[Cite as *Jeskey v. Jeskey,* 2015-Ohio-5599.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JOHN J. JESKEY, JR.	)	CASE NO. 14 JE 23
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
AMY M. JESKEY	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Jefferson County, Ohio Case No. 13 DR 173
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Kristopher M. Haught Scarpone & Associates 2021 Sunset Blvd Steubenville, Ohio 43952
For Defendant-Appellant:	Atty. John A. Vavra Atty. Joseph A. Vavra 132 West Main Street P.O. Box 430 St. Clairsville, Ohio 43950
JUDGES:	
Hon. Cheryl L. Waite Hon. Gene Donofrio Hon. Mary DeGenaro	
	Dated: December 28, 2015

[Cite as *Jeskey v. Jeskey,* 2015-Ohio-5599.]
WAITE, J.

{¶1} Appellant Amy M. Jeskey is appealing her divorce decree based on two financial matters that were decided by the trial court in her divorce from Appellee John J. Jeskey, Jr. Appellant believes the trial court erred by charging $22,000 against her portion of the marital assets for a joint account that she emptied prior to the divorce. The trial court concluded that Appellant had drained the account in anticipation of the divorce, thus treating her action as financial misconduct. Appellant also disagrees with her $900 per month spousal support award, and that the award is only to last until she turns age 63. The record indicates that the court considered a variety of factors in awarding spousal support, including Appellee's debts due to the divorce, the parties' earning ability, retirement benefits that would be shared equally, and the liquid assets that Appellant obtained as a result of the divorce (including the $22,000 she earlier withdrew from an account). Based on the court's calculations, the spousal support award resulted in the disposable income of the parties being divided nearly equally. Thus, this record supports the spousal support award. Neither assignment of error has merit, and the judgment of the trial court is affirmed.

Case Background

{¶2} The parties were married on July 10, 1982. They had three children, none of whom were minors at the time of the divorce. The parties separated on August 4, 2012. Appellant filed for divorce in Jefferson County, but later dismissed the complaint. The parties continued to live separate and apart, and on June 7, 2013, Appellee filed his own divorce complaint in the Jefferson County Court of

Common Pleas. The case went to final hearing on April 4, 2014. Both parties were represented by counsel and testified at the hearing.

{¶3} The parties were 54 years old at the time of the hearing. They agreed that Appellee would receive the marital home (worth $80,000) and that he would obtain a new mortgage and pay $40,000 to Appellant for one-half the value of the property. At the time of the hearing, Appellant was living with her father, while Appellee continued to live in the marital home.

{¶4} Appellee had a 401(k) plan and an IRA, ordered to be divided equally between the parties. The parties had over $28,000 in marital debt from credit cards and from an automobile loan. Appellee testified that he earned $28.43 per hour, with a monthly net take-home amount of $4,500. (Tr., p. 9.) Appellant was not employed outside of the home for a number of years during the marriage while she raised the children, but later worked at a garden center earning minimum wage for twenty to thirty hours per week. (Tr., p. 17.) However, she had been unemployed since at least 2011. She has a high school education and no specific job skills. She testified that she had worked in retail stores prior to the birth of the children. (Tr., p. 50.)

{¶5} Appellant testified that she has a variety of health problems including knee issues, osteoarthritis, fibromyalgia, diabetes, ventricular tachycardia, and asthma. (Tr., pp. 50, 52-53.) Appellant did not state whether or how any of these health issues might prevent her from being employed. She testified that one of her doctors concluded that she was not cleared to go back to work, and a doctor's note written on a prescription pad was admitted into evidence to support her contention.

(Tr., p. 62; Defendant's Exh. B.) She had not applied for any type of disability coverage. She also testified that she had $130 per month in prescription expenses, but that these expenses would go up to $1,600 when she was no longer covered by Appellee's insurance after the divorce.

{¶6} Considerable testimony was elicited regarding $22,000 that Appellant had withdrawn from a joint savings account before the parties separated. Appellant was in charge of the family finances and had access to the joint account, but it was Appellee's understanding that the account was "not to be touched." (Tr., p. 31.) The money in the account came from an insurance award arising from a personal injury lawsuit. (Tr., p. 19.) At the time of the separation, Appellee discovered that the money had all been withdrawn. The money was not withdrawn in a lump sum, but gradually over the course of a year. (Tr., p. 31.) Appellant testified that the money was spent on household bills, home heating oil, and real estate taxes, and that it was transferred gradually from savings to their checking account. (Tr., p. 46.) She testified that she did not take the money for personal use, and that she never discussed the withdrawals with Appellee. (Tr., pp. 46-47.)

{¶7} Appellant asked for $2,000 per month in spousal support. She testified that the $750 per month she received in temporary support was not enough to cover her basic needs.

