[Cite as *Newcomer v. Newcomer*, 2013-Ohio-5627.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Megan L. Newcomer	Court of Appeals No. L-11-1183
Appellee/Cross-Appellant	Trial Court No. DR 2007-0929
v.	
Michael G. Newcomer, et al.	**DECISION AND JUDGMENT**
Appellant/Cross-Appellees	Decided: December 20, 2013

* * * * *

Martin J. Holmes, Sr. and Matthew O. Hutchinson,
for appellee/cross-appellant.

Eric Allen Marks and Henry B. Herschel,
for appellant/cross-appellee Michael G. Newcomer.

Thomas Dillon, Rebecca E. Shope, and William T. Maloney,
for cross-appellee, Velocity—The Greatest Phone Company Ever, Inc.

* * * * *

SINGER, P.J.

{¶1} This an appeal from a divorce decree issued by the Lucas County Court of Common Pleas, Domestic Relations Division. We affirm its decree of divorce in part,

and reverse, in part. We conclude that the trial court properly imputed income to appellant and correctly applied the doctrine of internal affairs. Because, however, the trial court improperly allocated certain property mistakenly, we vacate that portion of the decree and remand the matter for further proceedings.

{¶2} Appellant/cross-appellee ("appellant") Michael G. Newcomer and appellee/cross-appellant ("appellee") Megan L. Newcomer met while in college. The couple married in Columbus, Ohio, on May 2, 1992. Appellant's best man was his college friend, Greg Kiley.

{¶3} The couple lived and worked in Columbus early in the marriage; appellee as a retail store manager, appellant attempting to develop a branch of his parent's building contracting business. In 1993, with the birth of the first of the couple's four children, appellee resigned her position. The couple moved to a home near Whitehouse, Ohio, so that appellant could work in his family's business. Appellee continued to remain without employment outside the home.

{¶4} In early 2006, Greg Kiley came for an extended stay at the Newcomer home. It is not wholly clear from the record, but it appears that Kiley came to establish with appellant a Toledo location for a business: cross-appellee Velocity – The Greatest Phone Company Ever, Inc. ("Velocity"). A dispute over the nature of the relationship between appellant and Velocity forms the heart of this appeal.

{¶5} On September 6, 2007, appellee sued for divorce. Appellant responded with a counterclaim, also seeking divorce. On October 10, 2007, a magistrate issued temporary orders designating appellee temporary residential parent and legal custodian of the children. The magistrate also established a visitation schedule and ordered appellant to pay child support of $267.15 per child, per month. Spousal support was set at $3,500 per month. Both support figures were based on appellant's income of $51,000 from his family business and $82,618 from Velocity. Appellant was also ordered to pay utilities, insurance, taxes, and mortgage payments for the family home and certain installment payments.

{¶6} On May 13, 2008, appellee filed a motion demanding that appellant show cause why he should not be held in contempt for willfully refusing to pay child support, spousal support and the payments for which he was responsible. Appellee alleged that, while she was facing home foreclosure and utility disconnects, appellant lived in a $600,000 house and drove a new Mercedes paid for by Velocity. The court would eventually find appellant in contempt and jail him for 30 days.

{¶7} Prior to the marriage, the parties executed an antenuptial agreement, reserving to each an exemption from any subsequent property division of gifts or inheritances received during the marriage. Expressly excluded from this reservation, however, was "any growth or appreciation in value of any * * * Business Property which * * * results from the personal efforts of either of the parties * * *."

{¶8} Appellant, at various time, held himself out to be an owner of, partner in, or president and CEO of Velocity. Appellant had banking authority for Velocity and used his personal accounts as a conduit to transfer millions of dollars to other individuals or corporations. Appellant was also the recipient of certain "loans" from Velocity. He would later deny any ownership interest in the company.

{¶9} Appellee added Velocity as a party to these proceedings in an attempt to clarify appellant's association with the company.[1] The trial court, however, overruled appellee's attempt to determine the ownership of Velocity, ruling that such an examination into a Delaware corporation was beyond the scope of the proceedings. The court also denied appellee's motion to put the company into receivership. Nevertheless, most of the testimony and evidence submitted to the court during the eleven day dispositional hearing went to the financial dealings of Velocity and the benefits appellant derived from the company, notwithstanding appellant's assertion that his employment had been terminated and that he was unemployed.

{¶10} In its final decree, the trial court granted the parties a divorce on grounds of incompatibility. With the exception of spousal support, the court enforced the parties' antenuptial agreement. Pursuant to a stipulation by the parties, the family home was awarded to appellee with an equity balance due appellant, offset by his share of marital

[1]Appellee's parents, Phillip and Brooke Callanen were also made parties by virtue of their control of her trust.

debts. Appellant was ordered to pay $146,983 to reimburse appellee for unpaid obligations from the court's temporary order.

{¶11} With respect to Velocity, the trial court characterized the company as a "quagmire of bank accounts, undocumented loans, unaccountable pay-outs and wire transfers of millions of dollars to and through personal accounts * * * and blatant commingling of corporate and personal funds." Even so, the court found no evidence that appellant held stock in the company and, for that matter, no credible evidence at trial as to the identity of Velocity's shareholders. The court reiterated its prior ruling that further inquiry into the ownership of the corporation was inappropriate.

