the stockyard increased in value during the course of the marriage in the amount of $108,541. The magistrate further found that this increase in value was marital property "because the increase is the direct result of the labor or in-kind contribution of one of the spouses that occurred during the marriage, that spouse being Max Middendorf." Finally, the magistrate determined that Pat was entitled to half of the $108,541 increase in value, that being $54,270.50.

Both Max and Pat filed objections to the magistrate's findings. On March 14, 1996, through its opinion, the court adopted the magistrate's finding that the increase in the value of the stockyard during the parties' marriage was marital property, and awarded $54,270.50 to Pat.

Max appealed the trial court's decision. Pat cross-appealed. One of Max's assignments of error was that the trial court had erred in finding that the increased

value of his interest in the stockyard during the parties' marriage was marital property. The appellate court overruled the assignment of error, finding that the trial court correctly determined that the increase was marital property.

This cause is now before this court pursuant to the allowance of a discretionary appeal.

James R. Kirkland, for appellee.

Elsass, Wallace, Evans, Schnelle & Co., L.P.A., Richard H. Wallace, Stanley R. Evans and *Thomas A. Ballato*, for appellant.

LUNDBERG STRATTON, J. In this case, we examine the legal standards for determining when appreciation in separate property becomes marital property for purposes of the division of property in a domestic relations case under R.C. 3105.171. Max asserts that in order for a court to determine that an increase in separate property is marital property, the court must find that *both* spouses have expended significant marital funds or labor directly contributing to the increase or that the non-owning spouse must contribute substantial work to improvement and maintenance of the separate property. We disagree.

In *Worthington v. Worthington* (1986), 21 Ohio St.3d 73, 21 OBR 371, 488 N.E.2d 150, this court affirmed a trial court's decision that held that the increase in value of separate property is marital property where the increase in value is the result of the couples' expenditure of a substantial sum of marital funds and labor. The court in *Worthington* held:

"A trial court, in determining the division of property pursuant to the factors contained in R.C. 3105.18 and all other relevant factors, does not abuse its discretion by apportioning the appreciation in value of non-marital property as a

marital asset, where significant *marital funds and labor* are expended to improve and maintain such property." (Emphasis added.) *Id.* at syllabus.

However, the General Assembly codified a new definition of "marital" and "separate property" in R.C. 3105.171, which became effective on January 1, 1991. 143 Ohio Laws, Part III, 5226, 5452. R.C. 3105.171(A)(3)(a), as amended, states:

" 'Marital property' means, subject to division (A)(3)(b) of this section, all of the following:

" * * *

"(iii) * * * 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." (Emphasis added.) 144 Ohio Laws, Part I, 1754-1755.

R.C. 3105.171(A)(6)(a) states:

" 'Separate property' means 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:

"* * *

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

Finally, R.C. 3105.171(A)(4) states:

" 'Passive income' means income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse."

It is within the province of a court to construe laws enacted by the legislature. *Cowen v. State ex rel. Donovan* (1920), 101 Ohio St. 387, 397, 129 N.E. 719, 722. The primary purpose of interpretation is to ascertain the intent of the legislature. *Ohio Assn. of Pub. School Emp. v. Twin Valley Local School Dist. Bd. of Edn.* (1983), 6 Ohio St.3d 178, 181, 6 OBR 235, 237-238, 451 N.E.2d 1211,

1214. In interpreting legislative intent, the court must first look to the language of the statute. *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381. If the language of the statute is unambiguous, then the statute must be applied pursuant to its plain meaning. *Id*. at 105-106, 65 O.O.2d at 298, 304 N.E.2d at 381.

The plain language of R.C. 3105.17(A)(3)(a)(iii) unambiguously mandates that when *either* spouse makes a labor, money, or an in-kind contribution that *causes* an increase in the value of separate property, that increase in value is deemed marital property. *Kotkowski v. Kotkowski* (May 19, 1995), Portage App. 94-P-0027, unreported, 1995 WL 378681; *Hansen v. Hansen* (Dec. 11, 1992), Lake App. No. 92-L-052, unreported, at 8, 1992 WL 366885.

The definition in R.C. 3105.171(A)(3)(a)(iii) differs from the "joint efforts" test in *Worthington* in that *Worthington* required an effort by *both* spouses before any increase in the value of separate property due to such efforts would be classified as marital property. R.C. 3105.171(A)(3)(a)(iii) requires only an expenditure or effort by *either* spouse. Thus, R.C. 3105.171(A)(3)(a)(iii) in effect supersedes *Worthington* for purposes of defining when appreciation of separate property is marital property. *Nine v. Nine* (Mar. 1, 1995), Summit App. No. 16625, unreported, 1995 WL 89478. Accordingly, the appellate court did not err in affirming the trial court's interpretation of R.C. 3105.171, that an increase in the value of separate property due to *either* spouse's efforts is marital property.

We must now determine if there was sufficient evidence to support the trial court's determination that there was an increase in the value of the stockyard during Max and Pat's marriage and that the increase was *due to* the labor, money or in-kind contributions made by Max. R.C. 3105.171(A)(3)(a)(iii). If the evidence indicates that the appreciation of the separate property is *not due* to the

input of Max's (or Pat's) labor, money, or in-kind contributions, the increase in the value of the stockyard is passive appreciation and remains separate property. R.C. 3105.171(A)(6)(a)(iii); 3105.17(A)(4); see, also, *Roberts v. Roberts* (Feb. 18, 1993), Highland App. No. 92 CA 800, unreported, 1993 WL 49461.

