

[Cite as *Taub v. Taub*, 2009-Ohio-2762.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Jonathan D. Taub,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 08AP-750
v.	:	(C.P.C. No. 06DR08-3226)
	:	
Kelly N. Taub,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

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D E C I S I O N

Rendered on June 11, 2009

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*Gregg R. Lewis and Eric E. Willison*, for appellant.

*The Anelli Law Firm, LLC, and Dianna M. Anelli*, for appellee.

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APPEAL from the Franklin County Court of Common Pleas,  
Division of Domestic Relations.

FRENCH, P.J.

{¶1} This appeal challenges a divorce decree that determined separate and marital property of the parties, made a distributive award, awarded attorney fees, and awarded spousal and child support. We conclude that the trial court did not err, and we affirm the trial court's judgment.

{¶2} Plaintiff-appellant, Jonathan D. Taub, filed a complaint for divorce from defendant-appellee, Kelly N. Taub, on August 4, 2006, in the Franklin County Court of Common Pleas, Division of Domestic Relations. That same day, Jonathan also moved for a restraining order against Kelly, asking the court to restrain Kelly from harassing him, removing any assets or valuables, incurring any debt or removing their three minor children from the court's jurisdiction. A magistrate issued a temporary restraining order immediately.

{¶3} On September 18, 2006, Jonathan moved for (1) psychological evaluations of the parties, (2) the appointment of a guardian ad litem to represent the interests of the Taub children, (3) an in-chambers interview of the children to determine their wishes regarding allocation of parenting rights and responsibilities, and (4) an order finding Kelly in contempt of the restraining order.

{¶4} Kelly filed an answer and a counterclaim for divorce, which contained a jury demand. She filed memoranda contra Jonathan's motions for contempt, psychological testing, the appointment of a guardian ad litem, and an in-chambers interview of the children. Kelly also moved for (1) temporary spousal and child support, (2) a temporary restraining order against Jonathan, and (3) the appointment of an investigator to determine the earning ability and financial worth of the parties.

{¶5} On October 6, 2006, the trial court issued a restraining order (the October 2006 Order") against Jonathan. Important for our purposes, the order restrained Jonathan "[f]rom either causing or permitting others to diminish, destroy, damage, or reduce the value of marital or separate property or assets of the parties \* \* \*, including

but not limited to \* \* \* certain inter vivos, spendthrift of [sic] other trust(s) from which [Jonathan] may, has been or may be drawing income; bank accounts, trusts, or other accounts belonging to the parties." The October 2006 Order also restrained Jonathan "[f]rom in any way causing or permitting others to cause withdrawal, spending, encumbering or disposal of any funds deposited in any bank account, savings account, credit union, stocks, bonds, or certificates of deposit belonging to the parties or the parties' minor children or trust accounts in which the parties or either of them or the parties' minor children are named as beneficiaries[ ] excluding checking accounts."

{¶6} On October 20, 2006, Jonathan moved to strike the jury demand from Kelly's counterclaim for divorce. He also asked the court for attorney fees and costs associated with his filing the motion.

{¶7} On November 28, 2006, a magistrate issued temporary orders. The magistrate's orders designated Jonathan as the residential parent and legal custodian of the three children and granted Kelly parenting time according to the local rule. The orders required Kelly to pay child support in the amount of \$231.64 per month.

{¶8} Kelly moved for reconsideration of the temporary orders. Kelly asked that she be designated the residential parent and that Jonathan be ordered to vacate the marital home. Kelly disputed the information submitted by Jonathan concerning his income and argued that these figures did not include gifts from Jonathan's father, Andrew Taub, or income from a trust fund. Kelly also disputed the income attributed to her by Jonathan, and she asked for an award of spousal support.

{¶9} Following a hearing on April 16, 2007, the trial court issued an order in which it found that the magistrate erred in awarding child support to Jonathan. The court found that Jonathan receives \$50,000 in income, which includes \$14,000 in passive income and \$36,000 in gift income per year. The court vacated the child support requirement.

{¶10} On April 20, 2007, the court, pursuant to a motion by Kelly, added Jonathan's parents, Andrew and Sondra Taub, and the Taub Trust, as party-plaintiffs. The court thereafter issued a restraining order, which prohibited Andrew and Sondra from selling or otherwise affecting the parties' assets.