{¶12} The court did find that appellant had a colorable claim of an ownership interest in Velocity and that appellant may be owed commission or other compensation from the company. These claims are choses in action and constitute marital property, subject to division, the trial court concluded. The court then awarded a one-half interest in these choses in action to each party with a separate right to assert these claims in a court of competent jurisdiction. Velocity was dismissed from the case.

{¶13} With respect to appellant's testimony that he had no reportable income between 2006 and 2009 and lived on loans from Velocity, the support of his parents and the largess of Greg Kiley, the court found this testimony "not credible." The court found that between 2006 and 2010, appellant obtained hundreds of thousands of dollars' worth of "loans" from Velocity, drove luxury vehicles, took extravagant vacations and lived in

an expensive home. The court noted that the lavishness of appellant's lifestyle did not subside even after he was supposedly "fired" from Velocity. The court found appellant voluntarily unemployed and, based on the lifestyle he provided his family before institution of the divorce and the lifestyle he provided himself during the pendency of the action, imputed to him an annual income of $150,000. On these findings, the court ordered appellant to pay appellee $3,000 per month spousal support for a period of 74 months. The court computed appellant's child support obligation at $1,373.79 per month when appellant provides medical insurance. The court denied appellee's motion for an award of attorney fees.

{¶14} From this judgment, appellant now appeals. Appellant sets forth the following six assignments of error:

I. The trial court applied the wrong standard in determining whether to uphold the parties' antenuptial agreement pertaining to spousal support.

II. The income imputed by the trial court is not support [sic] by competent, credible evidence.

III. The trial court erred in determining spousal support.

IV. The trial court erred in calculating child support.

V. The trial court lacked jurisdiction to issue a final order pertaining to monies owed on the temporary orders.

VI. The trial court erred in its allocation of Appellant/Cross-

Appellee's share of the cash-surrender value of his insurance policies.

{¶15} Appellee has filed a cross-appeal, setting forth the following six assignments of error:

I. The trial court erred in finding that the doctrine of internal affairs deprived the court of subject matter jurisdiction.

II. The trial court erred in awarding Megan a one-half interest in Michael's choses of action [sic] without determining the value of the claim.

III. The trial court erred in failing to consider ancillary considerations as part of its award of one-half of Michael's choses of action [sic].

IV. The trial court erred by awarding Megan a one-half interest in Michael's choses of action [sic] as to the Velocity business rather than appointing a receiver.

V. The trial court erred in failing to award Megan a greater award of the marital property (or a distributive award) for Michael's financial misconduct.

VI. The trial court erred in failing to award Megan any attorneys' fees and litigation expenses.

I. Spousal Support

{¶16} The antenuptial agreement between the parties provided that in the event of separation or divorce neither party would seek or receive an award of maintenance or alimony. In his first assignment of error, appellant asserts that the trial court improperly chose to abrogate this provision by awarding spousal support to appellee.

{¶17} Antenuptial agreements are valid and enforceable:

> (1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce. *Gross v. Gross*, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984), paragraph two of the syllabus.

{¶18} Provisions of the agreement regarding spousal support, however, are subject to additional scrutiny. Changed circumstances may render such provisions unconscionable when examined at the time of the divorce or dissolution. *Id.* at 109. Circumstances which may prompt a court to find unconscionable a spousal support provision of an antenuptial agreement include, for example:

> an extreme health problem requiring considerable care and expense; change in employability of the spouse; additional burdens placed upon a spouse by way of responsibility to children of the parties; marked changes

in the cost of providing the necessary maintenance of the spouse; and changed circumstance of the standards of living occasioned by the marriage, where a return to the prior living standard would work a hardship upon a spouse. *Id.* at fn. 11.

{¶19} The party seeking to nullify an antenuptial spousal support agreement bears the burden of showing the unconscionable effect of the provision at the time of the divorce or dissolution. In determining whether an antenuptial spousal support provision is conscionable and reasonable at the time of the divorce, the trial court is directed to use the same factors that govern an award of spousal support found in R.C. 3105.18. *Id.* at 109-110.

{¶20} The parties stipulated that the antenuptial agreement at issue was without fraud or duress and made with full disclosure. The issue in dispute is whether circumstances have changed sufficiently to warrant the trial court's decision to void the spousal support provision in the agreement and award spousal support to appellee.

{¶21} The parties differ on the standard of review to be applied. Citing *Saari v. Saari*, 9th Dist. Lorain No. 08CA009507, 2009-Ohio-4940, appellant maintains appellate review of a trial court decision finding a provision of an antenuptial agreement unconscionable is de novo. Appellee insists that appellant's reading of *Sarri* is flawed and that the decision implicates a mixed question of law and fact wherein factual findings are reviewed under an abuse of discretion standard. In fact, appellee argues, the *Saari*

court itself clarified this point in a later case, *Mann v. Mann*, 9th Dist. Lorain No. 09CA009685, 2010-Ohio-1489.

