

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

LEIF P. DAMSTOFT, SR.,	:	O P I N I O N
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-T-0076
ARETO P. DAMSTOFT,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 08 DR 101.

Judgment: Affirmed.

Leif P. Damstoft, Sr., pro se, 194 York Avenue, N.W., Warren, OH 44485 (Plaintiff-Appellant).

Anthony G. Rossi, III, Guarnieri & Secret, P.L.L., 151 East Market Street, P.O. Box 4270, Warren, OH 44482 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This appeal has been taken from a final judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division. Appellant, Leif P. Damstoft, Sr., seeks the reversal of certain orders in the final divorce decree regarding the payment of spousal support and the distribution of the funds in a 401K account. As to the first point, appellant primarily submits that the general laws in Ohio governing an award of spousal support are unconstitutional.

{¶2} The parties to the instant appeal were married in February 1984, and lived

together for approximately 24 years in Trumbull County, Ohio. While they were married, the parties had two children; however, by the time they began to have serious marital problems, both children had been emancipated.

{¶3} During the latter half of the marriage, appellant was employed at Dietrich Industries in Trumbull County. By the conclusion of their relationship, he was receiving net pay of \$393.94 each week. Nevertheless, a review of his earning statement readily shows that the “net pay” figure included a deduction for a child support payment and a deduction for a payment on a loan from his 401K account. At the final evidentiary hearing of the divorce action, appellant did not attempt to provide any explanation for the “child support” deduction. If the payments for the loan and child support had not been subtracted, appellant’s weekly net pay would have been approximately \$500.

{¶4} In relation to the 401K plan, appellant began to make payments into this account when his employment with Dietrich Industries started in the late 1990’s. Due to her status as appellant’s wife, appellee, Areto P. Damstoft, was originally named as the sole beneficiary of the account. In late November 2002, though, she willfully executed a “spouse’s consent” document, under which she agreed that appellant could name their two children as the account’s beneficiaries. According to him, this change was made in order to ensure that the children would receive some form of inheritance if he died.

{¶5} By the close of the marriage, the 401K account had an actual balance of \$26,202.97. However, at some prior point, a loan of over \$10,000 had been taken from the account. As was noted above, funds were being withheld from appellant’s weekly check to satisfy that loan.

{¶6} Besides his basic employment with Dietrich Industries, appellant owned and operated a small business named “LeifCo.” In a typical month, appellant would net

\$400 of profit from the business.

{¶7} In the early years of the marriage, appellee held a number of jobs outside the marital home. At some point after 1998, she was diagnosed with certain mental and physical disabilities rendering her unable to hold any gainful employment. Thus, during the final nine years of their relationship, her income consisted only of biweekly payments of \$527.54 in workers' compensation benefits and monthly payments of \$341 in social security benefits.

{¶8} In March 2008, appellant instituted the underlying action for a divorce. In addition to asserting that the parties were no longer compatible, appellant alleged that appellee had committed acts of gross neglect and extreme cruelty. In conjunction with her answer to the original complaint, appellee submitted a counterclaim for divorce, only alleging incompatibility.

{¶9} After the parties had engaged in limited discovery, appellee moved for an order of temporary spousal support. Following a hearing before a trial court magistrate, appellant was ordered to pay appellee the sum of \$200 per month during the pendency of the proceeding. The matter was then scheduled for a final evidentiary hearing in April 2009. However, the hearing was continued for a period of seven months when appellee filed for bankruptcy in federal court.

{¶10} Finally, in December 2009, the trial court was able to proceed on the final merits. Immediately prior to the evidentiary hearing, the parties were able to stipulate as to the vast majority of the pending issues. Accordingly, the only issues remaining to be litigated concerned the distribution of the 401K funds and the final award of spousal support. During the hearing itself, each party testified as to the events which culminated in appellee's decision to execute the "spouse's consent" document. Furthermore, each

party testified regarding the extent of their respective monthly incomes and expenses.