{¶11} On September 13, 2007, Kelly moved for an order finding Jonathan in contempt of the October 2006 Order. An affidavit from Kelly's attorney stated that Jonathan had sold stocks, in violation of that order, and asked the court for reimbursement to Kelly in the amount of half the stocks' value, or \$43,716.50.

{¶12} Trial was held on April 3, 2008. Following the filing of closing arguments and proposed findings of fact and conclusions of law, the court issued its judgment entry and divorce decree on August 15, 2008. We discuss the details of the decree below, as necessary to resolve the issues before us.

{¶13} Jonathan filed a timely appeal, and he raises the following assignments of error:

- I. The Trial Court erred when it considered funds from a family trust and premarital stock account to be marital instead of separate property.

II. The Trial Court erred when it awarded \$30,000.00 in [Jonathan's] separate property to [Kelly] as part of a property distribution award.

III. The Trial Court erred when it awarded attorneys fees in the amount of \$30,000.00 to [Kelly's] attorney.

IV. The Trial Court erred when it awarded spousal support to [Kelly] in the amount of \$500.00 per month for the next five years.

V. The Trial Court erred when it awarded child support to [Kelly] when she has the children for only Local Rule 27 visitation and when such visitation takes place only at [Jonathan's] home.

VI. The Trial Court erred when it arbitrarily and capriciously made factual and legal findings.

{¶14} In his first assignment of error, Jonathan challenges the trial court's conclusion that funds from a family trust, the Taub Family Trust, and certain stocks were marital property. To resolve this issue, we begin with R.C. 3105.171(A)(3), which defines "marital property," in pertinent part, as property that is owned by either or both of the spouses and that was acquired by either or both of them during the marriage. Marital property does not include "separate property," which means (1) property that the court finds was acquired by one spouse prior to the marriage, and (2) any gift "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)(ii), (vi).

{¶15} The characterization of property as marital or separate is a factual inquiry for the trial court, and we review that characterization under a manifest weight of the evidence standard. *Pearson v. Pearson* (May 20, 1997), 10th Dist. No. 96APF08-1100.

We must affirm the trial court's factual findings unless no competent, credible evidence supports them. *Id.*, citing *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74.

{¶16} Here, the trial court found that Jonathan received annual distributions from a trust controlled by Andrew, the Taub Family Trust, as reflected in Jonathan and Kelly's joint tax returns. The court could not, however, determine Jonathan's interest in any other accounts from which Jonathan received payments. Based on these factual findings, the court concluded that Jonathan's interest in the "pre marital trusts that were identified at the trial by any party" was separate property.

{¶17} While Jonathan does not take issue with the trial court's finding that his interest in the Taub Family Trust was his separate property, he argues that the court erred in finding that he held a one-third interest in that trust and that other trust funds existed. We conclude, however, that the trial court ultimately determined that Jonathan's interest in the Taub Family Trust—whatever that interest may be—was his separate property. And, despite the fact that Jonathan received gifts from multiple accounts—whether from separate trust accounts or not—the court concluded that it could not identify these accounts and, therefore, made no findings with respect to them. Jonathan's assertions about the details of these findings are irrelevant to a determination of marital versus separate property.

{¶18} Jonathan's primary concern regarding the Taub Family Trust is that the court used Jonathan's receipt of trust funds as part of its calculation of Jonathan's child support obligation. We will address this concern when we address Jonathan's fifth assignment of error.

{¶19} Next, Jonathan challenges the trial court's findings and conclusions concerning certain stock holdings. Jonathan and Andrew testified that Jonathan was injured at a Holiday Inn when he was a child and, as a result, received a legal settlement in the amount of \$15,000 to \$20,000, which Andrew used to purchase stocks on Jonathan's behalf. Throughout Jonathan's childhood, Andrew added to these investments monetary gifts given to Jonathan for his bar mitzvah, birthdays or holidays. Although the stocks were in Jonathan's name, the stock certificates show that Jonathan made the purchases, and any income they generated was taxable to Jonathan, Andrew testified that he had total control over the investments. Any correspondence concerning the investments was sent to Jonathan at Andrew's address. Andrew testified that stock dividends were deposited into an account held jointly by Jonathan and Sondra, and Sondra or Andrew issued a check every month to Jonathan from this joint account. The purpose of these monthly checks, according to Andrew, was to help Jonathan with his living expenses and to support his family.