{¶22} In general, an award of spousal support is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Tremaine v. Tremaine*, 111 Ohio App.3d. 703, 706, 676 N.E.2d 1249 (2d Dist.1996). An abuse of discretion connotes more than an error of judgment or a mistake of law, the term connotes 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). As to whether an antenuptial provision negating spousal support should be set aside, *Gross*, 11 Ohio St.3d at 110, 464 N.E.2d 500, directs that the court consider the factors enumerated in R.C. 3105.18.[2] It is an

[2] (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;
(b) The relative earning abilities of the parties;
(c) The ages and the physical, mental, and emotional conditions of the parties;
(d) The retirement benefits of the parties;
(e) The duration of the marriage;
(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
(g) The standard of living of the parties established during the marriage;
(h) The relative extent of education of the parties;
(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to

abuse of discretion if the court fails to do so. *Bisker v. Bisker*, 69 Ohio St.3d 608, 609, 635 N.E.2d 308 (1994). If, after such consideration, however, the court concludes that, at the time of the divorce or dissolution, enforcement of such provision is unconscionable or unreasonable, the court may void the provision and fashion an equitable spousal support order. *Gross*, 11 Ohio St.3d at 109-110, 464 N.E.2d 500.

{¶23} In the present matter, the court expressly states in its judgment entry that it has considered the R.C. 3105.18 factors and "specifically finds that the parties' circumstances have significantly altered since the time of the Antenuptial Agreement." The court notes that the parties now have four minor children, appellee dropped out of the labor market to rear the children, appellee needs updating in career skills and the parties' lifestyles have "dramatically changed." The court concluded that to apply the spousal support provision in the antenuptial agreement would now be "unfair and inequitable."

{¶24} Appellant argues that "unfair and inequitable" is not "unconscionable." Actually, "unconscionable" does mean "unfair;" specifically "extremely bad, unfair, or wrong: going far beyond what is usual or proper." Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/unconscionable (accessed Oct. 22, 2013).

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obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;
(l) The tax consequences, for each party, of an award of spousal support;
(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
(n) Any other factor that the court expressly finds to be relevant and equitable. R.C. 3105.18 (C)(1).

Moreover, there is nothing in the cases to suggest that there are necessarily specific words which must be used to nullify a spousal support provision in an antenuptial agreement. Indeed, in *Gross*, at 109, the court refers to "the issue of conscionability and reasonableness of the provisions." Accordingly, we will not disturb the trial court's decision on the basis of its language use.

{¶25} Appellant goes on to challenge the merits of the court's decision. Appellant points out that appellee comes from a family of great wealth, is the beneficiary of a sizeable trust fund, stands to inherit in excess of one million dollars from her parents and even through the pendency of the divorce received gifts and loans of tens of thousands of dollars from them.

{¶26} The trial court properly included the income from appellee's trust in computing the relative earning power of the parties. Appellee's parents have no legal obligation to provide gifts or support for their daughter irrespective of their ability to do so. Any inheritance is but an expectation. The gifts and loans appellee received from appellee's parents during the pendency of the divorce substituted for money appellant was legally obligated to pay and did not. This prevented a threatened foreclosure of the family home. In fairness, such generosity should not now weigh to relieve appellant of some, or all, of his obligation to appellee.

{¶27} On review of the entire record, we find nothing to suggest that the trial court employed the wrong standard with respect to the antenuptial agreement or abused its

discretion in fashioning a spousal support award. Accordingly, appellant's first assignment of error is not well-taken.

II. Income Imputation

{¶28} In his second assignment of error, appellant asserts that the trial court erred in calculating the amount of income it imputed to him. In his third and fourth assignments of error, he maintains that the use of this improperly imputed income figure in calculating the amount of spousal and child support awarded appellee was, as a result, similarly erroneous. We will discuss these assignments together.

{¶29} For purposes of child support calculations, once a court determines that a parent is voluntarily underemployed or unemployed, it may proceed to impute income to the parent. *Abbott v. Abbott*, 6th Dist. Fulton No. F-06-020, 2007-Ohio-5308, ¶ 31. The decision that deems a parent voluntarily unemployed, as well as the amount of potential income to be imputed are matters to be determined by the court, in its discretion, based upon the facts and circumstances of each case. *Rock. v. Cabral*, 67 Ohio St.3d 108, 616 N.E.2d 218 (1993), syllabus.

> Imputed income that the court or agency determines the parent would have earned if fully employed [is] determined from the following criteria:
>
> (i) The parent's prior employment experience;
>
> (ii) The parent's education;

(iii) The parent's physical and mental disabilities, if any;

(iv) The availability of employment in the geographic area in which the parent resides;

(v) The prevailing wage and salary levels in the geographic area in which the parent resides;

(vi) The parent's special skills and training;

(vii) Whether there is evidence that the parent has the ability to earn the imputed income;

(viii) The age and special needs of the child for whom child support is being calculated under this section;

(ix) The parent's increased earning capacity because of experience;

(x) The parent's decreased earning capacity because of a felony conviction;

(xi) Any other relevant factor. R.C. 3119.01(C)(11)(a).

{¶30} In determining spousal support, R.C. 3105.18(C) similarly permits courts to inquire into a party's earning potential and to impute income when the court finds that he or she is not working to full earning capacity. *Kelly v. Forbis*, 6th Dist. Wood No. WD-09-050, 2010-Ohio-3071, ¶ 39. The decision to impute income for spousal support and the amount of the potential income to be imputed is within the discretion of the court. *Id.*

{¶31} Appellant insists that there was insufficient evidence to conclude that he was voluntarily unemployed or to support the court's finding that his potential earning capacity was $150,000.