A trial court has broad discretion in making divisions of property in domestic cases. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 23 O.O.3d 296, 432 N.E.2d 183. A trial court's decision will be upheld absent an abuse of discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295, 18 OBR 342, 344, 480 N.E.2d 1112, 1114. "Abuse of discretion" is more than an error of law or judgment; it implies that the court acted in an unreasonable, arbitrary, or unconscionable fashion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 482, 450 N.E.2d 1140, 1142. If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion. *Ross v. Ross* (1980), 64 Ohio St.2d 203, 18 O.O.3d 414, 414 N.E.2d 426. Therefore, if there is some competent, credible evidence that there was an increase in the value of the stockyard during the marriage and that the increase in the valuation was due to labor, money, or in-kind contributions of either Max or Pat, or both, the increase in valuation is classified as marital property and subject to division.

On remand from the court of appeals, the magistrate hired Philip Brandt as an independent expert to value the stockyard. Brandt testified that the value of the stockyard when the Middendorfs were married was $201,389 and the value in December 1992, the stipulated date for purposes of determining value, was $309,930. Thus, the increase was $108,541. Both the magistrate and the court rejected the defense expert's testimony and found the court-appointed expert more

credible. This testimony provided credible evidence of an increase in the value of the stockyard during the Middendorfs' marriage.

The second issue upon which we must determine if credible evidence has been submitted is whether this increase in value of the stockyard was *due to* labor, monetary, or in-kind contribution by Max.

The stockyard business primarily involves buying hogs from farmers and then reselling them to the slaughterhouse. As a sideline, the stockyard would contract with farmers to feed the hogs until the hogs reached a marketable size, whereupon they would be sold to a meatpacking company. This arrangement has a reciprocal benefit: the farmer is relieved of the risks associated with owning the hog (disease, market fluctuation) and the stockyard is relieved of having to care for the hogs.

Max argues that there is no evidence that the increase in the stockyard's value was due to his funds or labor. Max asserts that the increase was due solely to passive appreciation from "market changes." However, Max's position fails to take into account all of the other factors contributing to the increase.

Passive forces such as market conditions may influence the profitability of a business. However, it is the employees and their labor input that make a company productive. In today's business environment, executives and managers figure heavily in the success or failure of a company, and in the attendant risks (*e.g.*, termination, demotion) and rewards (*e.g.*, bonuses, stock options) that go with the respective position. These individuals are the persons responsible for making pivotal decisions that result in the success or failure of the company. There is no reason that these factors should not likewise be relevant in determining a spouse's input into the success of a business.

It is true that the stockyard business has inherent, uncontrollable risks, such as market fluctuation and death of the livestock due to disease, which affect profitability. However, monitoring market prices in order to make timely purchases and sales, deciding the numbers of hogs purchased, and deciding whether to contract with farmers to care for hogs are a few of the calculated decisions made by the stockyard management that also affect profitability. Thus, no matter how high hog prices went, the business would not operate, let alone increase in value, without the necessary ingredients of labor and leadership from the owners and management. Making these calculated decisions was part of Max's responsibilities as a livestock buyer and co-owner of the stockyard. Max testified that he spent long hours working there, which included buying and selling hogs.

Both the trial court and the court of appeals found that these efforts directly contributed to the appreciation of the company assets. The trial court found that "the increase in value of Middendorf Stockyard Company was the direct result of the pivotal role which [Max] played in the management of the company during the course of the marriage." The appeals court found that the Max "played a vital role in the management of the Stockyards. * * * [He] clearly dedicated himself to his work, spending significant amounts of time working to keep his business profitable in an increasingly risky market." Absent an abuse of discretion, we will not disturb these findings of fact.

Although we note that Pat contributed substantial efforts to the family relationship that freed Max of the responsibilities of the home and children and enabled him to devote more time to the business, we need not reach the issue of the value of her contributions. Because Max's efforts contributed to the appreciation of the Middendorf Stockyards, the requirements of R.C.

3105.171(A)(3)(a)(iii) are met, as the statute requires the contribution of only one spouse. Thus, we find some competent, credible evidence that Max's interest in the stockyard increased in value by $108,541, during Max and Pat's marriage, due to Max's labor. Therefore, the trial court did not abuse its discretion in finding that the $108,541 appreciation of the stockyard was a marital asset to be divided between Max and Pat. Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER and COOK, JJ., concur.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN12 **Marital Termination & Spousal Support, Spousal Support**

An award of alimony may be made in the form of an allowance for reasonable attorney fees. Consideration must be given to the reasonableness of the fee award and to the criteria used in the granting of an alimony award. On appeal, the only questions for inquiry are whether the factual conclusions upon which the trial court based the exercise of its discretion were against the manifest weight of the evidence, or whether there was an abuse of discretion. The initial overriding consideration is the financial ability of the individual in question to meet the demands of any award. Not only must the award be within the individual's ability to pay, but it must also leave that individual the means to maintain his own health and well-being by obtaining proper food, shelter and clothing, and it must not burden him to the extent his incentive to pay is destroyed.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN13 **Marital Termination & Spousal Support, Spousal Support**

Ohio Rev. Code Ann. § 3105.18(H) does not authorize an award of interest on attorney fees issued as part of a support order. It merely states that the fees must be reasonable. Ohio Rev. Code Ann. § 3113.21.9 states that the court may order interest on an order issued pursuant to § 3105.18 if there is a failure to comply with the support order and such failure was willful.