{¶11} In its final divorce decree, the trial court granted both parties a divorce on the grounds of incompatibility. As to the 401K account, the court found that, in signing the “spouse’s consent” form, appellee had not intended to divest herself of her interest in its current value; thus, it was ordered that the account was a marital asset that was to be divided equally between the parties. In relation to the separate issue of spousal support, the trial court found that, given her two disabilities and other health problems, appellee had established a need for continuing support. Based upon this, appellant was ordered to pay appellee the sum of \$450 per month in spousal support until such time as she became eligible to collect social security retirement benefits.

{¶12} Although appellant was represented by counsel at the trial level, he chose to maintain the instant appeal *pro se*. In submitting his brief before this court, appellant has failed to comply with the requirement of App.R. 16(A)(3) that the legal issues in the case be set forth in specific assignments of error. Nevertheless, our review of his brief indicates that he has raised four general points for our consideration. Notwithstanding appellant’s refusal to abide by this court’s order to follow the appellate rules governing the submission of briefs, we will address the merits of his four contentions.

{¶13} Under his first argument, appellant challenges the constitutionality of the Ohio procedure for the imposition of spousal support in the context of a divorce action. Specifically, he asserts that the act of requiring one spouse to continue to give support to the other violates the constitutional prohibition against involuntary servitude. That is, he submits that it is a violation of his natural rights to require him to maintain a level of employment so that he will have sufficient funds to help appellee maintain her standard of living. In other words, it is appellant’s position that the trial court’s support order has

had the effect of giving his earning potential to appellee. In addition, he states that the fact that appellee's monthly income is now greater than his results in a violation of his constitutional right to equal protection under the law.

{¶14} At first glance, appellant's "servitude" argument appears to be unique in nature. However, our research on this matter has disclosed that the general argument has been addressed by this court and two other appellate courts. See, e.g., *Stewart v. Stewart*, 11th Dist. Nos. 2003-P-0094 & 2003-P-0122, 2005-Ohio-346; *Bagnola v. Bagnola*, 5th Dist. No. 2003-CA-00120, 2003-Ohio-5916; *Kelley v. Kelley*, 12th Dist. No. CA2001-04-087, 2002-Ohio-2317. Due to the inapposite nature of the situations, the courts have jettisoned the argument with little or no analysis of its relative merit.

{¶15} As was previously stated, appellant's "servitude" argument focuses upon the economic effect of an award of spousal support. But, as part of our limited analysis in *Stewart*, this court noted that, pursuant to well-established Supreme Court precedent, spousal support is not viewed as a pecuniary obligation; instead, it is deemed a moral duty that one spouse owes to the public as well as the other spouse. *Stewart*, 2005-Ohio-346, at ¶27, citing *Cramer v. Petrie* (1994), 70 Ohio St.3d 131, 136. Therefore, the purpose of such support is not to punish the spouse who has been able to work throughout the marriage, but rather to ensure that the other spouse can continue to be a productive member of society. Accordingly, the first aspect of appellant's constitutional argument does not have merit.

{¶16} As to his separate "equal protection" contention, it must again be indicated that appellant's position is predicated upon the assumption that, as a result of the trial court's support order in the instant action, his monthly income will be substantially less than appellee. However, as will be discussed below, the evidence presented during the

evidentiary hearing does not support appellant's assumption. That is, appellant's own testimony showed that the order to pay \$450 per month merely equalized the income of the two parties. To this extent, appellant simply cannot demonstrate an equal protection violation.

{¶17} Under his second argument, appellant contests the trial court's finding that his net monthly income, for purposes of calculating his support obligation, was \$2,550. He submits that the evidence presented to that court could only be interpreted to show that, once the monthly support order of \$450 was deducted, his actual income would be less than \$1,400. In light of this, he argues that the support order was unjust because it would make appellee's monthly income substantially greater than his.

{¶18} Our review of the trial transcript demonstrates that the difference between appellant's and the trial court's calculation turned upon the determination of how much "take home" pay he was receiving from Dietrich Industries. The earning statement that appellant presented as an exhibit at trial indicated that the company was paying him a net sum of \$393.94 each week. On the other hand, it is apparent that, in calculating his total monthly income to be \$2,550, the trial court was attributing to him a net weekly pay of \$500. Furthermore, it is apparent that the difference of approximately \$110 was due to the trial court's decision to add to the "\$393.94" figure two sums which the company had deducted from appellant's gross pay. The two sums at issue covered payments on a 401K loan and for child support.

{¶19} Before this court, appellant essentially asserts that the trial court erred in not basing its "income" calculation upon the actual amount he received as his net pay. Yet, in submitting evidence concerning his net income and expenses, appellant did not testify that appellee had received any direct benefit from the 401K loan. Similarly, since

both of appellee's children had already been emancipated, logic dictates that she had not received any benefit from the "child support" deduction.

{¶20} Given these circumstances, the trial court could deduce that the "loan" and "child support" deductions were simply separate debts incurred by appellant, akin to a mortgage debt or credit card debt. As such, the two amounts could properly be deemed as being part of appellant's actual net income from his employment with the company. Hence, since the evidence at trial supported the finding that appellant's net weekly pay was \$500, the trial court's ultimate calculation of his monthly income was not against the manifest weight of the evidence. In turn, because the subtraction of \$450 from his total monthly income would still leave him with the sum of \$2,100, the evidence clearly does not support appellant's contention that, in light of the support order, he is being required to subsist on an amount less than appellee's total income.

{¶21} In deciding whether an award of spousal support is warranted in a given case, a trial court is required under R.C. 3105.18(C) to review a variety of factors, such as the parties' age, earning abilities, education, and general health. *Kelley*, 2002-Ohio-2317, at ¶22. Once a trial court has rendered its "support" determination, it can only be reversed on appeal when it is shown that the ruling resulted from an abuse of discretion; i.e., the decision was based upon an unreasonable, arbitrary or unconscionable attitude on the part of that court. *Id.* at ¶23, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131.

{¶22} In the instant matter, the evidence before the trial court readily established that appellee's monthly income was \$1,397, while appellant's monthly income totaled \$2,550. In addition, appellant admitted during his testimony that appellee had physical and mental disabilities which made it difficult for her to maintain employment. In light of

these facts, it cannot logically be said that the trial court abused its discretion in granting an award of spousal support to appellee. For this reason, appellant's second argument is not well-taken.

{¶23} In his next argument, appellant maintains that appellee was not entitled to spousal support because she dissipated some of his assets prior to moving from their marital residence. In relation to this point, he contends that he raised this point before the trial court during the initial "meeting" in the case, but that a transcript of the meeting is unavailable because the proceeding was not recorded.

{¶24} As to this issue, this court would indicate that any "statement" appellant or his trial counsel made during a pre-trial conference would not have constituted evidence upon which a trial court could have based a determination. If appellant truly sought to prove that appellee improperly disposed of marital assets, it was incumbent upon him to present evidence on the issue during the final hearing on the merits. In the absence of a proper evidentiary submission on the matter, he has waived the right to rely upon the alleged misbehavior as a reason for reversing the trial court's decision.

{¶25} Under his final argument, appellant asserts that the trial court's order as to the distribution of the 401K account should be reversed because, in making this ruling, the court did not consider the tax consequences of giving appellee one-half of the funds. However, in raising this point, appellant has failed to provide any discussion as to what those consequences are.

{¶26} As was noted above, in finding that the 401K account was still an asset of the marriage, the trial court stated that the wording of the "spouse's consent" document did not give any indication that appellee was renouncing her interest as to the value of the account during appellant's lifetime. Our review of the document confirms the court's

statement; i.e., the controlling language only indicated that she was consenting to the removal of her name as a beneficiary. In light of this, appellee was entitled to receive some benefit based upon the present value of the account. Moreover, since the parties had stipulated as to the distribution of all other marital assets, the trial court did not have the option of offsetting the value of her interest against the value of other assets. As a result, the court actually had no real choice but to divide the account equally between the parties, regardless of the tax consequences, if any. To this extent, appellant again has not shown any error in the trial court's disposition of this matter.

{¶27} Pursuant to the foregoing analysis, this court concludes that appellant has failed to demonstrate any error in the final divorce decree. Therefore, as each of appellant's four arguments did not state any valid reason to reverse the trial court's decision, his composite assignment of error is without merit. It is the judgment and order of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.