{¶32} The trial court noted that, at the time of the decree, appellant was a 44 year-old college graduate with no physical, mental or emotional disability that would prevent or restrict his ability to be employed. Between 2006 and 2010, appellant had some sort of relationship with Velocity and Greg Kiley. Appellant and Kiley are simply not clear or, as the court found, not credible as to whether this was an employment relationship or whether appellant was an independent contractor or commission salesman. The manner in which appellant was paid is similarly unclear. Appellant and Kiley testified that appellant was to earn commission from a master contract for business he would generate for Velocity. Kiley and appellant maintain that the money appellant received was a loan or a draw against that potential commission.

{¶33} Kiley and appellant both maintained such loan accounts. The evidence of the Velocity accounts introduced at trial indicate that appellant obtained hundreds of thousands of dollars from his loan account, the balance of which at one point, before adjustments by Kiley, was $2.8 million. The adjustment decreased it to $815,000, some of which Velocity wrote off; $301,822 of which appellant discharged in bankruptcy during the pending divorce. Appellant declares he had no reportable income between

2006 and 2009. He claims he lived and supported his family during this time through the loans and the generosity of Kiley. The court found these claims "not credible."

{¶34} The trial court found appellant's true income to be "elusive." This elusiveness was due in no small measure to the irregular business practices and lack of fiscal accountability of Velocity. Millions of dollars passed annually from Velocity through appellant's personal bank accounts. This money was then wire transferred to other individuals or related companies. Both appellant and Kiley regularly used Velocity accounts and credit cards for personal purposes. Appellant and Kiley converted Velocity checks into cash at a vaguely affiliated check cashing store. Velocity paid for luxury car leases and travel for both men. During the time appellant claims zero reportable income, he reported monthly expenses of $7,800.

{¶35} In September, 2010, when Kiley and appellant testified that Kiley fired appellant from a job appellant earlier denied having, there was little change in the relationship between the two men and appellant appears to have continued a lavish lifestyle. He continued to travel. He bought a motorcycle and put it in a girlfriend's name. He assisted another girlfriend in opening a teen nightclub and claimed he took no share in the club's $9,600 or more weekly cash grosses.

{¶36} At the time appellant claimed to be unemployed and without income, he shared a home with the second girlfriend, paying $1,400 per month rent, driving a Range Rover and a Suzuki motorcycle, traveling frequently to Las Vegas, Miami, and Chicago.

The second girlfriend testified at trial that she also received many gifts of jewelry and clothing from appellant during this period. The girlfriend testified that during 2009 neither she nor appellant worked and explained their lifestyle as the result of the generosity of Kiley and Velocity. The trial court found this testimony "not credible."

{¶37} When reviewing the weight afforded evidence by a trier of fact, there is a presumption that the resultant findings are correct. *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). This presumption rests on the greater ability of the jury or court to view the witnesses, observe their demeanor, gestures and voice inflections and use these observations to weigh the credibility of the testimony. *Id.*

{¶38} The traditional statement of the standard is that judgments supported by some, meaning any, competent credible evidence will not be reversed as against the manifest weight of the evidence. *Vogel v. Wells*, 57 Ohio St.3d 91, 96, 566 N.E.2d 152 (1991); *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶39} More recently, the Ohio Supreme Court has restated the standard for manifest weight, emphasizing that, aside from the quantum of proof required, weight and sufficiency of the evidence are the same in both civil and criminal contexts. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Weight of the evidence concerns the greater amount of credible evidence offered in trial to support one

side or the other of an issue. The party having the burden of proof will be entitled to a verdict if the trier of fact, on weighing the evidence, finds that the greater amount of credible evidence sustains the issue to be determined. *Id.* at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The presumption in favor of the trier of fact continues. The appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. *Thompkins* at 387.

{¶40} There was ample evidence for the trial court to conclude that appellant is voluntarily unemployed. He said he was unemployed and presented no credible evidence that he was seeking work. There is of course the suspicion that he continued, and continues, in an under the table relationship with Velocity, or Kiley, or a teen nightclub. Since appellant attributes no income to such relationship, however, it was certainly within the court's discretion to take him at his word.

{¶41} More problematic is determining how much appellant's labor is worth if he found work. The range seems to be from next to nothing—what appellant and Kiley testified he made with Velocity—to millions, the amount flowing through his bank accounts while he was associated with Velocity. The trial court expressly found Kiley and appellant not to be credible witnesses, so next to nothing does not appear to be a proper option. The court prudently chose to ignore that massive amount of money that seemed to pass through appellant's hands and focused on his ability to earn and the

lifestyle he had provided his family and, from all appearances, continued to provide for himself after the separation.

{¶42} The court found no physical, medical or educational impediment to appellant earning a living and providing for a family. In considering the type of lifestyle appellant provided his family while they were together and for himself after he left the home, the court deemed appellant's earning potential at $150,000 per year. Given the evidence before the court, imputing this amount of income to appellant was not, in our view, an abuse of the court's discretion. Accordingly, appellant's second assignment of error is not well-taken.

{¶43} With respect to the computation of spousal support and child support, from the court's final decree, it is clear that the court considered the R.C. 3105.18(C) factors and the R.C. 3119.01(C)(11)(a) factors. We have already concluded that the amount of imputed income was appropriate. Accordingly, we conclude that the trial court did not abuse its discretion in computing spousal or child support as it did. Appellant's third and fourth assignments of error are not well-taken.