{¶20} Both Jonathan and Andrew testified that Jonathan never gave Andrew any money to purchase stocks for him, primarily because Jonathan would not have had the money to do so. Instead, Andrew only purchased additional stocks with income generated by stocks already owned by Jonathan. In Andrew's words: "Every share of stock that [Jonathan] owns was bought with money that he acquired before he got married." (Vol. I Tr. 35.)

{¶21} Jonathan testified that he was not "fully aware of" this stock account and that Andrew "took care of" it. (Vol. II Tr. 223.) He said that he had never instructed

anyone to buy or sell stock on his behalf. He admitted, however, that when Andrew told him how much the divorce case was costing—because Andrew and Sondra were paying Jonathan's legal fees—Jonathan told Andrew that "he could do whatever he wanted as far as the stocks that I was aware that we had." (Vol. II Tr. 242.)

{¶22} Jonathan and Kelly's 2007 tax return shows that Jonathan sold stock in February and March 2007, and that the total sales price was \$85,459. Andrew testified that the proceeds from these sales were sent to Andrew. Andrew signed Jonathan's name on the checks, which were deposited into Jonathan and Sondra's joint account. Andrew testified that he and Sondra used the money from this account to pay Jonathan's legal fees. The testimony about these legal fees showed that they totaled about \$40,000. When asked what happened to the remaining \$45,000, Andrew said that it went to him and Sondra.

{¶23} Testimony also focused on Jonathan's application for public assistance in 2007, just after the stock sale generating more than \$85,000. The court asked Jonathan directly about this application, on which Jonathan claimed to have no assets of any kind. The following dialogue occurred:

THE COURT: And yet you had \$85,459 from the sale of these stocks as of no later than March 1. And, yet, you signed that document with the Welfare Department saying that you had no annuities, no assets of any kind. I don't understand how you can justify that.

[JONATHAN]: I mean, my dad controlled those monies, and my understanding was it was either marked for taking care of the children, at one point, or for their future.

THE COURT: So all of the money that you were receiving from your parents not from the trust but from your parents was for your children?

[JONATHAN]: Yes.

THE COURT: Okay. What happened to the \$85,459?

[JONATHAN]: I'm not sure.

THE COURT: Well, I thought you testified earlier that you paid your dad back for money he gave you.

[JONATHAN]: That's when he told me that the costs of everything were getting high. I said, "Well, if you want to do anything with the monies." He asked me if he could take the moneys from my assets.

(Vol. II Tr. 332-33.)

{¶24} The trial court found that Andrew's testimony lacked credibility, in part because Andrew was with Jonathan when he applied for public assistance just after the stock sale and with knowledge that he and Sondra provided Jonathan with monthly income. Accordingly, the court looked to the documentary evidence to determine whether Jonathan's stock holdings were separate or marital property. This documentary evidence, the court found, did not prove that any stocks purchased during the marriage were purchased with proceeds from stocks held prior to the marriage. Instead, it consisted only of letters from a stockbroker, stock certificates, and transaction records, none of which proved a direct relationship between stock purchases and sales. The court also found that the testimony of the parties showed that any stock purchases made by Andrew and Sondra on Jonathan's behalf were not gifts for Jonathan's

exclusive use. Therefore, with the exception of a stock purchase in May 1996, the court concluded that proceeds from all other sales during the marriage were marital property.

{¶25} The court noted that the 2007 sales occurred after the filing of the October 2006 Order, which prohibited Jonathan from selling assets or allowing anyone else to withdraw or dispose of any stocks belonging to him. The court found that Jonathan and Andrew "conceived a plan to liquidate the stock holdings in an attempt to avoid the potential distribution as an asset of this marital estate." Accordingly, the court found that Jonathan, in collaboration with Andrew, had committed financial misconduct.

