

ORIGINAL

IN THE SUPREME COURT OF OHIO

ROBERT D. KEHOE,
Appellant,

vs.

MAURA A. KEHOE
Appellees.

Case No. 14-0286

On Appeal from the Judgment of the State
Court of Appeals, Eighth Appellate District,
Cuyahoga County, App. No.
CA-13-099404
(Cuyahoga C.P. No. DR 09 328835)

MEMORANDUM IN SUPPORT OF JURISDICTION OF
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APPELLANT ROBERT D. KEHOE'S MEMORANDUM
IN SUPPORT OF JURISDICTION

I. EXPLANATION OF WHY THIS CASE PRESENTS QUESTIONS OF
GREAT GENERAL AND PUBLIC INTEREST

Ohio appellate courts are bound by the law of the case doctrine and should use en banc proceedings to ensure consistency of results in a case, and to avoid endless litigation of issues that have been resolved. This cause presents an important question about whether Ohio's appellate courts should use en banc proceedings to resolve intra-district conflicts arising from a second panel's decision to depart from the law of the case, regardless of whether the conflict arises from a legal issue (as opposed to application of the same facts to the same law to arrive at a different conclusion). This is not mere "error" in the decision of the second panel, it is "a conflict of two or more decisions of the same court on issues that are dispositive of the case."

The Eighth Appellate District has interpreted this Court's holding in *McFadden v. Cleveland State University*, 120 Ohio St. 3d 54, 2008-Ohio-4914, 896 N.E. 2d 672 to require it to resolve conflicts between two or more decisions of the court through en banc proceedings on any *legal issue* that is dispositive of the case. Appellant argues that the directive from this Court set forth in *McFadden* is broader than the Eighth Appellate District's interpretation, and includes the law of the case doctrine that embodies issues decided by the court that establish precedent for all future proceedings in the matter.

By accepting jurisdiction over this appeal, the Supreme Court can establish that intra-district conflicts between two or more decisions of the court on *any* issue that is dispositive of the case includes *all* issues decided by the court. Stated differently, en banc proceedings should be utilized to ensure consistency and predictability for both legal issues and all other issues decided by the same court by application of the law of the case doctrine.

This is an issue of great importance to the appellate bench and bar, and all citizens of Ohio. While *McFadden* imposes a duty on appellate courts to conduct en banc prehearings to resolve conflicts, the Court did not prescribe specific rules to be applied. Resolving conflicts on dispositive issues is broader than conflict on points of law. In recent decisions, the Court has clarified the use of en banc proceedings by Ohio appellate districts. The Court should take this opportunity to clarify that Ohio adheres to the law of the case doctrine, and that en banc proceedings must be utilized to ensure that the law of the case is followed from one panel to another.

The en banc court did not consider whether there was a conflict on dispositive issues because it understands its role as determining intra-district conflicts on legal issues only. In determining that contravention of the law of the case doctrine is merely an “error” of the panel at most, the en banc court has foreclosed any review of cases that do not demonstrate conflicts on specific legal points. Presumably, the en banc panel left to the panel on reconsideration the correction of its error. In fact, no such correction can occur if the panel members also participate in the en banc court and agree that intra-district conflicts only involve conflicts on legal principles.

II. STATEMENT OF THE CASE AND FACTS

This dispute arises out of a simple divorce action. Following a seven day trial, the trial court made certain findings of fact and conclusions of law that imposed obligations on Husband that substantially exceeded his ability to pay and left him *insolvent*. The trial court’s decision was issued *nunc pro tunc* on September 6, 2011 (“Entry I”). Husband appealed to the Eighth Appellate District and set forth five assignments of error. The court of appeals issued its decision on July 26, 2012 (“Panel I”)¹ finding that the trial court abused its discretion on four of five assignments of error, and partially reversed on a fifth assignment of error. Panel I remanded

¹ Appendix 1.

the case for further proceeding consistent with its decision. The trial court issued its decision on remand on December 14, 2012 (“Entry II”) following the mandate of Panel I on assignments of error I and IV, but on II, III and V made only minor adjustments and still imposed obligations on Appellant that left him insolvent. Husband appealed Panel II’s decision, arguing that on remand the trial court did not follow the mandate of Panel I in that an equitable outcome was not achieved because the decision still rendered him *insolvent*. On November 9, 2013, in derogation of the law of the case doctrine, Panel II *reversed* Panel I on several key issues and affirmed Entry II in its entirety.²

On November 18, 2013, pursuant to App. R. 26(A)(1), Appellant requested that Panel II reconsider its decision announced November 7, 2013 because it: a) is in direct conflict with dispositive instructions from Panel I to reach an outcome that is equitable; b) is premised on inaccurate calculations, and c) misreads Panel I’s mandate that the trial court re-evaluate evidence on certain issues presented.

Appellant also moved the Eighth Appellate District Court pursuant to App.R. 26(A)(2)(b), Loc. App.R. 26(A)(2), and *McFadden*, for en banc consideration of the appeal because Panel II’s decision is in direct conflict with dispositive issues in Panel I’s decision. As such, Appellant argued that consideration en banc was necessary to secure and maintain uniformity and continuity of the court’s decisions. Appellant filed his Application for Reconsideration and Application for En Banc Consideration simultaneously. The en banc court issued its ruling on December 19, 2013.³ In a 10-2 decision denying en banc review, the court stated: “We find that appellant’s argument that the panel decision contravenes the law of the case at most claims an *error* in the panel decision. It does not allege a conflict between two or more

² Appendix 2.

³ Appendix 3 and 4

decisions of the court.” While noting that pursuant to App.R. 26, Loc.App.R. 26 and *McFadden* the court is “*obligated* to resolve conflicts between two or more decisions of this court on *any* issue that is dispositive of the case...,” it limits the issues for en banc review to questions of law.

Panel II expressed its views on Appellant’s Application for En Banc Consideration by participating in the decision of the en banc court and concurring in the decision to deny the application. Yet, Panel II issued a separate ruling on January 9, 2014 denying appellant’s motion for reconsideration without opinion.⁴ Panel II does not correct any “error” in its decision. Thus, Appellant was left with inconsistent rulings of the same court in Appeal I and Appeal II. The Eighth Appellate District did not recognize the law of the case and let stand inconsistent decisions of Panel I and Panel II.

Appellant has no desire to argue to this Court the underlying merits of his appeal to Panel II. However, it is not possible to determine if the en banc court or the panel erred in determining whether there was a conflict concerning dispositive issues without at least an overview of the inconsistencies between the decisions of Panel I and Panel II.