III. Jurisdiction on Temporary Orders

{¶44} In his fifth assignment of error, appellant contends that the trial court lacked jurisdiction to enter judgment on unpaid sums from temporary support orders.

{¶45} On December 31, 2009, a magistrate found appellant in contempt for failing to pay child and spousal support and certain installment payments, mortgage payments,

utilities and taxes on the marital home as provided for in temporary orders. On August 2, 2010, the trial court overruled appellant's objections to the magistrate's decision. The court gave appellant 30 days to purge his contempt or face 30 days in jail. *Newcomer v. Newcomer,* 6th Dist. Lucas No. L-10-1357, 2011-Ohio-6500, ¶ 2-4.

{¶46} On September 14, 2011, appellant moved to vacate the contempt finding pursuant to Civ.R. 60(B). Appellant asserted that newly discovered evidence had been found which would affect the income imputed to him at the time the temporary order was entered and, thereby, alter the basis of his contempt. *Id.* at ¶ 4. When the trial court rejected his Civ.R. 60(B) motion, appellant appealed.

{¶47} That appeal was still pending when the trial court issued its final decree. In that decree, the court reduced to judgment the arrearage from the temporary orders. Appellant argues that the court could not properly make such an order because the appeal divested the trial court of jurisdiction over the subject matter of the appeal, the proper amount of the temporary award.

{¶48} Once an appeal is taken, the general rule is that the trial court is divested of jurisdiction, except to take action in aid of the appeal, until the case is remanded to it by the appellate court. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas,* 55 Ohio St.2d 94, 97, 378 N.E.2d 162 (1978). As appellee points out, however, issues not inconsistent with the appellate court's authority to review, affirm, modify or reverse an appealed judgment, such as collateral issues, like contempt, are excluded from the

general rule. *State ex rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 570, 722 N.E.2d 73 (2000).

{¶49} Appellee maintains that appellant was unclear in the trial court and unclear here about exactly which judgment from which he sought relief. If he is appealing the contempt, appellee asserts that contempt is a collateral matter, the appeal of which does not divest the trial court of continuing jurisdiction. If it is from the temporary support order, appellee maintains that such orders are interlocutory and, therefore, not final appealable orders.

{¶50} Our decision in appellant's first appeal was from a motion denying him relief from judgment from the interlocutory orders, not an appeal of the temporary orders themselves. Indeed, in that appeal we concluded that the trial court had erred in denying appellant's Civ.R. 60(B) motion, *Newcomer*, 6th Dist. Lucas No. L-10-1299, 2011-Ohio-6500, ¶ 41, and remanded the matter to the trial court to consider appellant's newly discovered evidence. *Id.* at ¶ 69. Since our judgment was released several months after the final decree appealed from here, the trial court should not have entered judgment on the disputed arrearages until after remand. However, since we have concluded in a companion case that appellant was afforded his due on remand and that the trial court properly reinstituted its decision on the amount of arrearages from the temporary orders, *see Newcomer v. Newcomer*, 6th Dist. Lucas No. L-13-1029, 2013-Ohio ____, this assignment of error is moot.

IV. Allocation of Property Division

{¶51} In his remaining assignment of error, appellant maintains that the trial court did not properly credit the cash surrender value of an insurance policy in the property division. According to appellant, an ING policy valued at $12,000 was ordered retained by appellee, at the same time, the court reduced by $6,000 the amount appellant was to receive for his half of the home equity. Thus, according to appellant, he received a negative $6,000 when he should have received a plus $6,000. Appellant complains that the court similarly misallocated the $700 cash surrender value of a State Farm life insurance policy.

{¶52} Appellee concedes that the court seems to have misallocated the items of which appellant complains, but suggests that the amounts involved are de minimus and should not form a basis for disturbing the final property division. We disagree.

{¶53} If the court intended to divide the personal property in the marital estate equally, an unequal division is unreasonable and constitutes an abuse of discretion. Losing $6,000 when he should have received $6,000 is more than a de minimus error under almost any circumstances. Accordingly, appellant's sixth assignment of error is well-taken. The portion of the final decree dealing with the disputed items is vacated and the matter is remanded to the trial court to correct its error.

V. Doctrine of Internal Affairs

{¶54} In an amended complaint, appellee alleged that appellant had an ownership interest in Velocity – The Greatest Phone Company Ever, Inc., a Delaware corporation. Appellant joined Velocity as a third-party defendant pursuant to Civ.R. 75(B)(1). Velocity moved to be dismissed, arguing it was improper for the court to determine whether appellant possessed any ownership interest in a foreign corporation.

{¶55} On December 7, 2010, the trial court, applying the doctrine of internal affairs, ruled that, unless appellant was a registered shareholder, legal or equitable ownership of the corporation should only be determined in Velocity's state of incorporation, Delaware. The court found that appellant may have a claim to ownership in Velocity and that such a claim was a chose in action, best adjudicated in Delaware. In its final decree, the court divided the chose in action equally, granting to each party an independent right to pursue the claim.

{¶56} In her first cross-assignment of error, appellee asserts the trial court misapplied the doctrine of internal affairs to conclude that it was without jurisdiction to determine whether appellant had an ownership interest in Velocity.