Family Law > Marital Termination & Spousal Support > Spousal Support > General Overview

HN14 **Marital Termination & Spousal Support, Spousal Support**

A right to interest on unpaid installments of alimony accrues on the date each installment matures or becomes due, and runs until paid.

Counsel: APPEARANCES:

For Plaintiff-Appellant: JOHN F. SEELIE, ESQ., Cleveland, Ohio.

For Defendant-Appellee: JENNIFER B. MUNROE, PRO SE, Rocky River, Ohio.

Judges: JAMES M. PORTER, PRESIDING JUDGE, TIMOTHY E. McMONAGLE, J., CONCURS., KARPINSKI, J., CONCURS IN PART AND DISSENTS IN PART.

Opinion by: JAMES M. PORTER

Opinion

[*534] **[**1157]** JAMES M. PORTER, P.J.,

Plaintiff-appellant William C. Munroe appeals from the divorce decree of the Domestic Relations Court and contends that the court erred in favor of his ex-wife, Jennifer B. Munroe, defendant-appellee in making disposition of marital and separate property and in awarding spousal support and attorney fees in the particulars hereinafter discussed. We find merit to the appeal and affirm in part and reverse in part for the reasons hereinafter stated.

Plaintiff husband and defendant wife were married October 12, 1974. They **[***2]** had two children, Mary K. (10-18-78) and William C., Jr. (5-5-80). At the time of the divorce on December 11, 1995, the husband was 52 years of age and the wife age 48. The husband was employed at Fairview General Hospital as a home care marketing manager with annual gross earnings of $ 50,460 and net earnings of $ 2,660 per month. The wife was employed full time as an office manager for Partridge Enterprises earning $ 16,200 annually with take-home pay of $ 1,034 per month.

In May 1974, prior to the marriage, the husband purchased the real property at 275 Yacht Club Drive, Rocky River for $ 22,000. The husband paid $ 4,400 down plus approximately $ 1,100 in closing costs for a total of $ 5,5.00. He mortgaged the $ 17,600 balance on his individual credit and moved into the home in July 1974.

After purchasing the property and moving in, he proposed marriage to Jennifer in September 1974 and the parties were married October 12, 1974. The wife moved into the home with her eight-year-old child from a previous marriage. At **[*535]** the time the husband purchased the Yacht Club Drive real estate, there were

no plans to marry. After the marriage, title to the property was placed in their **[***3]** joint names.

In 1978, the parties took out a $ 25,000 home improvement loan for a new kitchen, second floor addition, garage and other improvements. The home improvement loan ($ 25,000) and the balance on the husband's original mortgage ($ 16,000) and costs were combined and refinanced in a new $ 42,500 first mortgage on which they were jointly liable. Before refinancing the first mortgage, the parties had reduced the mortgage by $ 914 with payments from marital income. The principal balance on the first mortgage is now $ 30,651, a reduction in principal of $ 11,849 from the $ 42,500 mortgage taken in 1978. Also, there is now $ 26,578 owed on a home equity line, secured by the Yacht Club Drive property, that is a marital debt not incurred in relation to said property.

The parties stopped living together during the winter of 1992 and officially separated in March 1993. The wife and two children remained in the Yacht Club Drive property. The husband filed a complaint for divorce on February 25, 1994 on grounds of gross neglect of duty. In March 1994, the wife counterclaimed **[**1158]** for divorce for gross neglect and incompatibility. On March 30, 1995, the wife filed her motion for support pendente **[***4]** lite with affidavit.

The case was tried from September 12 to 14, 1995. The court's decision and judgment entry were issued on December 11, 1995, granting both parties a divorce, shared parenting, dividing property (both marital and separate), and awarding temporary and permanent child support ($ 351.50 per month per child) and spousal support ($ 600 per month for six years).

The husband filed a timely notice of appeal from the trial court's final divorce judgment. A subsequent appeal by the husband from an order denying his motion to tax the trial transcript as costs has been consolidated for hearing and disposition with the original case. The wife filed no appellee's brief herein.

We will address defendant's assignments of error in the order asserted and together where it is appropriate for discussion.

> I. THE TRIAL COURT ERRED IN NOT AWARDING THE HUSBAND HIS SEPARATE PREMARITAL PROPERTY AND THE PASSIVE APPRECIATION ON SAID PROPERTY, CONTRARY TO THE EXPRESS MANDATES OF *OHIO REVISED CODE 3105.171*.
>
> IX. THE TRIAL COURT ERRED IN AWARDING THE WIFE THE POSSESSION OF AND RIGHT TO PURCHASE THE HUSBAND'S SEPARATE PROPERTY.

Assignments of Error I and IX will be addressed **[***5]** together as they both deal with whether the Yacht Club Drive real estate or portions thereof constitute separate property.

[*536] Under newly enacted ***HN1***[⬆] *R.C. 3105.171(B)* (effective Jan. 1, 1991): "the Court shall *** determine what constitutes marital property and what constitutes separate property" in accordance with specified definitions contained in the statute. A court dividing property upon divorce "shall disburse a spouse's separate property to that spouse." *R.C. 3105.171(D)*. "Separate property" includes: "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; [and] passive income and appreciation acquired from separate property by one spouse during the marriage." *R.C. 3105.171(A)(6)(a)(ii)* and *(iii)*; *Peck v. Peck (1994), 96 Ohio App. 3d 731, 734, 645 N.E.2d 1300*.