{¶8} The court filed its final order of divorce on May 15, 2014. The court divided the marital assets almost equally, giving Appellant slightly more assets than Appellee. All the marital debt was assigned to Appellee because Appellant did not

have any income to make payments. Appellee was also required to pay Appellant $40,000 as her share of the marital home as soon as he could obtain a mortgage. The court awarded Appellant $900 per month in spousal support until her 63rd birthday. This timely appeal followed.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT AMY EMPTIED AND RETAINED FOR HERSELF THE SUM OF $22,000.00 FROM A JOINT ACCOUNT IN CONTEMPLATION OF A DIVORCE, AS THAT FINDING IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. CONCLUSION TO CHARGE THAT SUM TO HER IS AN ABUSE OF DISCRETION.

{¶9} This assignment of error deals with the division of marital property, particularly a $22,000 setoff of Appellant's share of the marital property. This amount corresponds to the amount that was in a special savings account that the parties had maintained during the marriage and that was drained in the year before the parties separated. Although the money was not in the account at the time of the divorce, the court concluded that Appellant had drained the account in anticipation of divorce. While the court did not specifically use the phrase "financial misconduct," it is clear from the court's judgment entry that the $22,000 was attributed to Appellant due to her misconduct in emptying the account in the twelve months prior to the parties' separation. On appeal, Appellant argues that there is insufficient evidence to support such a finding.

{¶10} An appellate court reviews the trial court's division of marital property only for an abuse of discretion. *Cherry v. Cherry*, 66 Ohio St.2d 348, 355, 421 N.E.2d 1293 (1981). An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} It is well-established that the trial court should divide marital property equally, unless it determines that an equal division would be inequitable. See R.C. 3105.171(C)(1). If the division of marital assets is not equal, the trial court should explain in sufficient detail why an unequal division is equitable. *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 518 N.E.2d 1197 (1988), paragraph two of the syllabus. In this case, the assets were divided almost equally, with Appellant receiving slightly more assets, but also includes $22,000 attributed to her from the drained account.

{¶12} R.C. 3105.171 contains many factors and circumstances that the court must consider when dividing marital property. One of those considerations is whether a party committed financial misconduct prior to the divorce being granted. R.C. 3105.171(E)(4) states:

> (4) 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.

{¶13} An appellate court will not disturb a trial court's rulings regarding financial misconduct, in the context of the division of marital property, absent an abuse of discretion. *Rainer v. Rainer*, 7th Dist. No. 11 NO 383, 2012-Ohio-6268, ¶11; *Carpenter v. Carpenter*, 7th Dist. No. 06-NO-331, 2007-Ohio-1238, ¶14; *Berish v. Berish*, 69 Ohio St.2d 318, 319, 432 N.E.2d 183 (1982).

{¶14} The time frame of the dissipation of the assets can create an inference of wrongful scienter. *Rinehart v. Rinehart*, 4th Dist. No. 96 CA 10, 1998 WL 282622, at *12. If a party liquidates accounts just prior to separation, this can be treated as financial misconduct. *Babka v. Babka*, 83 Ohio App.3d 428, 436, 615 N.E.2d 247 (9th Dist.1992).

{¶15} In this case, the record shows that the parties had a joint account with $22,000 in it in the year before they separated. Although Appellant contends that this amount is not firmly established in the record, both parties testified that $22,000 was the correct amount. (Tr., pp. 19, 46.) The money came from the proceeds of a personal injury case. Appellee testified that, even though he did not take care of the family finances, it was their understanding that the account with the $22,000 was not to be touched when paying their bills.

{¶16} Appellant acknowledged that she withdrew all the money from the savings account during the year leading up to the separation. Although Appellant testified that she spent the money on household bills rather than on personal items, the trial court was not required to believe this testimony, nor was it crucial to the court’s decision. *Sims v. Dibler*, 172 Ohio App.3d 486, 2007-Ohio-3035, 875 N.E.2d

965, ¶44 (the trier of fact is free to believe of disbelieve any testimony, even the testimony of an expert witness). The essence of financial misconduct in R.C. 3107.171(E)(4) is that the spouse dissipated funds for personal benefit or to deprive the other spouse of marital assets. *Wideman v. Wideman*, 6th Dist. No. WD-02-030, 2003-Ohio-1858, ¶34. The fact that the funds were in a savings account, that the account was not supposed to be used except by joint agreement of the parties, and that Appellant withdrew the funds in the months leading up to the divorce and did not consult with Appellee about it, is enough to show an intent to defeat Appellee's share of marital assets.

{¶17} The record supports the trial court's division of marital property, including the decision to attribute $22,000 from a drained savings account to Appellant's share of marital property. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT JOHN SHOULD PAY AMY SPOUSAL SUPPORT OF ONLY $900.00 PER MONTH AND ONLY UNTIL HER 63RD BIRTHDAY AS ITS FINDINGS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND ITS CONCLUSIONS ARE AN ABUSE OF DISCRETION.

{¶18} Appellant contends that the court's award of $900 per month in spousal support was an abuse of discretion. She claims that she cannot support herself and

has not worked since 2008 and that she has multiple medical problems that prevent her from working. She contends that she does not have the $22,000 from a savings account that she emptied in the months prior to the parties' separation. She also argues that the trial court erred as to Appellee's income claiming that Appellee's income was $82,000, but that the court mistakenly used the amount of $4,500 per month as income, which only amounts to $54,000 annually. Appellant urges that Appellee did not present evidence of his expenses, and that the court had no basis for concluding that Appellee's net disposable income would be $3,500. Based on these reasons, Appellant concludes that her request for $2,000 per month in spousal support should have been granted.

{¶19} R.C. 3105.18 governs spousal support in a divorce. Although the trial court is required to consider the factors listed in R.C. 3105.18(C) in determining spousal support, the list of factors is not exclusive or exhaustive, and the trial court retains broad discretion in determining spousal support. *Kaechele, supra*, at paragraph one of the syllabus (dealing with a prior version of the statute).

{¶20} R.C. 3105.18(C) states:

> (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:

(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 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.

{¶21} The trial court specifically mentioned a number of statutory factors in making its determination. The court noted that Appellant would be receiving half of Appellee's retirement benefits. The court concluded that Appellant had the ability to work full-time at minimum wage based on her prior work record, discounting her testimony regarding her difficulties finding work and her health issues. The court noted that "[n]one of those difficulties are apparent in watching Wife walk, talk and move about." (5/15/14 Divorce Decree, p. 2.) The record reflects that Appellant had worked outside the home at various times during the marriage, but it was sporadic.

{¶22} Appellant is correct that the record contains a note from Dr. Michael Blatt written on a prescription pad page and dated "6/21/13," tersely stating that Appellant could not work due to ventricular tachycardia. (4/4/14 Tr., Def. Exh. B.) There is no further information or explanation given regarding this note, the duration of the condition, how the doctor reached his conclusion, or why the condition prevented her from working. Appellant testified about her medical issues and stated that three doctors did not approve of her seeking employment, but the record contains only this simple note from Dr. Blatt. Appellant failed in her testimony to connect her medical conditions to her alleged inability to work. Further, Appellant's evidence was rebutted. The record contains Appellee's testimony that Appellant worked 20 to 30 hours per week outside the home throughout the marriage. She left her last job in 2011 because she was disgusted with it and "maybe wasn't feeling good." (Tr., pp. 17-18.) The trial judge also observed her actions and behavior in the courtroom, which he was certainly entitled to do as the trier of fact. "[T]he trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶23} A court may impute income to a party in a divorce even if that party is not currently working, and this determination is reviewed only for abuse of discretion. *Ramsey v. Ramsey*, 7th Dist. No. 13 JE 17, 2014-Ohio-1227, ¶39. Although there is not a tremendous amount of evidence about Appellant's work or medical history in

the record, there is enough for the trial court to conclude that Appellant was able to obtain minimum wage employment, and that this should be imputed to her in the spousal support calculation. The parties' children are no longer minors and she has no other apparent responsibilities to prevent her from working some sort of position outside the home. The record also indicates that Appellant has not applied for or received any type of disability benefit.

{¶24} Regarding Appellant's contentions as to Appellee's monthly take home pay, she testified at trial that it was "roughly 4,450 a month[.]" (Tr., p. 62.) She cannot take a contrary position on appeal. While she contends that the trial court ignored her list of expenses, there is no indication that the court ignored this list, and without some of the evidence from the record supporting Appellant's claim, we will presume the regularity of the proceedings in the trial court. We note that her list of expenses contained some clearly erroneous information. For example, it shows $562.23 per month for health insurance, but also $1,621.86 per month for prescriptions, even though she testified that the prescription amount was her estimate assuming that she would be uninsured. She also lists $65.42 for homeowner's insurance even though she does not own a home and is living with her father. In the same vein, she lists $96.18 for real estate taxes, but Appellee received and resided in the marital home.

{¶25} It is not entirely clear from the record how the court arrived at its estimate of $1,000 per month in debt service on the part of Appellee due to a number of credit cards and the mortgage. Although there are no figures in the record to

correlate to this estimate, there is certainly evidence that Appellee will have a substantial amount of debt following the divorce. Appellee is responsible for the debt on all the family credit cards, his car loan, and for a $40,000 mortgage that he was ordered to enter as part of the divorce. This amounts to $68,406 in debt that is his responsibility. The monthly payment to be made on this debt is largely up to Appellee, and would depend on how quickly he decides to pay off the debt. Because the court could certainly have concluded that Appellee will have a substantial monthly debt payment, it may be, at most, harmless error for the court to fix the debt service amount at $1,000.