{¶57} The doctrine of internal affairs is a conflict of laws principle which recognizes the policy that a state should have authority to regulate the internal affairs of its own corporations. *State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, 850 N.E.2d 1218, ¶ 47, (10th Dist.). As a matter of comity and a need for uniformity of

decisions, the courts of one state may not ordinarily interfere with the prerogative of the state in which a corporation is created or domiciled to govern the internal operation of that entity. *Relief Assn. of the Union Works v. Equitable Life Assur. Soc.*, 140 Ohio St. 68, 42 N.E.2d 653 (1942), paragraph one of the syllabus; 2 Restatement of the Law 2d, Conflict of Laws, Section 302, Comment b (1971).

{¶58} Ordinarily, the law of the state of incorporation determines issues relating to the internal affairs of a corporation. *State ex rel. Petro* at ¶ 47, citing *First Natl. City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 621, 103 S.Ct. 2591, 77 L.Ed.2d 46 (1983). Those matters encompassed in a corporation's "internal affairs" are primarily those things involved in a corporation's relations with its shareholders: "original incorporation, the election or appointment of directors and officers, the adoption of by-laws, the issuance of corporate shares * * * the reclassification of shares and the purchase and redemption of the corporation of outstanding shares of its own stock." 2 Restatement of the Law 2d, Conflict of Laws, Section 302, Comment e.

{¶59} The Ohio formulation of the rule is stated in *Relief Assn. of Union Works*, at paragraph two of the syllabus:

> Courts of Ohio are without jurisdiction to entertain an action against a foreign corporation where the result of granting the relief asked would be to interfere with the management of such corporation or the exercise by the board of directors of such corporation of a discretion vested in them by the

laws of the state of creation or domicile of the corporation.

{¶60} Relying on a decision by the Franklin County Court of Common Pleas, appellee suggests that the rule has lost its vitality in an age of a global economy and long-arm jurisdiction and that the deference to an incorporator's home state should no longer be considered jurisdictional. That is a change beyond the purview of this court, a conclusion shared by the common pleas court in the case upon which appellee relies. *See Global Launch, Inc. v. Wisehart,* 156 Ohio Misc.2d 1, 2010-Ohio-1457, 925 N.E.2d 698, ¶ 14 (C.P.).

{¶61} Here, it is clear that any determination of an ownership interest in Velocity where none appears in the corporation's records would affect all other shareholders. This plainly would interfere with Velocity's internal affairs. Accordingly, the trial court properly concluded that it was without jurisdiction to entertain an ownership claim to the foreign corporation. Appellee's first cross-assignment of error is not well-taken.

VI. Choses in Action

{¶62} In her second cross-assignment of error appellee suggests that the trial court erred in awarding her half of appellant's ownership claim in Velocity without determining a value certain. In her third cross-assignment of error, appellee claims the trial court erred by failing to consider "ancillary considerations" when awarding her an interest in a chose in action. In her fourth cross-assignment of error, appellee maintains that the trial court should have appointed a receiver for Velocity rather than awarding her

an interest in a chose in action. We shall discuss these cross-assignments of error together.

{¶63} Ohio law requires courts to divide property equitably between the parties in a divorce. R.C. 3105.171(B). This, in most cases, requires the court to divide property equally. R.C. 3105.171(C)(1). The court enjoys broad discretion in fashioning an equitable division of marital property and its determination in crafting such an award will not be disturbed absent an abuse of that discretion. *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131, 541 N.E.2d 597 (1989).

> [A] "chose in action" is a "proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort." The term can also be defined as "[t]he right to bring an action to recover a debt, money, or thing." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co*., 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, ¶ 19, quoting Black's Law Dictionary 258 (8th Ed.2004).

The phrase applies to a right to bring an action in contract and in tort. *Id.* at ¶ 20.

{¶64} A chose in action is personal property, *Olive Branch Holdings, L.L.C. v. Smith Technology Dev., L.L.C.*, 181 Ohio App.3d 479, 2009-Ohio-1105, 909 N.E.2d 671, ¶ 32 (10th Dist.), and subject to division in a divorce proceeding. R.C. 3105.171 (A)(3)(a).

{¶65} In this matter, after determining that any claim appellant might have for an interest in Velocity should be adjudicated in a Delaware proceeding, the trial court determined that it was obligated to determine the existence of a chose in action that appellant may have against Velocity and allocate that claim between the parties. Such a determination, the court concluded, did not require a trial of a case within a case. The court continued:

> Further, in light of the allegiances and dealings between [appellant], Kiley, Velocity and related companies * * * the Court is not persuaded that it would be necessary, wise or equitable to recess this trial for a period of time for [appellant] to file such cause of action in Delaware. [Appellant's] forbearance in bringing such a lawsuit or lack of diligence in pursuing such a cause of action would be prejudicial to [appellee]. Therefore, with such form of intangible personal property of unspecified value the Court would be obligated to allocate a portion thereof to [appellee] in her own right.

{¶66} In the final decree, the court awarded appellee one-half of any chose in action appellant might have with respect to Velocity.

{¶67} Appellee insists that the trial court should have determined the value of the chose in action before effecting division. Citing *Willis v. Willis*, 19 Ohio App.3d 45, 48, 482 N.E.2d 1274 (11th Dist.1984), appellee advances the proposition that, in all

instances, domestic relations courts must ascertain a value certain on all property to be divided. Omission of such valuation, appellee maintains, is reversible error.