Under the new statutory scheme, ***HN2***[⬆] "the commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." *R.C. 3105.171(A)(6)(b)*.

> Thus, traceability has become the focus when determining whether **[***6]** separate property has lost its separate character after being commingled with marital property ***. The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence to trace the asset to separate property.

Peck, supra at 734.

We agree with the trial court that plaintiff's premarital down payment on the home ($ 4,400) was the husband's separate property. However, we find the trial court erred in not awarding plaintiff the value of any appreciation on the down payment as separate property despite commingling. (Journal Entry at 9). It is a matter of economic certainty that some of the current enhanced market value of the home was traceable to the original down payment twenty-one years earlier.

HN3[⬆] Marital property includes "all income and

appreciation on separate property, due to the labor, monetary or in-kind contributions of either or both spouses that occurred during the marriage." *R.C 3105.171(A)(3)(a)(iii)*; *Simoni v. Simoni (1995), 102 Ohio App. 3d 628, 639, 657 N.E.2d 800*. At the same time, ***HN4***[⬆] separate property also includes "Passive income and appreciation acquired from separate property by one **[***7]** spouse during the marriage." *R.C. 3105.171(A)(6)(a)(iii)*; *Sauer v. Sauer (May 30, 1996), 1996 Ohio App. LEXIS 2275*, *10, Cuyahoga App. No. 68925, unreported. Appreciation as the result of the increase in the fair market value of the separate property due to its location or inflation is passive income pursuant to the statute. *Sauer, supra, 1996 Ohio App. LEXIS 2275*, *11-12; *Nine v. Nine (March 1, 1995), 1995 Ohio App. LEXIS 822*, *10, Summit App. No. 16625, unreported. In the **[**1159]** instant case, the Yacht Club Drive residence increased in market value from $ 22,000 in 1974 to $ 184,000 today.

[*537] The critical issue under this assignment of error is what portion of the current net market value of the home is separate property of the husband versus marital property to be divided with the wife. See *Sauer, supra, 1996 Ohio App. LEXIS 2275*, *11 ; *Nine, supra, 1995 Ohio App. LEXIS 822*, *10.

The trial court found that the plaintiff paid $ 22,000 in 1974 prior to the marriage, of which $ 4,400 was the down payment with a mortgage of $ 17,600. Therefore, plaintiff's separate property is traceable pursuant to *R.C. 3105.171(A)(6)(b)* since "the commingling of separate property **[***8]** with other property of any type does not destroy the identity of the separate property as separate property except when the separate property is not traceable".

The court herein found the separate property of the husband in the Yacht Club Drive property was only the down payment he made at the time of purchase and "that the entire appreciation in the house value from the date of marriage through the date of trial is not passive, pursuant to *Ohio Revised Code § 3105.171* and therefore it is not the separate property of the Plaintiff [husband]." (Journal Entry at ***8***-9). We disagree.

We find that the trial court did not follow the dictates of the statute and gave the plaintiff no credit for appreciation over the last twenty-one years of his investment in the separate property prior to the marriage. This Court recently in *Sauer v. Sauer, supra, 1996 Ohio App. LEXIS 2275*, *12, provided the formula for determining the appreciation of separate property under such circumstances as follows:

Go to table1

[*9]** This Court in *Sauer* defined "separate investment" in the equation to be "the value of the property on the date of marriage." *Sauer* at 6, citing *Nine v. Nine (March 1, 1995), 1995 Ohio App. LEXIS 822*, Summit App. No. 16625, unreported. However, it is more accurate to say that "separate investment" is the value of that spouse's interest in the property, not the whole value of the property, on the date the parties were married. The "Total Investment" portion of the equation was defined as the separate property plus the investment of the marital funds. *Id.*

Therefore, in the instant case, the amount of the separate investment would be the value of the husband's interest in the property on the date of the marriage, which was the $ 4,400 down payment. The investment of the marital funds would include the $ 914 reduction in the first mortgage, and the $ 11,849 reduction in the refinanced mortgage. The $ 25,000 home improvement is not part of the total **[*538]** investment but rather increases the base fair market value from $ 22,000 to $ 47,000 for the purposes of determining total property appreciation. The formula simply put should read as follows:

Go to table2

[*10]** The separate investment equals the value of the spouse's separate investment at the time the parties' were married. The total investment equals the separate investment plus the reduction in mortgage. Any improvements to the property due to the efforts of both parties raises the base fair market **[**1160]** value for purposes of determining total appreciation.

Adapting the relevant figures to the modified *Sauer* and *Nine* equations effects the following result:

Go to table3

The husband would therefore be entitled to 25.6% of the appreciated value, or $ 35,072. This value is then added to his separate investment of $ 4,400 for a total of $ 39,472. Thus, if the property was sold today, of the $ 126,771 equity in the home ($ 184,000 minus the refinanced mortgage balance of $ 30,651 and second mortgage of $ 26,578), $ 39,472 would be the husband's separate property and $ 87,299 would be marital property. According to the decree, however, the

wife was granted possession of the residence until the youngest child reaches 18 years old (May 1998), at which time the parties have several options **[***11]** including buying the other out or selling the property. Whatever option the parties exercise, the husband should be entitled to 25.6% of the equity in the home, plus his original investment of $ 4,400. Therefore, the trial court's judgment respecting the disposition of the Yacht Club Drive property is reversed.