{¶26} Appellant continues to dispute the trial court's determination regarding the $22,000 bank account, but as already explained, the court did not abuse its discretion in attributing that money to Appellant. Additionally, Appellant will receive $40,000 from Appellee once he obtains a new mortgage on the marital home. Although the court is not permitted to treat the division of marital assets as part of spousal support, it may consider the parties' assets and debts in determining spousal support. R.C. 3105.18(A), (C)(1)(i). Finally, the court retained jurisdiction to modify spousal support. If Appellant's medical condition worsens or she becomes disabled, she may petition the court for a change in spousal support.

{¶27} For all the aforementioned reasons, this second assignment of error is overruled.

Conclusion

{¶28} Appellant presents two issues on appeal. She challenges both the division of marital assets and the award of spousal support. She believes that the court should not have attributed a $22,000 savings account to her when dividing marital assets. The record reflects that the account was not supposed to be spent except by agreement of the parties, that Appellant controlled the finances, and that she drained the bank account in the months leading up the parties' separation. Based on Appellant's financial misconduct in emptying the account, the trial court had the authority to attribute the funds that had been in the account to Appellant. Appellant further contends that she should have been awarded more than $900 in spousal support, but the record confirms that Appellee's income will be reduced due to the divorce and that Appellant appears able to work at a minimum wage job, thus decreasing the amount needed for spousal support. The evidence used in an attempt to prove that Appellant was medically unable to work was inadequate and minimal, and was partially rebutted. It was up to the trial court to weigh that evidence in coming to a decision. There is no abuse of discretion in either aspect of the divorce decree, and the judgment of the trial court is affirmed.

Donofrio, P.J., concurs.

DeGenaro, J., concurs in judgment only in part; see concurring in judgment only in part opinion.

DeGenaro, J., concurring in judgment only in part.

{¶29} While I join the majority's analysis regarding spousal support, I disagree with the analysis regarding the $22,000.00 Appellant withdrew from a separate savings account. The record demonstrates that the source of the funds was a settlement of Appellee's personal injury claim, and further that those funds were segregated into that special account. As a result, the funds were still traceable to Appellee as his separate property. Thus, the trial court correctly credited $22,000.00 against Appellant for her dissipation of this asset.

{¶30} The trial court, which had the benefit of observing the parties testify, found, based upon Appellee's testimony, that he had a savings account designated for these funds "derived from a personal injury settlement received by him." Appellant did not deny or otherwise rebut this testimony; rather she admitted taking the funds. The trial court did not believe Appellant's testimony that she used those funds for marital bills, further finding that her "draining of that account was Divorce preparation and not for household expenses." The facts as set forth by the majority in ¶6 above support the trial court's findings and also demonstrate there was no agreement between the parties regarding the use of those funds, making the majority's conclusion otherwise puzzling.

{¶31} Separate property is retained by the spouse who originally owned it as long as the property can be traced to that spouse; "commingling of separate property with other property of any type does not destroy" its identity as separate property. R.C. 3105.171(A)(6)(b). "Compensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets" is deemed separate property. R.C. 3105.171(A)(6)(vi).

{¶32} The record demonstrates that the $22,000.00 was Appellee's separate property, and at the time of the divorce it remained traceable to Appellee, thereby remaining his separate property. Appellee testified that the source of the funds were a personal injury settlement he received for an injury he sustained and that it was put in a separate savings account. The funds were not commingled, but if they had

been, based upon the record, they are still traceable back to Appellee. Appellant did not present any evidence or testify to the contrary, nor did she testify that the amount included lost marital earnings or reimbursement for expenses paid from marital assets. The record also supports the trial court's finding that Appellant dissipated that asset in anticipation of the parties' divorce. The trial court properly credited the amount against Appellant in the division of marital property.

{¶33} The trial court did not expressly characterize Appellant's behavior as financial misconduct, as noted by the majority in ¶9 above. Admittedly, the trial court did not expressly state that the disputed funds were Appellee's separate property either. Regardless of how the trial court characterized this particular asset, I cannot join the majority's conclusion that it was a marital asset. "[A] reviewing court may affirm the trial court's judgment for reasons that are different from those used by the trial court." *DeLost v. Ohio Edison,* 7th Dist. No. 10 MA 162, 2012-Ohio-4561, ¶15. Thus, I would affirm the trial court's decision because Appellant dissipated Appellee's separate property.