{¶68} Appellee reads *Willis* too broadly. The case involved a pension fund, unvalued in the final decree. The *Willis* court stated that, as a practical matter, appellate review of a decree is not possible unless the court has attached findings of value to the property to be divided. "The trial court is not privileged to omit valuation altogether." *Id.*

{¶69} The distinctions between *Willis* and the present matter are plain. The value of a pension fund is relatively fixed and may be determined with reasonable diligence. The value of a chose in action is inchoate, malleable by varying proofs and the acceptance of a trier of fact. In this matter, the enthusiasm of appellant may also be a factor.

{¶70} Since the court had already ruled that one of the choses in actions, any ownership interest appellant may have in Velocity, was more properly heard in Delaware, the court faced the prospect of delaying these proceedings while that matter was adjudicated in Delaware courts. The claims on contract could be tried here, but this would have involved a "trial in a trial," further prolonging an already extended divorce. Given these circumstances, we cannot say that the trial court abused its discretion in dividing the choses in action, rather than attempting to value them. Accordingly, appellee's second cross-assignment of error is not well-taken.

{¶71} Appellee, in her third cross-assignment of error, maintains that the trial court failed to consider "ancillary" considerations when it awarded her one-half of appellant's choses in action against Velocity. Appellee directs our attention to R.C. 3105.171(C), which instructs a court considering the division of property to weigh all relevant factors, including, specifically, those factors enumerated in R.C. 3105.171(F). Appellee notes that the trial court did not mention in its judgment consideration of any of the R.C. 3105.171(F) factors and argues that had the court considered the liquidity of the property, the economic desirability of retaining the asset intact, tax consequences and the cost of sale, *see* R.C. 3105.171(F)(4), (5), (6) and (7), respectively, it would not have divided appellant's choses in action against Velocity in the manner it did. The significant cost of pursuing these claims in the state of Delaware alone militates against the scheme the court imposed, appellee insists.

{¶72} R.C. 3105.171(F) contains no requirement that a trial court address in its judgment entry consideration of each factor when making a division of property. *Cangemi v. Cangemi*, 8th Dist. Cuyahoga No. 86670, 2006-Ohio-2879, ¶ 67. Indeed, absent an affirmative showing by the party challenging the division of property, the court is presumed to have followed the statute. *Eddy v. Eddy*, 4th Dist. Washington No. 01CA20, 2002-Ohio-4345, ¶ 60.

{¶73} In this matter, the court blended the undisturbed portions of the antenuptial agreement with the stipulations of the parties and considered days of testimony and a

voluminous submission of documentary evidence to fashion a property award. The court made lengthy findings on the doctrine of internal affairs question and the relationship of Velocity to the other parties. The court made specific findings with respect to the duration of the marriage, the assets and liabilities of the spouses, R.C. 3105.171(F)(1) and (2) factors. Award of the family home, the (F)(3) factor, was provided for by stipulation.

{¶74} Appellee complains that the court failed to consider the liquidity, desirability of keeping the assets intact or tax consequences of the choses in action, R.C. 3105.171 (F)(4)(5)(6), but fails to suggest the manner in which consideration of any of these factors should alter the court's award. Concerning the cost of the pursuit of the choses in action, the court clearly considered this issue and concluded that given appellant's relationship to Kiley and Velocity, appellant was unlikely to pursue these claims. This is why the court awarded each party one-half of the choses in action and expressly granted either party an independent right to seek remedy. While appellee may not like this decision, it cannot be said that it was made without consideration. Accordingly, appellee's third cross-assignment of error is not well-taken.

{¶75} In her fourth cross-assignment of error, appellee suggests that the trial court erred in awarding her a one-half interest in appellant's chose in action instead of granting her request to appoint a receiver for Velocity.

> "The appointment of a receiver is the exercise of an extraordinary, drastic and sometimes harsh power which equity possesses and is only to be

exercised where the failure to do so would place the petitioning party in danger of suffering irreparable loss or injury." Owing to the extreme nature of the remedy is the requirement that the movant must demonstrate the need for a receiver by clear and convincing evidence. Once the movant has satisfied this burden, a trial court is vested with the sound discretion to appoint a receiver. "A court[,] in exercising its discretion to appoint or refuse to appoint a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies." (Citations omitted.) *Crawford v. Hawes*, 2d Dist. Montgomery No. 23209, 2010-Ohio-952, ¶ 33.

{¶76} The decision of whether or not to appoint a receiver rests in the sound discretion of the court and will not be disturbed absent an abuse of that discretion. *State ex rel. Celebrezze v. Gibbs*, 60 Ohio St.3d 69, 73, 573 N.E.2d 62 (1991).

{¶77} A common pleas court may appoint a receiver in the following cases:

(A) In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject property or a fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of a party whose right to or

interest in the property or fund, or the proceeds thereof, is probable, and when it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(B) In an action by a mortgagee, for the foreclosure of his mortgage and sale of the mortgaged property, when it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and the property is probably insufficient to discharge the mortgage debt;

(C) After judgment, to carry the judgment into effect;

(D) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment;

(E) When a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

(F) In all other cases in which receivers have been appointed by the usages of equity. R.C. 2735.01.