Although we find that plaintiff is to receive the appreciated value of his separate property investment as stated above, we do not find that this entitles him to the entire residence. The entire property is not separate property, but a substantial portion is marital property. *Nine, supra, 1995 Ohio App. LEXIS 822*, *2. Therefore, we find the trial court did not abuse its discretion in permitting the defendant and the two children to reside on the property until the younger child attains majority or graduates from high school, whichever event last occurs. (Journal Entry at 17); *R.C. 3105.171(F)(3)* and *(J)*.

Assignment of Error I is sustained and Assignment of Error IX is overruled.

> **[*539]** II. THE TRIAL COURT ERRED IN TREATING THE HUSBAND'S SEPARATE LAWSUIT PROCEEDS AS MARITAL PROPERTY.

The trial court found as follows respecting the lawsuit settlement: **[***12]**

> that the monies that the plaintiff received from the lawsuit settlement [$ 4,000] were marital monies and not his separate monies since the cause of action upon which the lawsuit was based arose while the parties were residing together as husband and wife (1988) [and] the monetary damages sustained by plaintiff were directly related to the lost wages he incurred during the ten (10) months he was unemployed as a result of the incident which precipitated the cause of action, and which resulted in the lawsuit settlement.

(Journal Entry at 4-5).

The husband contends the settlement amount of his defamation lawsuit did not constitute lost wages, and there is no support in the record for such a conclusion which is contrary to *R.C. 3105.171(A)(6)(vi)* which defines "separate property" as follows:

> *HN5*[] Compensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets;

HN6[] A personal injury settlement is marital property only to the extent lost earnings and medical expenses have adversely impacted the marital estate. *Everhardt v. Everhardt (1991), 77 Ohio App. 3d 396, 399, 602 N.E.2d **[***13]** 701*; *Hartzell v. Hartzell (1993), 90 Ohio App. 3d 385, 386, 629 N.E.2d 491*.

Plaintiff herein brought two lawsuits against his former employer, Bede Industries. At trial, plaintiff testified that his first lawsuit against Bede concerned his severance package and a buyout regarding some real estate he owned with the company. The proceeds from the first Bede case were used to pay off marital debt, litigation costs of this divorce action and his second suit against Bede.

In his second suit against Bede, defendant claimed wrongful imprisonment and defamation **[**1161]** arising from Bede's accusation that plaintiff had stolen from the company. This case was settled for $ 4,000 which plaintiff used to buy a one-quarter partnership interest in a 25 foot motorboat.

At trial, defendant initially testified that he did not think his second suit concerned lost wages. (Tr. 159). However, he also testified that the false arrest/defamation affected him psychologically and caused him to be unable to work. (Tr. 160). Therefore, arguably the $ 4,000 settlement was for lost wages. Since the settlement agreement was confidential, there is no evidence as to how the damages were allocated among his injuries. **[***14]** Accordingly, we find the trial court did not abuse its discretion in finding that the $ 4,000 constituted marital property.

Assignment of Error II is overruled.

> **[*540]** III. THE TRIAL COURT ERRED IN AWARDING SPOUSAL SUPPORT WITHOUT CONSIDERATION OF THE STATUTORY FACTORS AS APPLIED TO BOTH PARTIES.
> IV. THE TRIAL COURT ERRED IN AWARDING 9 YEARS OF SPOUSAL SUPPORT AFTER A 19-YEAR MARRIAGE.

The husband complains that the trial court' failed to give adequate consideration to the husband's needs in awarding spousal support of $ 600 per month for a period of six years to the wife. (Journal Entry at 7).

This Court set forth the standards to be observed in reviewing an award of spousal support in *Terry v. Terry*

(1994), 99 Ohio App. 3d 228, 234, 650 N.E.2d 184:

> HN7[] Alimony comprises two components: a division of marital assets and liabilities, and periodic payments for sustenance and support. Kaechele v. Kaechele (1988), 35 Ohio St. 3d 93, 95, 518 N.E.2d 1197, 1200; Kunkle v. Kunkle (1990), 51 Ohio St. 3d 64, 67, 554 N.E.2d 83, 86. The court has equitable authority to divide and distribute the marital estate, and then consider whether an award of sustenance **[***15]** alimony would be appropriate. Holcomb v. Holcomb (1989), 44 Ohio St. 3d 128, 541 N.E.2d 597. The trial court has broad, but not unfettered, discretion in deciding what is equitable under the circumstances. Cherry v. Cherry (1981), 66 Ohio St. 2d 348, 355, 20 Ohio Op. 3d 318, 322, 421 N.E.2d 1293, 1298. HN8[] The trial court must set forth a factual basis or rationale which supports the award of spousal support. Kaechele, supra, at paragraph two of the syllabus; Moro v. Moro (1990), 68 Ohio App. 3d 630, 635, 589 N.E.2d 416, 419. This court cannot substitute its judgment for that of the trial court unless, under the totality of the circumstances, the trial court abused its discretion. Holcomb, supra, 44 Ohio St. 3d at 131, 541 N.E.2d at 599.
>
> HN9[] The trial court derives its authority to award spousal support from R.C. 3105.18, which sets forth numerous factors the court must consider when asked to provide spousal support. Among those factors are the respective earning abilities of the parties, the relative assets and liabilities of the parties, the standard of living enjoyed by the parties, and the time and expense necessary for the spouse who is seeking spousal support **[***16]** to acquire education, training and experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training or job experience, and employment is, in fact, sought. See R.C. 3105.18(C)(1).

The trial court herein made the following findings in support of its award of spousal support:

> The Court further finds that the parties have been married for 21 years, the Plaintiff is 52 years old, the Defendant is 48 years old, the Plaintiff's gross income is $ 50,460.00, the Defendant's gross income is $ 16,200.00 and the Defendant's net **[*541]** income is $ 1,034.00 per month. The Court finds that the Defendant is unable to meet her actual living expenses (which do not include health insurance coverage for herself) in the amount of $ 2,266.00 per month ($ 1,896.00 per month per Plaintiff's Exhibit 3, plus $ 230.00 per month for second mortgage, plus $ 140.00 per month for the consolidation loan), which are reasonable and necessary, solely upon her own income. The Court finds that, after consideration of all of the factors set forth in Ohio Revised Code § 3105.18, the Defendant is in need of, and entitled to, an award of spousal support from **[***17]** the Plaintiff, and that an award of spousal support to the Defendant in the **[**1162]** amount of $ 600.00 per month for a period of six (6) years, or until the Defendant's remarriage or cohabitation, or until either party's death, is reasonable, necessary, and appropriate under the facts and circumstances of this case. The Court finds that the Plaintiff has the financial ability to pay same.

(Journal Entry at 7).

Given the strict standards which govern our review of the trial court's judgment in this regard, we cannot say that the trial court abused its discretion in making the award. Plaintiff argues that the trial court's findings are inadequate as they do not show the trial court considered the husband's needs and ability to pay. However, the issue is whether the court's judgment entry and the transcript of the hearing provide sufficient details to enable this Court to review the lower court's determination and whether such review shows that the lower court considered the factors specified in R.C. 3105.18(C). Nelson v. Nimylowycz, (July 13, 1995), 1995 Ohio App. LEXIS 2973, Cuyahoga App. No. 67901, unreported at ***8***; Carman v. Carman (1996), 109 Ohio App. 3d 698, 704, 672 N.E.2d ***[***18]*** 1093. We find that the trial court did consider these factors as it so stated in its findings and that there is sufficient evidence to support the court's spousal support order.

The trial court was not obliged to give full credit to the living expenses that the plaintiff contends were in error. The defendant wife at trial stated that her monthly car expenses were correct, despite intense cross-examination. Her monthly gas utility expense of $ 140 per month was supported by budget amounts of $ 71.00/month to $ 161.00/month from July 1993 through August 1995. Given conflicting evidence, it was within the trial court's prerogative whether to believe defendant regarding her monthly expenses since the credibility of the witnesses is for the finder of fact. Robiner v. Robiner (December 7, 1995), 1995 Ohio App. LEXIS 5425, Cuyahoga App. No. 67195, unreported at 30; Andrades v. Andrades (May 11, 1995), 1995 Ohio App.

LEXIS 1952, Cuyahoga App. No. 67270, unreported at 6; Bacon v. Bacon (January 31, 1991), 1991 Ohio App. LEXIS 377, Cuyahoga App. No. 57678, unreported at 22.

In arguing the full economic impact of the spousal support award, plaintiff also calculates spousal support **[***19]** as including the husband's child support obligations. Plaintiff, however, does not contest the fairness of the child support obligations. **[*542]** In arguing that his monthly expenses exceeded his take home pay, he has also included both the first and second mortgage payments on the Yacht Club Drive property totalling $ 839/month. (Def. Ex. A). The trial court has clearly ordered that the defendant wife, who is occupying the property with the children, is responsible for these payments. (Journal Entry at ***8***-9). Given these adjustments, plaintiff has monthly income of $ 2,083.85, while the defendant has $ 2,449. Given that defendant's portion includes $ 716.65 of child support, her net resources to provide for the home, mortgage payments and her living expenses leaves her with $ 1,733. We cannot say the award was inequitable or that the court abused its discretion in its award of spousal support.

Assignments of Error III and IV are overruled.

V. THE TRIAL COURT ERRED IN AWARDING SUPPORT PENDENTE LITE PRIOR TO ACQUIRING JURISDICTION.

In this assignment of error, plaintiff contends that the trial court did not have jurisdiction to award temporary spousal support prior to **[***20]** the filing of the divorce action. The trial court awarded temporary spousal support retroactive to February 1993 (Journal Entry at 5), which was before the parties were separated, and a year before the divorce proceedings were filed.

A review of the court's Journal Entry indicates that the court incorrectly found that the plaintiff filed the divorce complaint as of February 1993, instead of the correct date of February 1994. (Journal Entry at 5). We find that this indeed created an error in the award of temporary spousal support one year before the complaint was filed. ***HN10***[⬆] Pursuant to R.C. 3105.18(B), the trial court has authority to award temporary spousal support "during the pendency of any divorce, or legal separation proceeding." See *Civ.R. 75(M)* to the same effect. No proceedings were pending until February 1994.

This Court in Rahm v. Rahm (1974), 39 Ohio App. 2d 74, 78, 315 N.E.2d 495 has held that ***HN11***[⬆] "temporary **[**1163]** alimony pending litigation may be awarded by the trial court any time after a complaint is filed and before judgment on the merits." Since the complaint in this case was not filed until February 1994, we find that the trial court could only award spousal support retroactive **[***21]** to that date. Therefore, we reverse and remand the trial court's temporary spousal support order and find that temporary spousal support should be dated from February 1994. Plaintiff's arrearage in such payments should be adjusted to show this correction.

