

[Cite as *Kennedy v. Kennedy*, 2003-Ohio-495.]

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DARLENE KENNEDY,)	
)	CASE NO. 2002 CO 09
PLAINTIFF-APPELLANT,)	
)	
- VS -)	OPINION
)	
JAMES KENNEDY,)	
)	
DEFENDANT-APPELLEE.)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Columbiana County Common Pleas Court, Domestic Relations Division, Case No. 00DR610.
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JUDGMENT:	Affirmed in Part, Reversed in Part, and Remanded.
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APPEARANCES:	
For Plaintiff-Appellant:	Attorney Peter Horvath 38294 Industrial Park Road P.O. Box 471 Lisbon, OH 44432

For Defendant-Appellee:	Attorney C. Brooke Zellers 585 E. State Street Salem, OH 44460
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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: January 28, 2003

DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court and the brief of Appellant. Appellee did not file a brief in this matter. Plaintiff-Appellant, Darlene Brown, appeals from the decision of the Columbiana County Court of Common Pleas, Domestic Relations Division, which granted a divorce between she and her husband, Defendant-Appellee, James Kennedy. We are asked to determine whether the trial court abused its discretion when dividing the marital property and fashioning the spousal support award. We conclude the trial court did not abuse its discretion when dividing the parties' marital property. However, it failed to properly consider the factors in R.C. 3105.18(C)(1) and, therefore, it abused its discretion when determining whether spousal support was appropriate and reasonable. Thus, we affirm the trial court's division of marital property, but reverse its determination with regard to spousal support, and remand that issue to the trial court.

{¶2} Darlene and James were married on December 11, 1981, and two children were born of that marriage, Jamie, dob 10/18/82, and Jessica, dob 04/30/84. On March 14, 2000, the couple was discharged from bankruptcy. They were experiencing marital difficulties, but stayed together until June 18, 2000. On that date, James had Darlene arrested for domestic violence and resisting arrest. As a result, she was ordered not to return to the marital home. Subsequently, Darlene violated her probation by returning to that home.

{¶3} James worked for General Motors and, from 1997 through 2000, earned approximately \$71,000.00 per year, including over \$92,000.00 in 2000. Darlene worked for Alliance Community Hospital and, from 1997 through 1999, she earned approximately \$6100.00 per year. However, from 1984 through 1995 Darlene earned an average of approximately \$14,800.00 per year, with the greatest amount being \$18,914.87 in 1992. Darlene's reduction in earning capacity is the result of an apparent sleeping disorder as disclosed in her interrogatory responses and testimony. Darlene and James owned a couple of cars that had liens on them and owed a debt on a condo lease. James had a

pension through his employer valued at \$16,208.71. Darlene had a pension through her employer valued at \$3,890.21. Sometime after September 30, 2000, Darlene cashed out her pension and did not share the proceeds with James.

{¶4} On October 6, 2000, Darlene filed a complaint for divorce in the Columbiana County Court of Common Pleas. At the same time, she filed a financial affidavit which did not reveal the existence of her pension and stated her income for the previous three years was between \$3,500 and \$5,000 per year. When she filed her complaint, Darlene was represented by counsel. Subsequently, counsel withdrew his representation. James filed an answer and counterclaim for divorce and the matter proceeded to trial.

{¶5} The trial court heard the matter and, as Darlene agreed to dismiss her complaint, the matter proceeded on James' counterclaim, and evidence was presented regarding marital assets and liabilities, spousal support, and custody matters. The trial court found the parties agreed James should have custody of the one minor child and awarded child support in accordance with the child support guidelines. It then valued the marital assets, divided the personal property in accordance with the parties' wishes, and awarded Darlene half of James' pension minus certain liabilities. Finally, the trial court refused to award spousal support to Darlene for the following reasons:

{¶6} "her willful conduct of hiding marital assets by liquidating and refusing to report her retirement annuity either in her financial affidavit or on her sworn interrogatories, for the under reporting of her income history in her sworn interrogatories, for her reckless spending which led to the parties' bankruptcy and further, so as to minimize any financial contribution on Defendant's part to Plaintiff's drug habit."

{¶7} Subsequently, the trial court denied a motion for a new trial filed by

Darlene's new counsel.

{¶8} We affirm the trial court's division of marital property. It assigned a value to each of the parties' assets and liabilities, determined Darlene cashed her pension in without sharing it with James, deducted the value of James' interest in that pension from her half of the marital property, and awarded the remaining amount. As this determination lies within the sound discretion of the trial court, we cannot say the trial court abused that discretion. The same does not hold true for the trial court's determination with regard to spousal support. It is questionable whether the trial court should rely on the factors it did to deny spousal support. However, it abused its discretion because it failed to consider all the factors listed in R.C. 3105.18(C)(1) when determining whether spousal support was appropriate and reasonable. Accordingly, we reverse the decision of the trial court in part and remand this matter to address the issue of spousal support.

{¶9} Darlene's sole assignment of error argues:

{¶10} "The alimony award as fashioned by the lower court is in contravention of R.C. 3105.18, *Kunkle v. Kunkle* or *Cherry v. Cherry*, and therefore constitutes an abuse of discretion."

{¶11} In her brief, Darlene argues the trial court erred in its division of the marital property and by failing to award her spousal support. Darlene contends this was a marriage of long duration, James has a large-sized pension, and as a result of the trial court's decision she has been left without the means to support herself. Thus, she argues, the trial court's decision should be reversed and this case remanded for further proceedings. James has not filed a responsive brief. Accordingly, we may accept

Darlene's statement of facts and issues as correct and reverse the judgment if such action reasonably appears to be supported by her brief and the record. App.R. 18(C); *State v. Caynor* (2001) 142 Ohio App.3d 424, 755 N.E.2d 984.

{¶12} Darlene's assignment of error contends the trial court's "alimony award" was in error. Although this may lead one to believe she is only challenging the trial court's decision regarding spousal support, this would be incorrect. In her brief, she cites to *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 95, 518 N.E.2d 1197, for the proposition that "alimony consists of two components: a division of marital assets and liabilities, and periodic payments for sustenance and alimony." She then proceeds to challenge both the division of marital property and the failure to award spousal support. Accordingly, we will address each of these issues.

{¶13} A trial court is vested with broad discretion in domestic matters and its decision will not be overturned absent a showing of an abuse of discretion. *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295, 18 OBR 342, 480 N.E.2d 1112. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. This court cannot substitute its judgment for that of the trial court unless, after considering the totality of the circumstances, we determine the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597.

{¶14} A domestic relations court is required, when granting a divorce, to equitably divide and distribute the marital property. R.C. 3105.171(B); *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 75 O.O.2d 474, 350 N.E.2d 413. In determining what is an equitable

division of the marital property, the court must consider “all relevant factors”, including those found in R.C. 3105.171(F). R.C. 3105.171(C)(1). Thus, a trial court which is making a division of marital property must consider the duration of the marriage, the assets and liabilities of the spouses, the desirability of awarding the family home or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage, the liquidity of the property to be distributed, the economic desirability of retaining intact an asset or an interest in an asset, the tax consequences of the property division upon the respective awards to be made to each spouse, the costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property, any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses, and any other factor the court expressly finds to be relevant and equitable. R.C. 3105.171(F).

{¶15} Here, a review of the trial court’s judgment entry reveals it did not abuse its discretion when making its division of the marital property. It assigned a value to each of the parties’ assets and liabilities. It also found Darlene cashed out her pension before the divorce and did not share that money with James. Thus, it subtracted his portion of that pension from her half of the remaining assets. Then the trial court correctly added these figures, which meant it found Darlene was entitled to \$13.97 in the division of marital assets, which it awarded to her. Given these facts, the trial court did not abuse its discretion when making its division of marital property.

{¶16} After a trial court divides the marital property, it must determine whether it will award spousal support. R.C. 3105.18(B). When a trial court determines whether spousal support is appropriate and reasonable, and if so, the amount of that spousal

support, a trial court must look to the fourteen statutory factors listed in R.C. 3105.18(C). *Kaechele* at paragraph one of the syllabus.

{¶17} “(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶18} “(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;

{¶19} “(b) The relative earning abilities of the parties;

{¶20} “(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶21} “(d) The retirement benefits of the parties;

{¶22} “(e) The duration of the marriage;

{¶23} “(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;

{¶24} “(g) The standard of living of the parties established during the marriage;

{¶25} “(h) The relative extent of education of the parties;

{¶26} “(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶27} “(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;

{¶28} “(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 obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

{¶29} “(l) The tax consequences, for each party, of an award of spousal support;

{¶30} “(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶31} “(n) Any other factor that the court expressly finds to be relevant and equitable.” R.C. 3105.18(C)(1).

{¶32} In conducting this determination, the trial court must consider all the statutory factors and not consider any one factor taken in isolation. *Kaechele* at 96. The goal of this exercise is to achieve an equitable result. *Id.*

{¶33} In this case, the trial court denied Darlene spousal support: 1) to minimize James' support of her drug habit; 2) because she failed to disclose her pension and understated her income; and, 3) because of her reckless spending during the marriage. It appears the only specific factor the trial court may have applied in making this determination is R.C. 3105.18(C)(1)(c) as a drug addiction could be part of a person's physical, mental, and emotional condition. See *Richards v. Richards* (Nov. 2, 2001), 2nd Dist. No. 18660. However, the remaining factors the trial court considered when making this decision were not one of those specifically laid out in the statute. Therefore, they must fall under the catchall provision of R.C. 3105.18(C)(1)(n).

{¶34} Some Ohio courts have previously held it is not an abuse of discretion for a

court to refuse to consider allegations of drug abuse when making a spousal support determination. See *Simmons v. Simmons* (Mar. 28, 2002), 8th Dist. No. 80084. However, we have previously concluded a trial court should not determine whether it believes a party deserves spousal support due to their previous actions in the marriage when deciding whether spousal support is reasonable and appropriate. For example, in *Bernard v. Bernard* (Jan. 30, 2002), 7th Dist. No. 00 CO 25, the trial court found the wife was guilty of extreme cruelty and gross neglect of duty during the marriage. Apparently, she committed marital infidelity and continued to cohabit with another man while the divorce was pending. The trial court denied spousal support due to her actions. We found it improper for the trial court to consider these facts when determining the appropriateness and reasonability of spousal support. “Whether an ex-spouse *deserves* spousal support is not a basis for awarding or failing to award spousal support. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 626. (Emphasis added.) The only relevant question is what is appropriate and reasonable under the circumstances. *Id.*” *Id.* at 6. In addition, we note the courts which have allowed evidence of drug abuse during the marriage have found arguments based on this alleged abuse meritless when, as in this case, the evidence indicates both Darlene and James had used marijuana during the marriage. See *Simmons*, *supra*.

{¶35} The trial court also denied spousal support due to Darlene’s failure to report her pension on either her financial affidavit or her sworn interrogatories and the underreporting of her income history on her sworn interrogatories. James never established exactly when Darlene liquidated her pension. The last known date for the existence of that pension is September 30, 2000, because James introduced a copy of a

statement of Darlene's pension account showing the ending balance on that date. The sworn interrogatories, dated July 6, 2001, do not reveal the existence of that pension. Accordingly, Darlene had ample time to liquidate the account before that date, meaning her answers to the interrogatories would not be hiding anything. Darlene's financial affidavit, which she signed and dated July 6, 2000, was filed with her complaint for divorce on October 6, 2000. Thus, at the time she signed the affidavit, she omitted listing the pension. However, at the time the complaint was filed she had the opportunity to liquidate the pension and, thus, it may not have been inaccurate at the time it was filed.

{¶36} With regard to Darlene underreporting her income history, the interrogatories asked Darlene to provide a list of all sources of income since 1994. Unrepresented at the time, in her answer, she listed Alliance and two different employment dates, 1979-1997 and wrote something and obliterated it, and 1997-2000 and wrote "approx. \$5,000 per year". At the hearing Darlene was asked to explain why she only reported \$5,000 worth of income when she had earned more than three times as much in the past. She answered, "From the last three years, that's what I made." Tr. at 24. James' counsel then asked if the interrogatory stated her income from 1979-2000. Darlene answered, "No, I said – yeah, right." Tr. at 24. It appears both from the interrogatories and her testimony that Darlene only intended to report her income for the last three years.

{¶37} As can be seen, there certainly is evidence to support the trial court's conclusion that Darlene hid marital assets and underreported her income history. However, the trial court already took Darlene's underreporting of income into account when it determined Darlene was underemployed and imputed income to her for the

purposes of child support. If the trial court had not imputed that income to her, her child support obligation would be reduced from \$185.50 per month to approximately \$60.43 per month. Additionally, the trial court addressed Darlene's failure to report her pension by factoring James' interest in her pension against her in the division of the marital property. Thus, the trial court had already taken Darlene's misfeasance into account, and by denying spousal support, the trial court penalized her twice. Further, James was not prejudiced by Darlene's actions since he introduced the evidence which contradicted the financial affidavit and interrogatories.

{¶38} The final reason the trial court denied Darlene's request for spousal support was due to her "reckless spending which led to the parties' bankruptcy". Courts have held it is appropriate to consider a party's financial misconduct during the course of the marriage when making a spousal support determination. See, e.g. *Winston v. Winston* (Nov. 16, 2000), 5th Dist. No. 1999CA00313. However, this has been used as a reason to raise or lower support, not deny it entirely. *Id.*

{¶39} Although the above discussion might lead one to conclude it is the better practice not to include these factors when addressing spousal support, this does not mean the trial court abused its discretion when considering these factors. What is unreasonable and, therefore, an abuse of discretion was the trial court's failure to consider *any* of the factors in R.C. 3105.18(C)(1) other than the catchall factor. Some of those factors would weigh in favor of granting spousal support. For instance, this was a twenty-year marriage, Darlene's sleeping disorder had reduced her earning capacity, and James earns significantly more on an annual basis than Darlene ever has. Conversely, some of those factors would weigh against awarding spousal support.

{¶40} We hasten to clarify that we do not give these examples in order to place any more weight on them than any of the other factors in R.C. 3105.18(C)(1) or to indicate what spousal support is appropriate or reasonable in this case. Indeed, we emphasize that this determination rests solely in the discretion of the trial court. *Kaechele*, supra. However, we stress that the trial court must consider all the statutory factors and not consider any one factor taken in isolation. *Kaechele* at 96. We mention these factors merely to demonstrate why the trial court erred when it failed to consider them when it made its spousal support determination.

{¶41} For the foregoing reasons, we conclude Darlene's sole assignment of error is meritorious. Accordingly, the trial court's decision is affirmed in part, reversed in part and this cause is remanded to the trial court to address the issue of spousal support.

Donofrio and Waite, JJ., concur.