Assignment of Error I -- Income

Panel I discussed in detail all aspects of husband’s income and the evidence in support of husband’s income. ¶21-26. Panel I concluded that “Notwithstanding the above evidence, including the joint returns of the parties that survived the scrutiny of the IRS, the trial court found appellant’s income to be \$120,000. Our review of the record indicates that *even with*⁵ the trial court’s finding of imputed income, the “obligation ordered far exceeds his ability to pay.”¶26

⁴ Appendix 5

⁵ The phrase “even with” is not Panel I’s affirmation of the trial court’s finding on husband’s income. Rather, the phrase was used to clarify that whether or not the trial court’s finding was accurate, the obligations imposed on husband still left him insolvent. Panel I then instructed the trial court to make an accurate finding on husband’s income.

Panel I then turned to the obligations imposed by the trial court's order and concluded that husband's "obligation in the first 12 months easily exceeded the imputed income of \$120,000 by more than \$50,000. As such, an equitable result has not been reached, and we suspect, appellant will be subject to contempt proceedings for failure to comply with an impossible task." ¶27-28. Accordingly, Panel I ordered the trial court to "re-evaluate the evidence in light of the foregoing to achieve a more equitable result."¶29. The "foregoing" was Panel I's extensive review of the evidence on income demonstrating that a finding of \$120,000 of income imputed to husband was an abuse of discretion. The "foregoing" was Panel I's mandate to review the factors set forth in R.C. 3105.18(C) to reach an equitable result on spousal support. ¶18. These findings and mandate constitute the law of the case.

Appellant assigned as error the trial court's failure to re-evaluate the evidence on his income in view of Panel I's clear mandate to do so. Panel II opined that husband "misunderstands our holding in *Kehoe I.*"..."Contrary to appellant's arguments, our decision in *Kehoe I* did not find the trial court's finding on income to be an abuse of discretion. *In fact, Kehoe I did not address appellee's income at all.*" ¶8 (emphasis added). Panel II states that we [Panel I] reversed the trial court's spousal support award because *even with* the \$120,000 yearly income figure the total obligations imposed in the first year exceeded husband's ability to pay by more than \$50,000 ... *Kehoe I* did not remand for the trial court to reconsider its findings on the income of husband or wife, but rather to reconsider the obligations imposed in light of those income findings." *Id.* ¶8.

There simply is no way to reconcile Panel I's mandate to "re-evaluate the evidence in light of the foregoing (more than three pages of discussion of evidence on income) with Panel II's holding that "*Kehoe I* did not address appellee's income at all." Panel I correctly stated that

an equitable spousal support award requires the analysis of all 14 factors of RC 3105.18(C), including income. See, RC 3105.18(C)(1)(a). Why would Panel I discuss the evidence on husband's income for ten paragraphs in its decision, and conclude with an instruction to re-evaluate the evidence in light of that discussion and the applicable law, if it was accepting the trial court's finding on husband's income?

Assignment of Error II -- Marital Debts

Panel I held that "...we instructed the trial court to *re-evaluate the evidence presented to arrive at a more equitable result regarding the division of property and allocation of debt obligations.*" ¶38 (emphasis added). That is the law of the case and the standard of review for both the trial court and Panel II. On remand, the trial court failed to address certain debts of the marriage. Appellant assigned as error the trial court's failure to allocate the parties marital debts in a manner consistent with R.C. 3105.171

Panel II held that "Appellant presents arguments within this assignment of error regarding marital property issues that were outside the scope of our limited remand following *Kehoe I* and, again, involve evidentiary rulings from trial." ¶10. Appellant did argue evidence from trial because the question of whether the trial court did as it was instructed ("re-evaluate the evidence presented to arrive at a more equitable division of property and allocation of debt") turns on evidence presented at trial. Panel II's reasoning that Appellant's arguments are outside the scope of the remand are inconsistent with Panel I's mandate and the law of the case.

Assignment of Error III -- Spousal Support

Panel I treated spousal support and division of property together in the third assignment of error in *Kehoe I*. See, ¶¶19-28 Panel I thoroughly reviewed Appellant's income and the obligations imposed on him by the trial court and concluded that "...*even with* the trial court's

finding of yearly income of \$120,000,⁶ the obligation far exceeds his ability to pay.” Panel I then analyzed the obligations imposed and determined that in the first year Appellant was ordered to pay \$169,074 (*plus* other enumerated but not quantified expenses) ... which “...easily exceeds the imputed income of \$120,000 by more than \$50,000. As such, an equitable result has not been reached,” ¶28. Accordingly, Panel I ordered the trial court to “re-evaluate the evidence in light of the foregoing to achieve a more equitable result.”¶29.

In view of this mandate, on remand the trial court made no attempt to determine the income of the parties. The trial court’s decision on remand begins with imputed income of \$120,000. In Entry II, the trial court did adjust Husband’s obligations as follows: Spousal support was reduced from \$3,000 per month to \$2,500 per month beginning after the sale of the marital residence; health insurance premiums were capped at \$1,000 per month; attorneys’ fees and litigation expenses combined were reduced from \$57,510 payable in the first year to \$35,000 payable at the rate of \$200 per month over 14.6 years. Educational debt was allocated 75% to husband and 25% to wife based on a disparity of income. The amount and term of the debt was not quantified and does not appear to be a factor in re-evaluating the evidence.

Appellant argued that the trial court still abused its discretion because the imputed income is not supported by the evidence and further, the obligations still exceed his ability to pay, let alone reach a more equitable result. Panel II noted that: “While there is no mathematical formula” to reach the goal of equitable spousal support, this Court *requires* the trial court to consider all factors of RC 3105.18(C) and “not base its determination of any one of those factors taken in isolation.” citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988), paragraph one of the syllabus. Panel II then went through a mathematical calculation of

⁶ Imputed “yearly income” is based on 13 months of bank statements that could not be cross-examined and other disregarded evidence as noted by Panel I.

obligations imposed on husband by the trial court in Entry II. Specifically, Panel II notes that Entry II imposed annual obligations on husband of "...\$52,200 until the marital home is sold and \$44,400 after the home is sold." ¶15. These calculations are in error, and are inconsistent with the calculations set forth by Panel I. Specifically, Panel II omits \$37,764 in health care costs, which is a constant before and after sale of the marital home. Thus, the correct and consistent calculation of annual obligations is \$89,964 before the house is sold, \$82,164 after.

Had Panel II included all expenses enumerated by Panel I, and assuming that Panel I did not instruct the trial court to re-evaluate the evidence on husband's income (which assumption is erroneous), then the mathematical formula that Panel II utilized would be as follows: $\$120,000 - \$89,964 = \$30,036$ before the house is sold, $\$120,000 - \$82,164 = \$37,836$ after. If these numbers are adjusted for "utilities, property taxes, income taxes, food, and other normal everyday expenses," plus husband's own attorneys' fees (Panel I, ¶28), then it becomes clear that not only has an equitable result not been achieved, but that husband still "...will not be able to comply with the order" and may be "...subject to contempt findings for failure to comply with an impossible task." Panel I, ¶28.