{¶78} In this matter, no mortgage debt is implicated, nor is there a judgment affecting Velocity ripe for enforcement. Notwithstanding Velocity's relaxed accounting practices, there is no evidence of record that the company is or is about to become

insolvent. The court entered no finding to establish with certainty any interest in or debt by Velocity in favor of appellee or appellant. Thus the first four sections of R.C. 2735.01 are unavailable to justify appointment of a receiver. With respect to R.C. 2735.01(F), appellee's purpose for the appointment seems more in the nature of a quasi-discovery than for any reason receivers have previously been appointed in equity. At the least, appellee provided no authority supporting a similar use of a receiver in equity. Accordingly, the trial court's decision to deny appointment of a receiver in this matter was within the court's discretion. Appellee's fourth cross-assignment of error is not well taken.

VI. Financial Misconduct

{¶79} In her fifth cross-assignment of error, appellee claims that the trial court erred in denying her a disproportionate share of the marital property or a distributive award to sanction appellant for his financial misconduct.

{¶80} R.C. 3105.171(E)(4) provides:

> If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.

{¶81} R.C. 3105.171(E)(5) permits similar compensation if a spouse has substantially and willfully failed to disclose assets or debt. The burden of proving financial misconduct rests with the offended spouse. *Thill v. Thill*, 2d Dist. Clark No 2001-CA-23, 2001 WL 929995, *2 (Aug. 17, 2001). Once financial misconduct is established, the decision to make a compensating distributive award rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Mikhail v. Mikhail*, 6th Dist. Lucas No. L-03-1195, 2005-Ohio-322, ¶ 25.

{¶82} The threshold issue is whether there was financial misconduct or concealment of assets in this case. Appellee recognizes that the trial court made no such finding, even though the final decree is replete with multiple comments derogating Velocity accounting and business practices.[3] Appellee would have us either deem these various comments as the equivalent of a finding of misconduct or enter the finding the trial court should have made.

{¶83} We have no doubt that the trial court's failure to enter a financial misconduct finding was intentional. The court had no difficulty in making manifest its other findings, so it is unlikely its failure to find financial misconduct was an unintentional omission. We decline appellee's invitation to infer such a finding from various portions of the lengthy divorce decree.

[3] *E.g*: "Finding that the husband and Kiley are the best of friends, lack credibility in their testimony, are deceptive in their business practices and are unaccountable in their operation of Velocity, the Court determines that husband will likely never assert his claims for ownership and unpaid compensation."

{¶84} Concerning appellee's request that this court find financial misconduct, this, in essence, is an assertion that the trial court's failure to find such misconduct is against the manifest weight of the evidence. Although, as we discussed above in the imputed income section, this court has the ability to act as a "thirteenth juror," the presumption of the trial court's correctness continues. *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517 at ¶ 12. As we have said before, the presumption is all the more difficult to overcome for a party who bears the burden of proof. Such a party has little room to complain if the finder of fact chooses not to believe some or all of his or her proofs. *Cont'l Tire N. Am. v. Titan Tire Corp.*, 6th Dist. Williams No. WM-09-010, 2010-Ohio-1355, ¶ 38-39. Having thoroughly reviewed the evidence in this matter, we fail to find that the trial court lost its way or that manifest injustice resulted in the court's failure to find financial misconduct. Accordingly, appellee's fifth cross-assignment of error is not well-taken.

VII. Attorney Fees and Litigation Costs.

{¶85} In her final cross-assignment of error, appellee maintains that the trial court abused its discretion when it failed to award her attorney and litigation fees. Appellee compares appellant's conduct in that matter to that of the husband in *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, 884 N.E.2d 1113, ¶ 93, (6th Dist.), in which, we affirmed a trial court decision to award $190,000 in attorney and litigation fees. Appellee argues that appellant's conduct in this matter was more obstreperous, more uncooperative

and more egregious than that of the *Moore* husband. Appellee put on evidence at trial that her attorney fees and litigation costs were reasonable. As a result, she insists, she too should receive such an award.

{¶86} R.C. 3105.73(A) provides:

> In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate.

{¶87} The decision of whether to award attorney fees and litigation expenses has traditionally rested within the sound discretion of the court. *Moore* at ¶ 81, citing *Layne v. Layne*, 83 Ohio App.3d 559, 568, 615 N.E.2d 332, 2nd Dist. (1992). The standard remains the same under R.C. 3105.73 (which superseded R.C. 3105.18(H) in 2005). *See id.* at ¶ 80-81. Decisions vested in the court's discretion will not be disturbed absent an abuse of that discretion. An abuse of discretion is more than an error in judgment or a mistake of law. The term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶88} The trial court noted that appellee's fees and expense request of approximately $220,000 included representation of her mother and step-father. Moreover, the court noted, it was apparent "that most of the fees were incurred relative to [appellee's] attempt to establish ownership by [appellant] in Velocity," which the court determined was an issue to be resolved in the courts of Delaware. The trial court found that an award of attorney fees would not deny appellee the ability to prosecute her legal proceedings, a factor required in R.C. 3105.18(H), but neither required, nor excluded, in R.C. 3105.73. The court concluded that appellee failed to establish she was entitled to reimbursement for her legal expenses and litigation costs and denied her request for an award. On review, we cannot say that this decision was arbitrary, unreasonable or unconscionable. Accordingly, appellee's sixth cross-assignment of error is not well-taken.

{¶89} On consideration, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part. This matter is remanded to said court to correct errors in allocating the distribution of property. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE