[Cite as *Cope v. Guehl*, 2009-Ohio-2891.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SUSAN G. COPE fka GUEHL	)	CASE NO. 07 CO 35
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ROBERT L. GUEHL	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 06 DR 469
JUDGMENT:	Affirmed in part. Reversed in part.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. John B. Juhasz 7330 Market Street Youngstown, Ohio 44512-5610
For Defendant-Appellant:	Atty. Robert L. Guehl 2230 South Patterson Blvd., #11 Dayton, Ohio 45409
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: June 10, 2009

[Cite as *Cope v. Guehl*, 2009-Ohio-2891.]
WAITE, J.

{¶1} Appellant, Robert L. Guehl, appearing pro se, appeals the decree of divorce issued by the Columbiana County Court of Common Pleas on August 17, 2007. Appellant contends that the trial court erred when it inequitably divided marital property, characterized certain assets as separate property belonging solely to Appellee, Susan G. Cope fka Guehl, and awarded her spousal support.

{¶2} At a pre-trial conference conducted on April 27, 2007, counsel explained that the parties had stipulated to the value of the marital property, but they could not reach an agreement on the following issues: (1) Appellee's setoff for the down payment on the marital property; (2) the classification of the office building as separate or marital property; and (3) spousal support. (Tr., pp. 24-27.)

FACTS

{¶3} The parties were married on June 4, 1987 and separated in October 2005, with no children being born as issue of the marriage. The parties entered into a prenuptial agreement dated May 29, 1987 that memorialized Appellant's net worth to be $98,350.00 and Appellee's net worth to be $42,200.00 as of the date of the agreement.

{¶4} Financial statements reflecting the specific assets belonging to each party were attached to the agreement. The parties agreed that "neither party shall have any right, interest or claim in or to the property of the other, either during their marriage, in divorce or dissolution proceedings, or upon the death of the other." (Prenuptial Agreement, p. 1.)

{¶5} Appellee's financial statement reflects assets of $35,000.00 for real estate, with a corresponding $26,500.00 liability reflecting a mortgage on the property. Appellee concedes that the real estate identified in the financial statement was a residence located on Buckeye Circle owned by Appellee prior to the marriage. (Tr., p. 80.)

I. Appellee's down payment on the marital residence

{¶6} Appellee contends that the parties used the proceeds of the sale of the Buckeye Circle property as the down payment on their marital residence. (Tr., pp. 80, 83.) When she was asked what she did with the proceeds of the sale of the Buckeye Circle property, she responded, "I believe that we rolled it into the down payment [on the marital residence]." (Tr., p. 80.) However, all of the evidence adduced at trial related to the purchase of the Buckeye Circle property, instead of the sale.

{¶7} Although Appellee bought the Buckeye Circle property in October 1984, an undated letter with a March 18, 1985 postmark was admitted into evidence at the trial and purportedly memorializes a loan to Appellee from her parents in the amount of $11,000.00, to be used as a down payment on that property. (Tr., pp. 57-58.) The letter reads:

{¶8} "Your mother and I have loaned you $11,000.00 for the down payment of your home at 1446 Buckeye Circle.

{¶9} "The additional money is to be used for other household expenses as you deem necessary and as something to fall back on in the event of a household emergency.

{¶10} "When you are capable, we hope that you will repay the $11,000.00 as we may need it in our later years." (Letter, p. 1.)

{¶11} Appellee was married to Shane Franks at the time, but Appellant testified that he had encouraged Appellee and her parents to document the loan in order that the loan would be traceable. (Tr., p. 58.) However, Appellee's financial statement attached to the prenuptial agreement does not reflect the debt to her parents as a liability.

{¶12} The settlement statement memorializing the purchase of the Buckeye Circle property was admitted at trial. The settlement statement indicates that Appellee, fka Susan Franks, and Shane Franks paid $500.00 in earnest money and $7,787.75 in cash to the seller at closing.

{¶13} At the pre-trial on April 27, 2007, Appellee's counsel characterized the amount of the down payment on the marital residence as the $11,000.00 loaned to her by her parents and "about seven or eight thousand dollars that she received in the closing of a piece of real estate that she had owned previously as a piece of separate property that she put into the marital residence." (Tr., p. 25.) In her proposed findings of fact and conclusions of law, Appellee asserts that she contributed the $11,000.00 plus "an additional $7,787.75." (6/15/07 Proposed Findings of Fact and Conclusions of Law, ¶28.)