Further, even if wife's income was not to be re-evaluated pursuant to Panel I's remand, an equitable result still was not achieved. Taking only wife's income of \$24,000, plus either \$89,964 or \$82,164, (\$113,964 before sale; \$106,164 after sale) leaves an annual disparity of more than \$70,000 that clearly is not equitable consistent with the mandate of Panel I.

Assignment of Error IV – Attorneys' Fees

In (correctly) tying its discussion of an award of attorneys' fees to its analysis of spousal support, property division and debt allocation, Panel I instructed the trial court to "re-evaluate the evidence presented to arrive at a more equitable result regarding division of property and

allocation of debt obligations. Said instruction necessarily entails a review of the propriety of awarding attorney fees and if so, how much.” ¶38. Again, this is the law of the case.

On remand, the trial court determined that “Upon reconsideration of the evidence the Court finds that the original amount of attorney fees that were to be paid by [husband] *exceeded his ability to pay.*”⁷ Based on [the original award] husband was rendered “insolvent and unable to pay his basic living expenses.” Entry II, p. 2. The trial court then reduced the award of attorneys’ fees from \$40,000 payable over 18 months, plus expert fees of \$17,510 payable within ten days, to a total amount of \$35,000 payable at the rate of \$200 per month over 14.6 years. Entry II does not “re-evaluate the evidence,” or “review the propriety of awarding attorney fees and if so, how much.”

Appellant assigned as error the award of attorneys’ fees and the failure to re-evaluate the evidence concerning division of property and allocation of debts, or review the propriety of awarding attorney fees and if so, how much. RC 3105.73. Panel II held that this Court’s concern with an award of attorneys’ fees in *Kehoe I* “stemmed from the impractical obligations [Entry I] cumulatively imposed upon appellant.” Essentially, Panel II held that because the math now works (based on erroneous calculations), there was no longer a concern about the cumulative effect of the obligations. Further, Panel II found that the trial court did reduce the total award of attorneys’ fees and litigation expenses and made it payable over 14.6 years. ¶19.

Panel II’s ruling is inconsistent with the mandate of Panel I to re-evaluate the evidence to determine whether in light of property division and debt allocation an award of attorneys’ fees was appropriate. Nowhere in Panel I’s opinion is there a discussion of the cumulative effect of

⁷ The instruction to “review the propriety of awarding attorney fees and if so, how much.” necessarily requires some analysis of whether fees are payable and if so, how husband is better able than wife to pay them.

impractical obligations imposed upon husband by Entry I. Essentially, Panel II unilaterally determined that because Entry II gives husband a longer term for payment there is no detrimental effect. That reasoning completely neutralizes the instruction of Panel I, and finds an independent reason to affirm the trial court on this issue.

The foregoing all are dispositive issues in the case. Panel II's decision conflicts with the resolution of the issues by Panel I. There is no uniformity in the decisions of the appellate court.

III. ARGUMENT AND LAW

PROPOSITION OF LAW NO. I: An appellate court abuses its discretion by erroneously denying an App.R. 26(A) application for reconsideration seeking en banc review of an intra-district conflict on any issue that is dispositive of the case regardless of whether the conflict is an issue of law.

On at least two occasions in recent years this Court has declared that “[a]ppellate courts are duty-bound to resolve conflicts within their respective appellate districts through en banc proceedings,” and that upon recognizing such a conflict the court “must convene en banc to resolve the conflict.” *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, *McFadden v. Cleveland State University*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672. In *McFadden* this Court noted that “When different panels hear the same issues diametrically different results are possible...” The Court held that a court of appeals is *obligated* to resolve conflicts between two or more of its decisions on any issue that is dispositive of the case in which the application is filed. Further, that en banc review is appropriate to maintain the integrity of the court by making decisions uniform, and promoting finality and predictability. See also, *Greenspan v. Third Fed. S&L Ass’n.*, 122 Ohio St. 3d 455, 2009-Ohio-3508, 912 N.E.2d 567 (court of appeals erred by not convening en banc to resolve conflict, instead holding inconsistent decision was “simply in error.”) *Id.* at ¶¶23-24.

This Court is the ultimate authority of law in the State of Ohio. *Haynes v. State Med. Bd. Of Ohio* (2000), 138 Ohio App.3d 762, 769. As such, courts of appeals in Ohio are required to follow the law as prescribed by the Supreme Court. *Mannion v. Sandel*, 91 Ohio St. 3d 318, 322, 2001-Ohio-47, *Cooke v. Montgomery Cty.*, 158 Ohio App.3d 139, 2004-Ohio-378, at ¶39. When this Court has spoken on an issue, Ohio appellate courts do not have the privilege of choosing whether to follow the decision. *Penn Traffic Co. v. Clark Cty. Bd. of Elections* (1999), 138 Ohio App.3d 1, 5. Notwithstanding clear guidelines from this Court, the appellate court has defined which conflicts are dispositive of issues in the case, and which types of conflicts merit en banc review.

Appellant filed his Application for Reconsideration and Application for En Banc Consideration simultaneously. The en banc court issued its ruling on December 19, 2013. In a 10-2 decision denying en banc review, the court stated that: "We find that appellant's argument that the panel decision contravenes the law of the case at most claims an *error* in the panel decision. It does not allege a conflict between two or more decisions of the court." ⁸ While noting that pursuant to App.R. 26, Loc.App.R. 26 and *McFadden* the court is "*obligated* to resolve conflicts between two or more decisions of this court on *any* issue that is dispositive of the case..." the appellate court limits the issues for en banc review to questions of law.

Panel II expressed its views on Appellant's Application for En Banc Consideration by participating in the decision of the en banc court and concurring in the decision to deny the application. Yet, Panel II issued a separate ruling on January 9, 2014 denying Appellant's Motion for Reconsideration without opinion. Panel II does not correct any "error" in its

⁸ The Eighth Appellate District has taken this position in prior decisions. *See, eg., Klocker v. Zeiger*, Case No. 94555 (motion decided December 12, 2010); *Dzina v. Dzina*, Case no. 94748 (motion decided May 12, 2011).

decision. Thus, Appellant was left with inconsistent rulings in Appeal I and Appeal II. There is no consistency or recognition of the law of the case. Stated differently, the en banc court determines that it cannot grant en banc review for Panel II's contravention of the law of the case established by Panel I because at most, Panel II committed (non reviewable) error. Implicit in its ruling is the view that en banc review exists only for conflicting intra-district decisions on legal issues. This begs the question of whether there are consistent decisions of the court. If a party risks *de novo* review of issues previously decided, then there is a chilling effect on subsequent appeals to correct errors of the trial court on remand. The goal of consistency and predictability is defeated. Without fear of oversight of conflicting decisions, panels are free to issue decisions with "diametrically different results." See, *McFadden* at ¶ 15.

As this Court made clear in *State v. Forest*, 136 Ohio St.3d 134, 2013-Ohio-2409, a determination regarding whether an intra-district conflict exists can be made by a panel or by an en banc court. In the Eighth Appellate District, contravention of the law of the case doctrine merely constitutes error by the panel at most. Regardless of who decides conflict, inconsistent decisions by different panels of the Eighth Appellate District can never call for en banc review under the law of the case doctrine or the related doctrine of *stare decisis*.

En banc review is appropriate in this case because Panel II's decision is in direct conflict with Panel I's decision instructing the trial court to re-evaluate key evidence in light of the factors set forth in RC 3105.18(C), and the provisions of RC 3105.171 and RC 3105.73. Specifically, Panel I reversed the trial court's finding on the dispositive issues of income, spousal support, property division and attorneys' fees. Panel II determined that the trial court either was not instructed to re-evaluate evidence on these issues, or that on remand an equitable outcome was achieved. These are not mere errors by Panel II. This Court did not limit en banc review to

conflicts in legal decisions of the court. Rather, the Court instructs that en banc proceedings should be used to resolve *any* conflicts between decisions of the appellate court on *any* issue that is dispositive of the case in which the application is filed.

En banc consideration is necessary to maintain uniformity of the appellate court's decisions, to ensure the integrity of the appellate court, and to give finality and predictability to its decisions.

PROPOSITION OF LAW NO. II: The law of the case doctrine and the doctrine of stare decisis preclude reconsideration of previously decided issues in the same case and is binding not only in the trial court but also in subsequent proceedings of the same reviewing court.

Under the doctrine of the law of the case, the decision of a reviewing court in a case remains the law of the case applicable to all subsequent proceedings. "Thus, the decision of an appellate court in a prior appeal will ordinarily be followed in a later appeal in the same case and court." *Nolan v. Nolan*, 11 Ohio St.3d 1, 11 OBR 1, 3, 462 N.E.2d 410, 412 (rule applied in divorce case) (citations omitted). "Where at a rehearing following remand a trial court is confronted with substantially the same facts and issues as were involved in the prior appeal, the court is bound to adhere to the appellate court's determination of the applicable law." *Id.* The purpose of the rule is to ensure that upon remand, the mandate of an appellate court is followed by the trial court. *Stemen v. Shibley* (1982), 11 Ohio App.3d 263, 265, 11 OBR 441, 465 N.E.2d 460. The rule is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. See, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29, 32, 13 O.O.3d 17, 391 N.E.2d 343. These principles sound remarkably similar to the reasons articulated by this Court for en banc review.

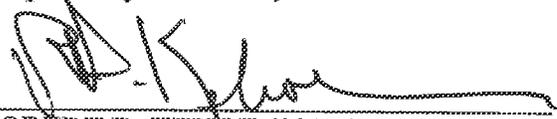
The related doctrine of *stare decisis* also requires reviewing courts to follow decisions of prior courts that have ruled on the same issues. As this Court observed in *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at ¶1, the goals of stability, continuity and predictability are “the bedrock of the American judicial system.” If an appellate court can disregard this Court’s instruction to resolve all conflicts of two or more decisions within the same district on any issue that is dispositive of the case by en banc proceedings, then there will be no consistency and the doctrines of *stare decisis* and law of the case will be meaningless. Conflicts on dispositive issues are not mere “errors” of the panel to be left uncorrected. Rather, they are conflicts that must be resolved by en banc review. To allow otherwise would permit appellate courts to ignore precedent without oversight.

By resolving conflicting appellate decisions, the en banc procedure gives predictability and consistency to judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

IV. CONCLUSION

This case presents questions of great general and public interest and is deserving of review. Based on the foregoing law and discussion, Appellant requests that the Court accept jurisdiction in this case so that important issues presented can be reviewed on the merits.

Respectfully submitted,

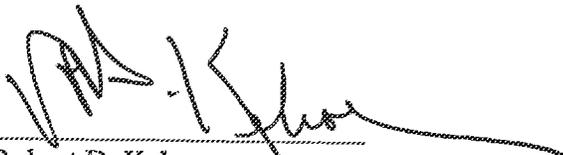


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CERTIFICATE OF SERVICE

A copy of Appellant's Memorandum in Support of Jurisdiction was served by electronic mail on February 24, 2013 upon:

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Appellee, pro se



Robert D. Kehoe, *pro se*

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97357

MAURA A. KEHOE

PLAINTIFF-APPELLEE

vs.

ROBERT D. KEHOE, ET AL.

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Civil Appeal from the
Cuyahoga County Court
Domestic Relations Division
Case No. CPD-328835

BEFORE: Blackmon, A.J., Jones, J., and S. Gallagher, J.
RELEASED AND JOURNALIZED: July 26, 2012

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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 26 2012

CLARENCE M. FURST
CLERK OF THE COURT OF APPEALS

PATRICIA ANN BLACKMON, A.J.:

{¶1} Appellant Robert D. Kehoe appeals the division of property, apportionment of the debt obligation, and spousal support awarded to appellee, Maura A. Kehoe.

Appellant assigns the following errors for our review:

I. The trial court erred by failing to disburse husband's separate interest in the marital residence to him pursuant to R.C. 3105.171(A)(6)(a)(I) and 3105.171(D).

II. The trial court erred by finding that educational loans incurred during the marriage for the benefit of their children, income taxes, and business and personal debts and obligations were not marital debts.

III. The trial court erred by awarding wife an unreasonable and inappropriate amount of spousal support, health insurance, mortgage and all other expenses related to the marital home, taxes and other personal and business debts and expenses in amounts that exceed his annual income by at least \$75,000, thereby rendering husband insolvent and unable to pay his basic living expenses.

IV. The trial court erred by issuing a spousal support order that does not terminate upon husband's death or wife's cohabitation.

V. The trial court erred by ordering husband to pay wife's attorney fees, expert witness fees and all court costs, when wife also received more than one-half of net assets and financial obligations imposed by the trial court exceed the husband's entire income, therefore rendering the order inequitable and without basis under R.C. 3105.73.

{¶2} Having reviewed the record and pertinent law, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion. The apposite facts follow.

{¶3} Appellant and appellee were married on July 24, 1982 and had three children, all of whom are currently emancipated. Appellant is an attorney; his company is Kehoe & Associates, LLC, which he formed in 2004.

{¶4} Appellee worked as an administrative assistant at several firms prior to staying at home to raise the children. She has degrees from Marymount and Ursuline Colleges. During the children's teenage years, appellee taught tennis and most recently, worked as a sales assistant at an antiques store.

{¶5} On November 6, 2009, appellee filed a complaint for divorce, appellant counterclaimed, and significant motion practice followed. Subsequently, the action was tried on April 11, 12, 13, 14, and 15, 2011, and July 5 and 6, 2011. As to the specific and detailed evidence presented at trial, we will discuss these facts below when addressing the corresponding assignments of error.

{¶6} Ultimately, the trial court awarded appellee \$3,000 per month in spousal support for ten years, health insurance, and awarded attorney fees of \$40,000, plus the cost of a financial expert in amount of \$17,510. In addition, the trial court ordered appellant to pay all expenses of the marital residence until it was sold.

Separate Marital Interest

{¶7} In the first assigned error, appellant argues the trial court erred when it failed to disburse his separate interest in the marital residence.

{¶8} As a general rule, appellate courts review the propriety of a trial court's determination in a domestic relations case for an abuse of discretion. *Saari v. Saari*, 195

Ohio App.3d 444, 2011-Ohio-4710, 960 N.E.2d 539 (9th Dist.), citing *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989). Abuse of discretion is more than simply an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶9} Under R.C. 3105.171(B), the trial court must determine what constitutes marital property and what constitutes separate property. *Burriss v. Burriss*, 4th Dist. Nos. 09CA21, 10CA11, 2010-Ohio-6116. When interpreting statutes and their application, an appellate court conducts a de novo review, without deference to the trial court's determination. *Roberts v. Bolin*, 4th Dist. No. 09CA44, 2010-Ohio-3783, at ¶ 20, citing *State v. Sufronko*, 105 Ohio App.3d 504, 506, 664 N.E.2d 596 (4th Dist. 1995).

{¶10} In the instant case, appellant testified that his late mother loaned him \$30,000 towards the down payment on the marital property. Appellant also testified that his mother died after making the loan and the loan was never repaid. The record before us includes a copy of the promissory note for \$30,000 payable to appellant's mother, copy of a check from his mother's account payable to the title company, and a copy his mother's bank ledger indicating that a check for \$30,000 was written on appellant's behalf.

{¶11} The party seeking to establish an asset or a portion of it as their own separate property has the burden of proof, ordinarily by a preponderance of the evidence, to trace the asset to the separate property source. See *Eddy v. Eddy*, 4th Dist. No.

01CA20, 2002-Ohio-4345. Here, the evidence established that the \$30,000 could be traced to the loan appellant obtained from his mother. Moreover, appellee acknowledged that appellant's mother did in fact loan them the money. At trial, appellee testified as follows:

Q. When did you buy the house?

A. 1998.

Q. Handing you what's been marked for identification purposes as Defendant's exhibit MM. I'd like you to look at MM for a second Miss Kehoe. That appears to be a loan that Bob got from his mother, right.

A. Yes. I remember vaguely that she gave him \$30,000. Tr. 429-430.

{¶12} Given that appellant presented evidence of the separate source of the funds used to aid in the acquisition of the marital home and appellee's testimony confirms that said funds were indeed a loan from appellant's mother, we find the trial court erred by failing to distribute \$30,000 to appellant as his separate interest in the marital residence. Appellant presented sufficient, credible evidence that the \$30,000 was a loan from his late mother to assist with the down payment on the marital residence. Accordingly, we sustain the first assigned error.

Student Loan Obligations

{¶13} In the second assigned error, appellant argues the trial court erred by failing to find that debt obligation undertaken to educate the parties' college aged children were marital debt.

{¶14} A trial court must take into account marital debt when dividing marital property. *Barkley v. Barkley*, 119 Ohio App.3d 155, 169, 694 N.E.2d 989 (4th Dist.1997). Assets and debts incurred during the marriage are presumed to be marital unless it can be proved they are separate. *Vergitz v. Vergitz*, 7th Dist. No. 05 JE 52, 2007-Ohio-1395, at ¶ 12. The party seeking to establish that property (or debt) is separate rather than marital bears the burden of proving this to the trial court. *Id.*, citing *Hurte v. Hurte*, 164 Ohio App.3d 446, 454, 2005-Ohio-5967, 842 N.E.2d 1058 (4th Dist.). The determinative factor is whether the loan was incurred during the marriage. *Nemeth v. Nemeth*, 11th Dist. No. 2007-G-2791, 2008-Ohio-3263.

{¶15} In the instant case, the parties incurred approximately \$42,583 for their daughter, who attended Fairfield University between 2005 and 2009, prior to the time that appellee filed for divorce, for which appellant currently pays approximately \$667 per month. Appellant has undertaken educational debt for the parties' youngest child, who started college after appellee filed for divorce. Appellant is not requesting any assistance from appellee with the student loans taken out after the divorce action was initiated.

{¶16} Despite the fact that their children were college-aged when the educational debts were incurred, and we acknowledge that parents have no duty to support emancipated children, the loans were incurred during the marriage to finance the children's education. Having been undertaken during the marriage, the loans should have been treated as any other expenditure of the marriage, and this is a marital debt. Accordingly, we sustain the second assigned error.

Spousal Support and Division of Property

{¶17} In the third assigned error, appellant argues the trial court erred by awarding an unreasonable and inappropriate amount of spousal support.

{¶18} In determining whether to grant spousal support and in determining the amount and duration of the payments, the trial court must consider the factors listed in R.C. 3105.18(C)(1)(a)-(n). *Deacon v. Deacon*, 8th Dist. No. 91609, 2009-Ohio-2491, citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988), paragraph one of the syllabus. The goal of spousal support is to reach an equitable result. *Id.* at 96, 518 N.E.2d 1197. And while there is no set mathematical formula to reach this goal, the Ohio Supreme Court requires the trial court to consider all 14 factors of R.C. 3105.18(C) and “not base its determination upon any one of those factors taken in isolation.” *Id.*

{¶19} In the instant case, the trial court ordered appellant to pay spousal support in the amount of \$3,000 per month, cover the health insurance costs for appellee, pay all expenses of the marital residence until it sold, and pay \$17,510 to appellee’s experts, Valuation & Litigation Consulting, LLC, within ten days of the decree. As previously discussed, the trial court also ordered appellant to pay all the pre-divorce petition educational loans for the parties’ children and any unpaid income taxes.

{¶20} In addition, the trial court ordered appellant to pay appellee’s attorney fees in the amount of \$40,000, according to the following schedule: \$10,000 on or before December 1, 2011, \$10,000 on or before June 1, 2012, \$10,000 on or before December 1, 2012, and \$10,000 on or before June 1, 2013.

{¶21} Appellant argues the above obligations exceeds his annual income by more than \$75,000 per year. The trial court stated in the divorce decree that the primary issue throughout the proceedings was the establishment and identification of appellant's true income. The trial court specifically stated that "Defendant claims that he currently earns \$85,000 annually [Plaintiff's Exhibit 19], however, Defendant deposited a total of \$119,706 into his personal account from January 15, 2010 through January 14, 2011 [Plaintiff's Exhibits 21 and 22] to support a finding of his earnings at \$120,000 per year."

{¶22} Appellant argues it was unreasonable and inappropriate for the trial court to find that his income was \$120,000 per year despite evidence that the parties' joint tax returns for the preceding four years reflect net income of \$76,821 in 2006, \$101,938 in 2007, \$7,952 in 2008, and \$91,306 in 2009. Appellant presented evidence that the parties' 2006 tax return was audited by the Internal Revenue Service ("IRS") and in the process, all four tax years were reviewed, and the IRS left the returns intact.

{¶23} In addition, Douglas Heiser, CPA, who prepared the parties' returns, testified that all four tax returns were prepared in the same manner as Tax Year 2006, which survived the IRS audit. Heiser testified that the IRS agent spent a whole day examining the firm's income and expenses, but found nothing to justify changing the returns.

{¶24} Further, appellant explained that the additional deposits reflected in his personal checking account came from loans against his pension plan, credit card advances, and withdrawals from an inheritance account, which is almost exhausted. Tr.

564. Appellant stated that overdraft protection averaging approximately \$400 per month contributed to the additional deposits into the checking account.

{¶25} Finally, appellant testified that they were spending more than he was making, he implored appellee to return to work full-time after the children were teenagers, but she refused. Appellant cited to the fact that he had to put one of their vehicles up for sale in order to pay the youngest child's private school tuition, so that the child could graduate from high school.

{¶26} Notwithstanding the above evidence, including joint income tax returns that survived the scrutiny of the IRS, the trial court found appellant's income to be \$120,000. Our review of the record indicates that even with the trial court's finding that his yearly income was \$120,000, the obligation ordered far exceeds his ability to pay.

{¶27} To recap, in the first year of the order, appellant is required to pay appellee's attorney's fees of \$40,000 and \$17,510 in fees for a forensic financial expert, who billed for 88 hours of work, but presented no testimony, spousal support of \$36,000, plus an undetermined cost for appellee's health insurance. Appellant is required to pay all household expenses for the marital residence until sold. Appellant testified that the mortgage payment was \$3,150 per month or \$37,800 per year, and the family's health insurance cost is \$3,147 per month or \$37,764 per year.

{¶28} Here, appellant's obligation in the first year of the trial court's order totals \$169,074, without accounting for utilities, property taxes, income taxes, food, and other normal everyday expenses. In addition, appellant is responsible for his own attorney

fees. At a glance, appellant's obligation in the first 12 months easily exceeds the imputed income of \$120,000 by more than \$50,000. As such, an equitable result has not been reached, appellant will not be able to comply with the order, and we suspect, in the future, appellant will be subject to contempt findings for failure to comply with an impossible task.

{¶29} Accordingly, we sustain the third assigned error and order the trial court to re-evaluate the evidence in light of the foregoing to achieve a more equitable result.

Spousal Support Obligation Beyond Husband's Death

{¶30} In the fourth assigned error, appellant argues the trial court erred by issuing a support order that continues after his death and appellee's cohabitation.

{¶31} R.C. 3105.18(B) permits a trial court to award reasonable spousal support incident to a divorce action. *Crouso v. Crouso*, 3d Dist. No. 14-02-04, 2002-Ohio-3765, ¶ 15. This statute includes the following:

In divorce and legal separation proceedings, upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 of the Revised Code, the court of common pleas may award reasonable spousal support to either party. * * * Any award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise.

{¶32} Thus, the general rule is that spousal support awards should terminate upon a date certain, in order to place definitive limit on the parties' rights and responsibilities. *Bowen v. Bowen*, 132 Ohio App.3d 616, 725 N.E.2d 1165 (9th Dist. 1999). In the instant case, the trial court's order provided that the spousal support shall terminate upon

Maura's death, remarriage, or 120 months, whichever shall first occur. Central to the issue at hand is that the court's order was also binding on appellant's estate.

{¶33} In support of her argument that the spousal support should remain binding on appellant's estate, appellee cites *Millstein v. Millstein*, 8th Dist. Nos. 79617, 79754, 80184, 80185, 80186, 80187, 80188, 80963, 2002-Ohio-4873, a case in which we upheld an order that was binding on the obligor's estate. However, *Millstein* is distinguishable from the present case.

{¶34} Both cases involve marriages of long duration, both involved mothers that were primarily homemakers, but unlike the present case, there was a significant age difference in *Millstein*. In *Millstein*, we stated: plaintiff is 49 years of age. Defendant is 72 years of age. Both are in good physical, mental and emotional health. Because of the age difference, the spousal support order shall be binding on defendant's estate.

{¶35} In addition, Mr. Millstein had a net worth in excess of \$120 million, which is not the case here. As such the trial court erred by making the spousal support binding on appellant's estate. As it relates to terminating the order upon appellee's cohabitation, this issue can be addressed if that occurs. As previously stated, the trial court's order provides for termination if appellee remarries. Accordingly we sustain in part, overrule in part the fourth assigned error, and instruct the trial court to delete the portion of the order, which makes it binding on appellant's estate. As it stands, if appellant dies within ten years, the parties' children would be paying the spousal support to their mother.

Attorney Fees

{¶36} In the fifth assigned error, appellant argues the trial court erred when it ordered him to pay appellee's attorney fees, expert witness fees, and all court costs.

{¶37} An award of attorney fees in a domestic relations action is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *McEnergy v. McEnergy*, 10th Dist. No. 00AP-69, 2000 WL 1863370 (Dec. 21, 2000), citing *Goode v. Goode*, 70 Ohio App.3d 125, 590 N.E.2d 439 (10th Dist.1991).

{¶38} In our disposition of the third assigned error, we instructed the trial court the re-evaluate the evidence presented to arrive at a more equitable result regarding the division of property and allocation of debt obligations. Said instruction necessarily entails a review of the propriety of awarding attorney fees and if so, how much. Accordingly, we sustain the fifth assigned error.

{¶39} Judgment affirmed in part, reversed in part, and remanded for the trial court to re-evaluate the evidence to arrive at a more equitable division of property and debt obligations.

It is ordered that appellee and appellant share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.



PATRICIA ANN BLACKMON, ADMINISTRATIVE JUDGE

LARRY A. JONES, SR., J., and
SEAN C. GALLAGHER, J., CONCUR

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 99404

MAURA A. KEHOE

PLAINTIFF-APPELLEE

vs.

ROBERT D. KEHOE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. CP-D-328835

BEFORE: E.A. Gallagher, J., Rocco, P.J., and Blackmon, J.

RELEASED AND JOURNALIZED: November 7, 2013

FOR APPELLANT

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FOR APPELLEE

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FILED AND JOURNALIZED
PER APP.R. 22(C)

NOV X 7 2013
CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By [Signature] Deputy

EILEEN A. GALLAGHER, J.:

{¶1} Appellant Robert D. Kehoe appeals the judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, following this court's remand which affirmed, in part, and reversed, in part, the trial court's original divorce decree. For the following reasons, we affirm the judgment of the trial court.

{¶2} The underlying facts and procedural posture of this case was set forth by this court in *Kehoe v. Kehoe*, 8th Dist. Cuyahoga No. 99404, 2012-Ohio-3357, 974 N.E.2d 1229 (*Kehoe I*):

Appellant and appellee [Maura A. Kehoe] were married on July 24, 1982 and had three children, all of whom are currently emancipated. Appellant is an attorney; his company is Kehoe & Associates, LLC, which he formed in 2004.

Appellee worked as an administrative assistant at several firms prior to staying at home to raise the children. She has degrees from Marymount and Ursuline Colleges. During the children's teenage years, appellee taught tennis and most recently, worked as a sales assistant at an antiques store.

On November 6, 2009, appellee filed a complaint for divorce, appellant counterclaimed, and significant motion practice followed. Subsequently, the action was tried on April 11, 12, 13, 14, and 15, 2011, and July 5 and 6, 2011.

Ultimately, the trial court awarded appellee \$3,000 per month in spousal support for ten years, health insurance, and awarded attorney fees of \$40,000, plus the cost of a financial expert in the amount of \$17,510. In addition, the trial court ordered appellant to pay all expenses of the marital residence until it was sold.

Id. at ¶ 3-6.

{¶3} In *Kehoe I*, appellant appealed the trial court's division of property, apportionment of the debt obligations and spousal support awarded to appellee. We held that the trial court erred in failing to distribute \$30,000 to appellant as separate interest in the marital residence, failing to treat education loans incurred during the marriage as marital debt, making the spousal support obligation binding on appellant's estate and reaching an inequitable result in its award of spousal support and attorney's fees. We remanded solely for the purpose of allowing the trial court to correct these errors and "achieve a more equitable result" in regards to the spousal support and attorney fee awards. *Id.* at ¶ 29, 39.

{¶4} On remand the trial court partially vacated the earlier divorce decree. The court recognized appellant's \$30,000 separate interest in the marital residence, ordered education loans incurred during the marriage to be treated as marital debt and reduced the \$40,000 award of attorney fees along with a \$17,510 award for appellee's financial expert to a single \$35,000 award for attorney fees and litigation expenses to be paid in monthly increments of \$200. The trial court ordered appellant to be responsible for the mortgage, insurance, taxes and utilities associated with the marital home and ordered the home to be listed for sale within 30 days. The court froze any spousal support obligations until the residence is sold. The trial court further reduced the

spousal support to \$2,500 per month and ordered such support to terminate upon the death of either party, appellee's cohabitation with an unrelated male as if married or the expiration of ten years. Appellant appeals from this judgment asserting four assignments of error.

{¶5} Appellant's first assignment of error states:

The trial court erred by failing to abide by the Eighth District Court of Appeal's decision rendered July 26, 2012 reversing and remanding the judgment entry filed in this case on September 6, 2011.

{¶6} As a general rule, appellate courts review the propriety of a trial court's determination in a domestic relations case for an abuse of discretion. *Gray v. Gray*, 8th Dist. Cuyahoga No. 95532, 2011-Ohio-4091, ¶ 7, citing *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989). Abuse of discretion is more than simply an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶7} The arguments presented in appellant's first assignment of error are largely redundant with the specific arguments he presents in his second, third and fourth assignments of error. We note, however, that throughout all of his arguments appellant repeatedly raises issues concerning evidentiary rulings rendered by the trial court at trial. Our decision in *Kehoe I* only reversed the trial court's divorce decree *in part* and our remand was limited as

described above. We did not reverse any of the trial court's evidentiary rulings excluding testimony or evidence and aside from correcting the above errors, the mandate to the trial court was only to re-evaluate the evidence to reach a more equitable result on the spousal support and attorney fee awards. Appellant's arguments regarding evidentiary rulings made at trial are well beyond the scope of the present appeal and res judicata at this late stage.

{¶8} Furthermore, appellant argues that the trial court erred in failing to recalculate the yearly income it attributed to both appellant and appellee in the original divorce decree as part of our remand to re-evaluate the evidence and reach a more equitable result. Appellant misunderstands our holding in *Kehoe I*. In the original divorce decree the trial court found appellant's income to be \$120,000 per year and appellee's income to be \$24,000 per year. Contrary to appellant's arguments, our decision in *Kehoe I* did not find the trial court's income finding to be an abuse of discretion. In fact, *Kehoe I* did not address appellee's income at all. Instead, we reversed the spousal support award because even with the \$120,000 yearly income figure attributed to appellant, the total obligations imposed on him by the first divorce decree exceeded his ability to pay in the first year by more than \$50,000. *Kehoe I* at ¶ 28. We concluded that, "[a]s such, an equitable result has not been reached [and] appellant will not be able to comply with the order." *Kehoe I* at ¶ 28. *Kehoe I* did not remand for the trial court to reconsider its findings on the income of

appellant or appellee, but rather to reconsider the obligations imposed in light of those income findings. Appellant's arguments to the contrary are overruled.

{¶9} Appellant's second assignment of error states:

The trial court erred by failing to allocate the parties' marital debts in a manner consistent with R.C. 3105.171 by ordering husband to [pay] more than one half the debts, including income taxes, and other business and personal debts incurred during the marriage when such debts are incurred for the direct benefit of the parties and their children.

{¶10} Appellant presents arguments within this assignment of error regarding marital property issues that were outside the scope of our limited remand following *Kehoe I* and, again, involve evidentiary rulings from trial. Those arguments are overruled.

{¶11} On remand the trial court followed our mandate in *Kehoe I* and treated certain educational loans for the benefit of the parties' daughter as marital debt as this debt was incurred during the course of the marriage.¹ The trial court divided the educational loan debt between the parties ordering appellant to pay 75% and appellee to pay 25%. Relying on the income findings from the original divorce decree, which again, were not found to be an abuse of discretion in *Kehoe I*, the trial court stated that such division was reasonable

¹Appellant additionally raises the issue of certain student loans associated with the parties' son, who began college after appellee filed for divorce. This court noted in *Kehoe I* that appellant was not requesting any assistance from appellee with loans taken out after the divorce action was initiated and such loans were not within the confines of our limited remand. As such, they are outside the scope of this appeal.

in light of the disparity of income between the parties. Appellant fails to advance an argument or provide any citation to authority to support his bare assertion that the trial court's division of the educational debt was inequitable or in violation of R.C. 3105.171(C)(1). Since appellant has offered no substantive argument on this issue, we find that appellant has failed to demonstrate an abuse of discretion by the trial court in regards to the division of the educational debt.

{¶12} Appellant's third assignment of error states:

The trial court erred by disregarding the factors in R.C. 3105.18 and awarding wife an unreasonable and inappropriate amount of spousal support when it failed to consider revenue from property division, wife's full earning capacity, and ordered husband to pay health insurance, mortgage and all other expenses related to the marital home, income taxes and other personal and business debts and expenses in amounts that exceed his annual income by at least \$170,000, thereby rendering husband insolvent and unable to pay his basic living expenses.

{¶13} In determining whether to grant spousal support and in determining the amount and duration of the payments, the trial court must consider the factors listed in R.C. 3105.18(C)(1)(a)-(n). *Deacon v. Deacon*, 8th Dist. Cuyahoga No. 91609, 2009-Ohio-2491, ¶ 57, citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988), paragraph one of the syllabus. The goal of spousal support is to reach an equitable result. *Id.* at 96. While there is no set mathematical formula to reach this goal, the Ohio Supreme Court requires the trial court to consider all 14 factors of R.C. 3105.18(C) and "not

base its determination upon any one of those factors taken in isolation.” *Id.*

{¶14} In *Kehoe I*, we noted that appellant’s obligations exceeded his ability to pay during the first year after the divorce decree. We noted that, per the original decree, appellant was obligated to pay \$40,000 towards appellee’s attorney fees, \$17,510 towards appellee’s financial expert, spousal support of \$36,000, health care costs of roughly \$37,764 and mortgage costs of \$37,800. These obligations totalled \$169,074 and well exceeded appellant’s yearly income of \$120,000. As such, we concluded that an equitable result had not been reached and remanded to the trial court to reevaluate and achieve a more equitable result.

{¶15} We find that the trial court did reach an equitable result on remand. Per the trial court’s new order, appellant is obligated to pay \$3,150 per month towards the mortgage of the marital home until it is sold. Appellant’s spousal support obligation is not triggered until the home is sold. At that point appellant’s mortgage obligation is replaced with \$2,500 per month in spousal support. In addition, appellant has monthly obligations of \$200 towards appellee’s attorney fees and litigation expenses and up to \$1000 towards health care for appellee. This translates to a year-long obligation of \$52,200 until the marital home is sold and \$44,400 after the home is sold. We find no abuse of discretion in the trial court’s modification of spousal support.

{¶16} Appellant’s third assignment of error is overruled.

{¶17} Appellant's fourth assignment of error states:

The trial court erred by ordering husband to pay wife's attorney fees when wife also received more than one-half of net marital assets and the financial obligations imposed by the trial court exceed husband's entire net income, therefore rendering the order inequitable and without basis under R.C. 3105.73.

{¶18} An award of attorney fees in a domestic relations action is within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Dureiko v. Dureiko*, 8th Dist. Cuyahoga No. 94393, 2010-Ohio-5599, ¶ 26.

{¶19} Our concern in *Kehoe I* regarding the trial court's award of attorney fees stemmed from the impractical obligations the original divorce decree cumulatively imposed upon appellant. As addressed in the third assignment of error, this concern no longer exists. Furthermore, we note that the trial court significantly decreased appellant's obligations in regards to fees and expenses. In the original decree, appellant was obligated to pay \$40,000 in appellee's attorney fees and \$17,510 for appellee's financial expert. In the order following our remand, the trial court reduced these obligations to a single award of \$35,000 payable in monthly increments of \$200. We find no abuse of discretion in the trial court's order.

{¶20} Appellant's fourth assignment of error is overruled.

{¶21} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the lower court 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.



EILEEN A. GALLAGHER, JUDGE

KENNETH A. ROCCO, P.J., and
PATRICIA A. BLACKMON, J., CONCUR

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

MAURA A. KEHOE

Appellee

COA NO.
99404

LOWER COURT NO.
CP D-328835

DOMESTIC RELATIONS

-vs-

ROBERT D. KEHOE, ET AL.

Appellant

MOTION NO. 469975

Date 12/19/13

Journal Entry

Application by Appellant for en banc consideration is denied. See separate journal entry of this same date.

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OF THE COURT OF APPEALS
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[Signature]
MELODY J. STEWART
Administrative Judge

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

Maura A. Kehoe

Appellee

COA NO.
99404

LOWER COURT NO.
CP DR-328835

-vs-

COMMON PLEAS COURT
DOMESTIC RELATIONS DIVISION

Robert D. Kehoe

Appellant

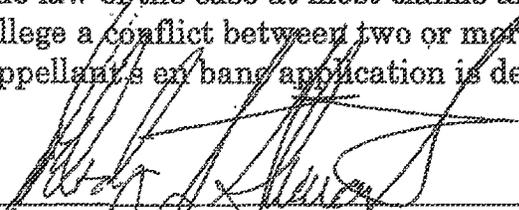
MOTION NO. 469975

Date 12/19/2013

Journal Entry

This matter is before the court on appellant's application for en banc consideration. Pursuant to App.R. 26, Loc.App.R. 26, and *McFadden v. Cleveland State Univ.*, 120 Ohio St.3d 54, 2008-Ohio-4914, 896 N.E.2d 672, we are obligated to resolve conflicts between two or more decisions of this court on any issue that is dispositive of the case in which the application is filed.

We find that appellant's argument that the panel decision contravenes the law of the case at most claims an error in the panel decision. It does not allege a conflict between two or more decisions of this court. Therefore, appellant's en banc application is denied.


MELODY J. STEWART, ADMINISTRATIVE JUDGE

Concurring:

PATRICIA A. BLACKMON, J.,
FRANK D. CELEBREZZE, JR., J.,
EILEEN A. GALLAGHER, J.,
EILEEN T. GALLAGHER, J.,
LARRY A. JONES, J.,
KATHLEEN ANN KEOUGH, J.,
MARY EILEEN KILBANE, J.,
TIM MCCORMACK, J., and
KENNETH A. ROCCO, J.

Dissenting:

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J.

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Robert D. Kehoe

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Case: CA-13-099404
Case Caption: MAURA A. KEHOE vs. ROBERT D. KEHOE - ET AL.
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Decision Date: 01/09/2014
Application by Appellant for Reconsideration is denied.

GALLAGHER, E., P.J.
ROCCO, K., J., CONCURS
BLACKMON, P., J., CONCURS

On Copy:
MAURA A KEHOE (E1) - 2991 EDGEHILL ROAD, CLEVELAND HEIGHTS, OH 441180000

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

MAURA A. KEHOE

Appellee

COA NO.
99404

LOWER COURT NO.
CP D-328835

-vs-

DOMESTIC RELATIONS

ROBERT D. KEHOE, ET AL.

Appellant

MOTION NO. 469990

Date 01/09/14

Journal Entry

Application by Appellant for Reconsideration is denied.

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Presiding Judge KENNETH A. ROCCO,
Concurs

Judge PATRICIA A. BLACKMON, Concurs

[Signature]
EILEEN A. GALLAGHER
Judge