Assignment of Error V is sustained.

VI. THE TRIAL COURT'S FINDINGS AND ORDERS REGARDING MORTGAGE PAYMENTS AND REAL ESTATE TAXES ARE CONTRADICTORY AND MUST BE MODIFIED.

[*543] The husband contends that the trial court ordered the parties to each pay one-half of the real estate taxes on the Yacht Club Drive property (Journal Entry at 18). This portion of the order overlooks the fact that real estate taxes would be paid through the mortgage escrow under the court's prior order requiring the wife to make the first mortgage payments. The first mortgage on the Yacht Club Drive real estate is $ 599 per month which includes real estate taxes. The trial court makes the finding that the first mortgage is payable at $ 599 per month. (Journal Entry at ***8***).

These orders are inadvertently inconsistent and that portion of the order requiring the husband to pay one-half of the real estate taxes at Journal Entry p. 18 is vacated.

[*22]** Assignment of Error VI is sustained.

VII. THE TRIAL COURT ERRED IN ORDERING THE HUSBAND TO PAY THE WIFE'S ATTORNEY'S FEES AND SAID ORDER IS CONTRARY TO THE EVIDENCE.

VIII. THE TRIAL COURT ERRED AND DISCRIMINATED AGAINST THE HUSBAND IN AWARDING INTEREST ON THE WIFE'S ATTORNEY FEE AWARD WHILE FAILING TO AWARD INTEREST ON THE HUSBAND'S AWARDS.

In awarding attorney fees to the parties, we are guided by this Court's statements in McCoy v. McCoy (1993), 91 Ohio App. 3d 570, 583-84, 632 N.E.2d 1358:

> ***HN12***[⬆] An award of alimony may be made in the form of an allowance for reasonable attorney fees. Swanson v. Swanson (1976), 48 Ohio App. 2d 85, 89, 2 Ohio Op. 3d 65, 68, 355 N.E.2d 894, 897. Consideration must be given to the reasonableness

> of the fee award and to the criteria used in the granting of an alimony award. *Id. at 90, 2 Ohio Op. 3d at 68, 355 N.E.2d at 898*. On appeal, the only questions for inquiry are whether the factual conclusions upon which the trial court based the exercise of its discretion were against the manifest weight of the evidence, or whether there was an abuse of discretion. *Id;* *Oatey v. Oatey (1992), 83 Ohio App. 3d 251, 263, 614 N.E.2d* ***[***23]*** *1054, 1061*; *Birath v. Birath (1988), 53 Ohio App. 3d 31, 39, 558 N.E.2d 63, 71*.

* * *

Further, the *Swanson* court cautioned that:

> "The initial overriding consideration is the financial ability of the individual in question to meet the demands of any award. See *Rivers v. Rivers (1968), 14 Ohio App. 2d 120 [43 Ohio Op. 2d 277, 237 N.E.2d 164]*. Not only must the award be within the individual's ability to pay, but it must also leave that individual the means to maintain his own health and well-being by obtaining proper food, shelter and clothing, and it must not burden him to the extent his incentive to pay is destroyed. *Blaney v. Blaney (Iowa 1964) [256 Iowa 1151], 130 N.W.2d 732, 733*. See *Coleman v. Coleman (Mo. App. 1958), 318 S.W.2d 378*." *Id., 48 Ohio App. 2d at 95, 2 Ohio Op. 3d at 71, 355 N.E.2d at 901*.

[*544] The trial court made the following findings of fact in awarding attorney fees of $ 5,000 to the wife at five-percent interest:

> The Court further finds that the Defendant has incurred attorney fees in connection with this matter in the amount of. $ 21,240.00, of which the Defendant has paid $ 9,325.00, leaving a balance **[***24]** due on Defendant's attorney fees in the amount of $ 11,433.75. The Court finds that these fees are reasonable and necessary under the facts and circumstances of this case.
>
> The Court further finds that the Plaintiff has incurred attorney fees in connection with this matter in the amount of $ 12,764.00, of which the Plaintiff has paid $ 2,500.00, leaving **[**1164]** a balance due on Plaintiff's attorney fees in the amount of $ 10,264.00.
>
> The Court further finds that the Defendant is entitled to an award of additional spousal support from the Plaintiff in the amount of $ 5,000.00, as and for a contribution toward her attorney fees which were incurred in connection with this matter. The Court finds that the Plaintiff has the financial ability to pay same, and the Defendant does not.

(Journal Entry at 11).

Although plaintiff disputes this allowance, we fail to find any abuse of discretion in the award of such a modest amount, even though the court failed to recognize that plaintiff also owed an additional $ 7,500 in attorney fees to his prior counsel.

Plaintiff also contends that the trial court erred in awarding the defendant attorney fees at five-percent interest. He contends it is unfair **[***25]** due to the trial court's failure to recognize the appreciation on the $ 4,400 of his separate property. In sustaining plaintiff's Assignment of Error I, we have remedied that complaint. Nonetheless, we find the trial court's award of five-percent interest on defendant's attorney fees was an abuse of discretion.

HN13[↑] *R.C. 3105.18(H)* does not authorize an award of interest on attorney fees issued as part of a support order. It merely states that the fees must be reasonable. *R.C. 3113.21.9*, Order for Payment of Costs on an Action, states that the court may order interest on an order issued pursuant to *R.C. 3105.18* if there is a failure to comply with the support order and such failure "was willful." In the case herein, we have no willful noncompliance as the plaintiff has not yet had the opportunity to begin to pay the amount. In fairness to the decision below, it seems that the court's order would have permitted the plaintiff to wait to pay the attorney fees until the marital home was sold, if it was indeed sold. The court issued its five-percent interest order in conjunction with its order dictating what should be the proper course of action if either party is unable to buy the home and **[***26]** it is put up for sale. The court stated as follows:

> **[*545]** 3) The remaining net proceeds shall be divided equally between Plaintiff and Defendant, however out of the Plaintiff's one-half share the Defendant shall be paid the sum of $ 5,000.00 plus five-percent interest per annum from the date hereof, as and for additional support toward her attorney fees.

(Journal Entry at 17).

Plaintiff should be given the option of paying off the attorney fees without incurring the five-percent interest obligation he would incur by awaiting the sale of the Yacht Club Drive property. ***HN14***[↑] "A right to interest on unpaid installments of alimony accrues on the date

each installment matures or becomes due, and runs until paid." *Allen v. Allen (1990), 62 Ohio App. 3d 621, 625, 577 N.E.2d 126*; *Kern v. Kern (1990), 68 Ohio App. 3d 659, 662, 589 N.E.2d 434*. The trial court's award of attorney fees in this case was a form of spousal support. Therefore, the interest should begin to accrue as of the date it becomes due and payable, which is as of the date of the judgment order. Therefore, if plaintiff pays defendant the lump sum attorney fees immediately, no interest will have accrued.

[*27]** We remand this portion of the award back to the trial court to correct its order to state that "the lump sum amount due for attorney fees shall accrue at the rate of five-percent interest until paid in full."

Assignment of Error VII is overruled; Assignment of Error VIII is sustained.

> X. THE TRIAL COURT'S REFUSAL TO TAX THE COST OF THE TRANSCRIPT FOR APPEAL AS COSTS VIOLATED THE APPELLANT'S RIGHT TO DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES AND OHIO CONSTITUTIONS.

Plaintiff contends that the trial court erred in denying his motion to tax as costs the expense of preparing the transcript for appeal. This assignment of error has no merit.

App.R. 24 controls the assessment of costs on appeal. *App.R. 24(B)*, as amended July 1, 1992, provides that "costs" include the "expense incurred in preparation of the record, including the transcript of proceedings ***." Therefore, on appeal, the expense of preparing a transcript is included in "costs." *Kruse v. Vollmar (1993), 85 Ohio App. 3d 198, 200, 619 N.E.2d 482*. We find, however, despite this provision, the **[**1165]** trial court did not err in denying plaintiff's motion as the "court of appeals has exclusive jurisdiction **[***28]** under *App.R.24* to assess the costs on appeal." *Crest v. Management, Inc. v. McGrath (July 6, 1994), 1994 Ohio App. LEXIS 2997*, Summit App. No. 16579, unreported at 3-4.

App.R. 24(A)(4) gives this Court the discretion to award costs as it sees fit when the "judgment appealed is affirmed or reversed in part or is vacated." Since we are in fact reversing the trial court's judgment in part, we order that the parties share the cost of preparing the transcript equally.

[*546] Assignment of Error X is overruled.

Judgment affirmed in part; reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that appellant and appellee shall pay their respective costs herein taxed.

The Court finds there were reasonable grounds for these appeals. It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Domestic Relations Division to carry this judgment into execution.

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

TIMOTHY E. McMONAGLE, J., CONCURS.

KARPINSKI, J., CONCURS IN PART AND

DISSENTS IN PART. (SEE CONCURRING

[*29]** AND DISSENTING OPINION ATTACHED).

JAMES M. PORTER

PRESIDING JUDGE

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B)*, *22(D)* and *26(A)*; Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, S. Ct. Prac.R. II, Section 2(A)(1).

Concur by: KARPINSKI

Dissent by: KARPINSKI

Dissent

KARPINSKI, J., CONCURRING IN PART AND DISSENTING IN PART:

I respectfully dissent from the majority's disposition of the first assignment of error.

I would affirm the trial court's division of property relating to the parties' residence. The trial court awarded William Munroe his $ 4,400 down payment on the residence made five months before the marriage. William Munroe failed to prove any "passive," rather than active, appreciation to this separate property to warrant any greater **[***30]** award.

Following the marriage, the parties obtained a joint home improvement loan of $ 25,000, which substantially exceeded the original purchase price of $ 22,000, and completely transformed the property. [1] There is no evidence that the increase in value of the residence was traceable as "passive appreciation" to this modest down payment as opposed to the substantial reconstruction of the property through the intervening addition of an entire second floor, a new kitchen, a garage and other improvements. As a result, the trial court did not "abuse its discretion" when dividing the parties' interests in this property.

The majority's reliance on *Sauer* and *Nine* to support its argument to the contrary is misplaced. Neither case involved such significant improvements, made shortly after the marriage and more than doubling the cost of the jointly titled residence. The majority's ultimate **[***31]** award to William Munroe of 25.6% of the appreciated value of the residence is counter-intuitive. At a minimum, it would appear that William Munroe's separate property, that is, his down payment of 20%, was diluted, not augmented to 25.6%, when the couple more than doubled their indebtedness on the property.

[*547] For these reasons, I respectfully dissent from the disposition of this assignment of error.

[1] The parties held title to the property jointly and also refinanced this total indebtedness to make it a joint liability.