{¶14} The only testimony Appellee provided at trial regarding the alleged loan was in response to the question, "[s]o just to make sure I'm clear about this. You're saying that $11,000 loaned to (sic) your father from Buckeye Circle went into the marital residence [ ]." Appellee answered, "I believe so." (Tr., p. 83.)

{¶15} The settlement statement appears to be the basis for the additional $7,787.75 specified in her proposed findings of fact and conclusions of law. However, this $7,787.75 amount and the $500 in earnest money appear to have come out of the alleged $11,000.00 loan her parents made to her to purchase the Buckeye Circle property. More importantly, all of the foregoing evidence establishes the cash payment made to purchase the Buckeye Circle property, not the proceeds from the sale of that property. It is the proceeds of this sale that form the basis for Appellee's separate property claim in regards to the marital property, as she claims her proceeds were used as a down payment on the marital home. No such evidence was offered.

{¶16} Despite the lack of any evidence as to the actual amount of the down payment on the marital residence, the trial court granted a setoff in favor of Appellee in the amount of $18,726.74. The trial court relied on the following findings of fact: "The Plaintiff has presented evidence that her father loaned her $11,000.00 which she used to purchase real estate known as the Buckeye Circle Property, which she purchased in 1984. Additionally at the time of that purchase, Plaintiff provided an additional $7,787.75." (Decree of Divorce, ¶29.) We note that none of the above can

be used to support Appellee's claim to a certain amount of separate property as regards the marital home.

II. The office building on North Lincoln Avenue

{¶17} In addition to the marital residence, the parties purchased an office building that served as Appellant's law office. (Tr., p. 59.) The property on North Lincoln Avenue was purchased in 1991 and renovated in 1995 with a total of $110,000.00 borrowed from Appellee's father. (Tr., pp. 59, 63.) The title to the property was put in Appellee's name, and a mortgage on the property was given to her father, which was ultimately transferred to the Cope Family Trust upon his death. (Tr., p. 59.) When the trust was distributed, Appellee received the mortgage as a part of an equitable distribution of the trust assets between Appellee and her sisters. Appellee subsequently forgave the mortgage.

{¶18} Appellant testified that he paid down the mortgage in addition to paying rent on the North Lincoln property. (Tr., p. 87.) Although he did not produce any documentation memorializing the alleged mortgage payments, he contends that Appellee's 2006 income tax return, which provides a cost basis of $131,184.00 in the property, reflects "contribution to the equity of the building by [Appellant's] law practice, in addition to sixteen years of maintenance, upkeep, and rental payments." (Appellant's Brf., p. 10.)

{¶19} Unfortunately, the court reporter who transcribed Appellant's cross-examination of Appellee at the trial was unable to hear the relevant exchange between the parties on this issue:

{¶20} "Q: It indicates a cost basis on the building of $131,184. And I assume you got that from the accountant, Quaker Tax?

{¶21} "A: Quaker Tax prepared this.

{¶22} "Q: Which indicates that the $21,000.00 (inaudible)); correct?

{¶23} "A: Apparently so." (Tr., p. 89.)

{¶24} Appellant moved to Dayton, Ohio following the separation and abandoned the office building. Although the property was valued at $145,000.00 in 2003, Appellee ultimately accepted $99,000.00 when she sold the building, due to the depressed real estate market. The proceeds of the sale of the North Lincoln property were $92,500.00.

{¶25} The trial court appears to have concluded that the proceeds of the sale of the North Lincoln property were separate property. The trial court wrote, "Plaintiff retained the proceeds of the sale [of the North Lincoln property], but that is because she had transferred to her the mortgage as part of her distributive share of her father's estate from the Cope Family Trust." (Decree of Divorce, ¶15.) This finding appears to be supported in the record.

III. Spousal Support

{¶26} Appellee, who was 59 years old on the date of trial, testified that she is a retired middle school teacher. (Tr., pp. 68, 71-72.) Appellee and Appellant had agreed that Appellee would retire in 2006, but, because of the divorce proceedings, she chose to continue working in order to help her cope with the divorce. (Tr., pp. 71-72.)

{¶27} Appellee testified that she ultimately retired in 2007, after teaching language arts in the Columbiana Exempted School District for 31 years, because her superintendent reassigned her to teach fifth and sixth grade science. (Tr., p. 72.) Appellee explained that the reassignment would require her to attend workshops and college classes, "to get up to speed to be able to teach those things that are totally out of [her] field." (Tr., p. 84.)

{¶28} Appellee calculated her income in 2007 to be approximately $26,000.00, down from $41,000.00 in 2006. (Tr., p. 78.) She stated that her prospects for finding another position are, "[n]ill" because, "with [her] experience and years, you know, no one would hire [her]." (Tr., p. 85.) She indicated that she could work as a substitute teacher in Columbiana, and estimated the pay to be $70.00 a day with no benefits. (Tr., pp. 85-86.) She testified that she did not know of another job that she could get that would pay her as much as she has made teaching. (Tr., p. 86.)

{¶29} Appellant, who was 60 years old on the date of trial, is a practicing attorney with J.D. and L.L.M. degrees. (Tr., pp. 48, 68.) He testified that he was a part-time assistant public defender for seven years, and the Salem Law Director, also a part-time position, for eight years. (Tr., p. 49.) While performing his part-time duties for the state, Appellant also maintained a private law practice in Salem, Ohio. (Tr., p. 50.)

{¶30} After the separation, Appellant closed his Salem, Ohio practice and worked for a law firm in Beaver Creek, Ohio for about four months making an annual

salary of $75,000.00. (Tr., p. 53.) He left the firm to accept a position with the Montgomery County Prosecutor's Office, where he is paid $65,000.00 annually.

{¶31} He explained that he suffered the reduction in salary in order to increase his retirement benefits under the Public Employees' Retirement System, since those benefits would be calculated based upon his highest three years of salary in a government job. (Tr., p. 54.) He also explained that he was working 70 to 80 hours a week at the Beaver Creek law firm, compared to 35 hours a week at the prosecutor's office. With respect to his future earning potential, he testified that he is an at-will employee, but has committed to remain at the prosecutor's office for at least three years. The trial court awarded spousal support to Appellee in the amount of $1,000.00 per month for five years.

{¶32} Appellant challenges the trial court's determination that the down payment on the marital residence and the proceeds from sale of the North Lincoln property were separate property. He also challenges certain specific deductions that he claims should have been made on his behalf based upon the prenuptial agreement and other alleged agreements between the parties. Finally, Appellant contends that the parties have equal earning capacities. Therefore, he believes the trial court abused its discretion in awarding spousal support to Appellee.

{¶33} Because there is no support in the record for the trial court's conclusion that Appellee contributed the proceeds of separate property in the amount of $18,726.74 to the down payment on the marital residence, the trial court's decision granting Appellee a setoff in that amount was against the manifest weight of the

evidence. However, the trial court's conclusion that the office building at issue was separate property belonging solely to Appellee was supported by competent evidence. Finally, the trial court did not abuse its discretion in dividing the remaining marital property or in awarding spousal support. Accordingly, the judgment of the trial court is reversed with respect to the down payment on the marital residence, and affirmed with respect to all other issues.

ANALYSIS

ASSIGNMENT OF ERROR I

{¶34} "THE TRIAL COURT ERRED BY INEQUITABLY DIVIDING THE MARITAL PROPERTY WITHOUT A REASONABLE BASIS TO SUPPORT THE DIVISION."

{¶35} Divisions of property are reviewed under an abuse of discretion standard. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at ¶5. The term "abuse of discretion" implies more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. The trial court's decision is unreasonable if there is no sound reasoning process that would support its decision. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. Rather than independently reviewing the weight of the evidence, we must be guided instead by the presumption that the trial court's findings are correct. *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846.

{¶36} A domestic relations court is required, when granting a divorce, to equitably divide and distribute the marital property between the parties. R.C. 3105.171(B); *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 75 O.O.2d 474, 350 N.E.2d 413. When dividing marital property, the trial court must divide it equally between the parties unless an equal division would be inequitable. R.C. 3105.171(C)(1); see, also, *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293 (A potentially equal division of the marital property is the starting point of the trial court's analysis). In determining the equitable division of the marital property, the court must consider "all relevant factors," including those found in R.C. 3105.171(F). Id.

{¶37} According to R.C. 3105.171(F), a trial court 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 an asset intact or in retaining the interest in an asset, the tax consequences of the property division as regards the respective awards to be made to each spouse, the costs of sale, whether 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.

{¶38} A trial court must indicate the basis for its division of the marital property in sufficient detail to enable a reviewing court to determine whether the

award is fair, equitable, and in accordance with the law. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97, 518 N.E.2d 1197. This means, however, that a trial court is required only to indicate the basis for its decision and need not explain in minute detail its reasoning. *Davis v. Davis* (Dec. 26, 2001), 7th Dist. No. 2000 CO 31, at 5, 2001 WL 1667852.

{¶39} The trial court listed the marital property in the divorce decree and divided it equally between the parties. Appellant contends that the trial court failed to equally divide the marital property in this case, but his argument is based upon his contention that the North Lincoln property and the $18,726.74 that the trial court deducted from the value of the marital residence are marital property. He further argues that the trial court failed to properly setoff amounts specified in the prenuptial agreement, and to properly setoff amounts agreed to by the parties.

{¶40} The trial court must determine whether property is marital or separate. R.C. 3105.171(B). Marital property includes, "[a]ll real and personal property that currently is owned by either or both of the spouses, * * * and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i). Separate property includes all real and personal property that the court determines is, "[a]n inheritance by one spouse by bequest, devise, or descent during the course of the marriage," as well as, "[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." R.C. 3105.171(A)(6)(a)(1)(i) and (vii).

{¶41} "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when separate property is not traceable." R.C. 3105.171(A)(6)(b). "The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace an asset to separate property." *Graham v. Graham*, 8th Dist. No. 90506, 2008-Ohio-4811, ¶18.

{¶42} We review the trial court's classification of property as marital or separate to determine whether the classification is supported by the manifest weight of the evidence. *Woodland v. Woodland*, 7th Dist. No. 06-BE-9, 2007-Ohio-3503, ¶28, *citing James v. James* (1995), 101 Ohio App.3d 668, 684, 656 N.E.2d 399. Therefore, we must uphold the findings of a trial court where the record contains some competent evidence to support those findings. Id., citing *Fletcher v. Fletcher* (1994), 68 Ohio St.3d 464, 468, 628 N.E.2d 1343.

{¶43} Appellant claims that the trial court's decision to grant a setoff to Appellee in the amount of $18,726.74 from the value of the marital residence was against the manifest weight of the evidence. Although Appellee testified that she "believe[s]" the parties used the proceeds of the sale of the Buckeye Circle property as a down payment for the marital residence, the only evidence in the record on this issue relates to the purchase of the Buckeye Circle property, not the proceeds of its sale. With respect to the amount of the down payment, Appellee testified that she "believe[s]" that the parties used the $11,000.00 loaned to her by her parents. She provided no testimony regarding the additional $7,787.75 asserted in her proposed

findings of fact and conclusions of law. As a consequence, there appears to be no evidence on the record to support the trial court's conclusion that Appellee used the proceeds of separate property in the amount of $18,726.74 for the down payment on the marital residence.

{¶44} The North Lincoln property was purchased and renovated during the marriage with $110,000.00 loaned by Appellee's father in exchange for a mortgage on the property. (Tr., p. 67.) The deed and the mortgage were in Appellee's name, and Appellant conceded at trial that the intent behind the financing arrangement was to create, "a secured investment for [Appellee's father] and to return – I don't know what the interest rate was, but a good interest rate with a secure mortgage on the property, plus be able to take money out as a lease to [Appellee.]" (Tr., pp. 61-62.)

{¶45} After her father's death, Appellee received the mortgage as part of an equitable distribution of her father's assets from the family trust. According to Appellant's testimony, Appellee forgave the mortgage, and continued collecting monthly rent from Appellant's law firm. (Tr., p. 59.)

{¶46} To the extent that the mortgage on the North Lincoln property was inherited by Appellee from her father's estate, there is competent evidence on the record to establish that the property was separate property. Appellant basis his marital property argument on his contention that he made mortgage payments on the property. When Appellant was asked whether there was any documentation of the alleged mortgage payments, he responded, "I don't have them with me, no." (Tr., p. 65.) Then Appellant stated, "But I could testify that they were made on a regular

basis to Mr. Cope and the lease payments were made on a regular basis to [Appellee]." (Tr., p. 65.)

{¶47} Apart from Appellant's self-serving statements, there is no evidence that any payments were made or the amount of these alleged payments. Moreover, Appellee specifically denied Appellant's claim that any payments were made on the mortgage. (Tr., p. 77.)

{¶48} Appellant further argues that even assuming that the North Lincoln property was separate property, it became marital property when Appellee forgave the mortgage. However, the mortgage did not become comingled with marital property because the mortgage remained traceable to the real property.

{¶49} Finally, at oral argument, Appellant asserted that he should receive a percentage of the proceeds from the sale of the North Lincoln property based upon the appreciation in value of the real property during the marriage. He relied on the 2003 appraisal to argue that the real property had appreciated in value, and, as a consequence, the proceeds of the sale should be divided to reflect his portion of the appreciated value. Appellant claims:

{¶50} "That is, if the appraised value of $145,000 in 2003 represented a breakdown of $103,000 attributable to [Appellee's] inheritance, $21,000 attributable to [Appellant's] contribution to the equity, and the balance of $24,000 attributable to appreciation in value (a marital asset), should not the reduced sale price reflect the same percentages of value?" (Appellant's Brf., p. 12.)

{¶51} The definition of "marital property" includes, "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both spouses that occurred during the marriage[.]" R.C. 3105.171(A)(3)(a)(iii). "Separate property" includes, "[p]assive income and appreciation acquired from separate property by one spouse during the marriage[.]" R.C. 3105.171(A)(6)(a)(iii). "Passive income" means, "income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." R.C. 3105.171(A)(4). Therefore, if the separate property of one spouse appreciates during the marriage due to the labor, monetary, or in-kind contribution of either spouse, the appreciation should be characterized as marital property. R.C. 3105.171(A)(3)(a)(iii). However, if the appreciation is attributable to a source outside their control, such as inflation or a change in fair market value, it should be characterized as separate property. *Kondik v. Kondik*, 11th Dist. No. 2008-P-0042, 2009-Ohio-2300, ¶54, citing *Parks v. Parks* (Sept. 7, 1993), 12th Dist. No. CA93-03-043, *3.

{¶52} According to the 2003 appraisal, the North Lincoln property appreciated in value during the marriage. However, that appreciation was never realized. In fact, the property was sold for less than the amount originally invested in the acquisition and renovation of the law office. Moreover, Appellant never substantiated his claims that he invested additional labor, money, or in-kind contribution into the property. Therefore, the fact that the property appreciated in value at some point during the

marriage was irrelevant to the trial court's conclusion that the proceeds from the sale of the North Lincoln property were separate property.

{¶53} As a consequence, there is no evidence to establish the source or amount of the down payment on the marital residence, but there is credible evidence to support the trial court's conclusion that the North Lincoln property constituted separate property.

{¶54} Appellant challenges a number of other decisions made by the trial court in dividing the marital assets. First, Appellant contends that the trial court failed to deduct certain amounts set forth in the prenuptial agreement from its calculation of marital assets. Specifically, Appellant argues that he did not receive a setoff for $800.00 reflecting the cash value of his life insurance as per the prenuptial agreement or for $31,000 in investments documented in the agreement.

{¶55} In his post-hearing memorandum, Appellant did not argue that specific assets listed in the prenuptial agreement should be reduced by their pre-marital value for the purposes of calculating marital property. Instead, Appellant advocated deducting the full value of the parties' respective pre-marital net worth amounts from the marital property calculation. The trial court rejected Appellant's method of calculation, choosing instead to provide a setoff for the parties with respect to their retirement accounts, which appears to be the only setoff based upon the prenuptial agreement contemplated by the parties or addressed before the trial court. Moreover, there is no evidence that the investments identified in the financial statement attached to the prenuptial agreement are still in existence. In other words,

it appears that those investments became comingled with marital assets and are no longer traceable.

{¶56} Next, Appellant observes that he was not credited for $5,259.68 in post-separation mortgage payments made on the marital property, $7,982.13 for paying off the second mortgage on the marital property, or $4,416.50 for paying the 2005 income tax. According to Appellant, the parties agreed that he would be credited for the foregoing amounts.

{¶57} In fact, there is no evidence on the record to substantiate the alleged agreements. Appellant does not cite to any stipulation on the record, and the trial testimony does not support the arguments made in his brief. In his post-hearing memorandum, he requested the foregoing setoffs, but did not argue that the setoffs were the subject of any agreement between the parties. (Post-Hearing Brf., p. 11.) Because there is no evidence to establish that such agreements existed between the parties, the trial court did not abuse its discretion in not taking the alleged agreements into account when dividing the marital property.

{¶58} Finally, Appellant contends that the trial court did not consider Appellee's separate property when he divided the marital assets. Although the trial court has jurisdiction over the separate property, R.C. 3105.17 does not require that the trial court consider the parties' separate property when dividing the marital assets.

{¶59} Accordingly, Appellant's first assignment of error as it applies to the trial court's setoff in favor of Appellee for the down payment on the marital property is

sustained. The amount allowed as separate property to Appellee should have been divided equally between the parties. The remainder of Appellant's first assignment of error, as it applies to the North Lincoln property and the division of marital assets, is overruled.

ASSIGNMENT OF ERROR II

{¶60} "THE TRIAL COURT ERRED BY AWARDING SPOUSAL SUPPORT TO APPELLANT [sic] WITHOUT REASONABLE BASIS TO SUPPORT THE AWARD."

{¶61} After a trial court divides the marital property, it must determine whether spousal support should be awarded. R.C. 3105.18(B). The trial court must consider fourteen statutory factors listed in R.C. 3105.18(C)(1) in order to determine whether spousal support is appropriate and reasonable:

{¶62} "(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;

{¶63} "(b) The relative earning abilities of the parties;

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

{¶65} "(d) The retirement benefits of the parties;

{¶66} "(e) The duration of the marriage;

{¶67} “(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;

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

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

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

{¶71} “(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;

{¶72} “(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;

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

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

{¶75} “(n) Any other factor that the court expressly finds to be relevant and equitable.”

{¶76} When reviewing an award of spousal support, an appellate court will not reverse the trial court's award absent an abuse of discretion. *Blakemore*, 5 Ohio St.3d at 219, 450 N.E.2d 1140.

{¶77} Based upon the trial court's observation that Appellant voluntarily accepted a reduction in his salary and returned to public employment in order to increase his retirement benefits, Appellant contends that the spousal support award in this case unfairly implies that he is underemployed. (8/17/07 Divorce Decree, p. 8.) He also objects to the trial court's conclusion that Appellee had been "squeezed into retirement." (8/17/07 Divorce Decree, p. 9.)

{¶78} Appellant relies upon a number of government studies attached to his brief to demonstrate that, because Appellee is fluent in Spanish, it is Appellee who is underemployed. Also attached to his brief is a chart which purports to prove that over the course of their marriage the parties have a comparable earnings history. Because none of the foregoing evidence was presented to the trial court, this Court cannot consider any of this evidence. *State v. Hooks* (2001), 92 Ohio St.3d 83, 748 N.E.2d 528, ("a reviewing court cannot add matter to the record before it that was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.") Finally, Appellant contends that the trial court failed to consider Appellee's separate property in calculating the parties' relative earning capacities.

{¶79} The trial court in the case sub judice considered the appropriate factors in arriving at its decision on spousal support. The trial court based its award on the duration of the marriage, as well as Appellant's acknowledgement that the parties

enjoyed "[a] comfortable standard of living." (Tr., p. 68.) The trial court observed that Appellant has advanced degrees, and, thus, has superior earning ability as compared to Appellee, particularly since Appellee was essentially forced into retirement. Moreover, Appellee testified that it is unlikely that she will find comparable employment based upon her age and her years of service.

{¶80} Appellee testified that her annual income after retirement will be approximately $26,000.00. Appellant's position with the prosecutor's office generates an annual income of $65,000.00. Even if we agreed with Appellant that the trial court's observation rose to the level of an incorrect finding that he was underemployed, there is an obvious and sizable difference in the parties' annual income to support the trial court's award.

{¶81} Based upon the foregoing facts, we cannot conclude that the trial court's spousal support award was unreasonable, arbitrary, or unconscionable. *Blakemore*, supra. Accordingly, Appellant's second assignment of error is overruled.

{¶82} In conclusion, there is credible evidence supporting the trial court's decision that the proceeds of the sale of the North Lincoln property was separate property belonging solely to Appellee. The same is not true of the setoff in the amount of $18,726.74 on the marital property granted in favor of Appellee. The trial court did not abuse its discretion in dividing the remainder of the marital property or awarding spousal support. Accordingly, the trial court's ruling as to Appellee's separate property as regards the marital property is reversed and Appellee is ordered

to pay $9,363.37 to Appellant, to reflect half of the amount of the setoff awarded by the trial court on the marital property.

Donofrio, J., concurs.

DeGenaro, J., concurs.