{¶26} On appeal, Jonathan argues that the trial court erred in reasoning that a stock purchase must be tied directly to a prior stock sale in order to establish the proceeds as separate property. Instead, Jonathan argues, proceeds from a sale may go into a holding fund and then be used at a much later time to make a purchase, thus preserving the proceeds as separate property. We agree that this type of evidence could have been offered, and might have proven that all proceeds were Jonathan's separate property, but Jonathan offered no such evidence.

{¶27} Before this court, Jonathan argues that it would have been impossible for Jonathan to use marital funds to buy stock because he and Kelly simply would have not had the money to do so. He offers, then, that stock purchases made throughout the marriage could only have been made with (1) pre-marital stock proceeds or (2) gifts from Andrew and Sondra. As for the latter source, Jonathan argues that any gifts given by Andrew and Sondra were given solely to Jonathan. While we agree that no evidence supports the notion that Jonathan and Kelly could have provided funds for stock

purchases during their marriage, we do not agree that gifts given by Andrew and Sondra—whether by way of monthly checks or stock purchases—were for Jonathan's use alone. Andrew said that the monthly checks were to assist with Jonathan's living expenses and to support his family. Jonathan said that he used money received from his parents to pay the family's bills, and Kelly supported this testimony. No one testified about whether Andrew and Sondra intended stock purchases as a gift exclusively to Jonathan because Andrew and Jonathan denied that any money other than proceeds from Jonathan's pre-marital stock holdings was ever used to purchase additional stocks for Jonathan. Contrary to Jonathan's arguments, given the testimony concerning Andrew and Sondra's substantial gift-giving to Jonathan, it is not "absurd" or "sophistry" to conclude that Andrew and Sondra could have paid for some or all of the stock purchases and that their intent was not to give the proceeds solely to Jonathan.

{¶28} More importantly, it was Jonathan's burden to prove, by a preponderance of the evidence, that all of the stock holdings and proceeds were his separate property. *Neighbarger v. Neighbarger*, 10th Dist. No. 05AP-651, 2006-Ohio-796, ¶25. While the trial court spoke in terms of a "presumption" existing, the court may have been referring to R.C. 3105.171(A)(3)(a), which includes within the definition of "marital property" all property that is currently owned by one of the spouses and that was acquired by either of the spouses during the marriage. The undisputed evidence was that, regardless of whether Jonathan directed Andrew to purchase stock for him, Jonathan was the lawful owner of the stock until its sale in 2007, as reflected in his 2007 tax return, and he acquired that stock during the marriage. Thus, unless Jonathan could prove otherwise,

the stocks (or the proceeds from their sale) were marital property. The court's conclusion that Jonathan did not meet this burden, and that the stocks (or proceeds) were marital property, is supported by competent, credible evidence—namely, the stock certificates, which identify Jonathan as the owner and purchaser of the stocks, and the 2007 tax return, which shows that any income from their sale was taxable to Jonathan. While more careful recordkeeping and different evidence might have led the court to a different outcome, competent, credible evidence exists to support the court's conclusion that the majority of the stock holdings were marital property. Therefore, we overrule Jonathan's first assignment of error.

{¶29} In his second assignment of error, Jonathan argues that the trial court erred when it made its property distribution award. We disagree.

{¶30} As an initial matter, we need to clarify the nature of the court's awards. As we discussed previously, the court concluded that, with the exception of one stock sale in May 1996, Jonathan's stock holdings were marital property, a conclusion we have determined to be proper. Therefore, pursuant to R.C. 3105.171, the court had to divide that property equitably. As a general rule, subject to an important exception we discuss below, "the division of marital property shall be equal." R.C. 3105.171(C)(1). Here, the court determined the current value of the marital stock holdings to be \$73,491. The court did not divide those assets equally. Instead, the court gave Kelly less than half the value, \$32,250, a division that favored Jonathan. Considering this award as a division of marital property, we cannot conclude that the trial court erred to Jonathan's prejudice.

{¶31} Nevertheless, the court stated that the award of \$32,250 was a "distributive award," which is subject to R.C. 3105.171(E). R.C. 3105.171(E)(3) states: "If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property."

{¶32} Here, there is no question that Jonathan violated the October 2006 Order when he allowed Andrew to sell his stocks in February and March 2007. Andrew testified that he and Sondra began paying Jonathan's legal fees in September 2006. Jonathan's own testimony shows that, when those payments began to have a significant financial impact on Andrew and Sondra, Jonathan allowed Andrew to sell the stocks as a way to reimburse them. See, e.g., Vol. II Tr. 242 (Jonathan told Andrew that "he could do whatever he wanted as far as the stocks that I was aware that we had"); Vol. II Tr. 333 (When Andrew told Jonathan "that the costs of everything were getting high," Andrew asked Jonathan "if he could take the monies from my assets"). While Jonathan told the trial court, and argues here, that the sales were to reimburse Andrew and Sondra for their payment of his legal fees—a purpose he apparently believes justifies his actions—there is no question that he violated the October 2006 Order.

{¶33} This court has stated that a court should find financial misconduct "only if the spouse engaged in some type of wrongdoing (i.e., wrongful scienter)." *Mantle v. Sterry*, 10th Dist. No. 02AP-286, 2003-Ohio-6058, ¶32. In the typical case, "the offending spouse will either profit from the misconduct or intentionally defeat the other

spouse's distribution of marital assets.' " *Id.*, quoting *Hammond v. Brown* (Sept. 13, 1995), 8th Dist. No. 67268.

{¶34} Here, Jonathan committed wrongdoing by violating the restraining order, and his actions earned him a profit of more than \$85,000. These findings alone justify a finding of financial misconduct. Therefore, the trial court did not abuse its discretion when it found that Jonathan committed financial misconduct, a finding that supports a distributive award under R.C. 3105.171(E)(3).

{¶35} Having properly found that Jonathan committed financial misconduct, the trial court could have compensated Kelly "with a greater award of marital property." R.C. 3105.171(E)(3). As we noted, however, Kelly's award was actually less than half of the sale proceeds and less than Jonathan's award. Under these circumstances, we cannot conclude that the court erred to Jonathan's prejudice.

{¶36} Jonathan also argues that the trial court failed to comply with R.C. 3105.171(F), which requires a court "[i]n making a division of marital property and in determining whether to make and the amount of any distributive award" to consider the following factors: (1) duration of the marriage; (2) the spouses' assets and liabilities; (3) desirability of awarding the family home to the custodial parent; (4) the liquidity of the property; (5) the desirability of leaving an asset intact; (6) tax consequences; (7) the costs of selling an asset; (8) the applicability of any separation agreement; and (9) any

other factor the court deems relevant and equitable.<sup>1</sup> Jonathan's assertion that the court "never analyzed any of" these factors is unfounded.

{¶37} This court has stated that "[a]n exhaustive itemization by the trial court of every factor set forth in R.C. 3105.171(F) is unnecessary; however, the court's decision must clearly indicate that the factors were considered before the property division was made." *Beagle v. Beagle*, 10th Dist. No. 07AP-494, 2008-Ohio-764, ¶40, citing *Hightower v. Hightower*, 10th Dist. No. No. 02AP-37, 2002-Ohio-5488, ¶21, citing *Casper v. DeFrancisco*, 10th Dist. No. 01AP-604, 2002-Ohio-623.

{¶38} Here, the court considered the duration of the marriage and determined it to have begun on March 8, 1996, and to have ended on the date of the final hearing on April 3, 2008. Next, the court considered the assets and liabilities of Jonathan, as reflected in its several pages of findings of fact and conclusions of law concerning those assets and debts and their appropriate division. Most importantly, the court explained, in detail, its reasoning for its findings and conclusions concerning Jonathan's stock holdings.

{¶39} The remaining factors are irrelevant in this case. The award of a family home is irrelevant because the parties did not own a home. The liquidity of the parties' assets, the desirability of leaving the assets intact, the tax consequences of a sale, and the potential costs of a sale were all made irrelevant by the stock sales in February and March 2007. And there is no applicable separation agreement. Jonathan does not

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<sup>1</sup> Effective April 7, 2009, R.C. 3105.171(F) also requires the court to consider any retirement benefits. See 2007 Ohio H.B. No. 395.

identify which of these irrelevant factors should have been considered. Instead, he argues only that no financial misconduct occurred, an argument we have already rejected. We overrule Jonathan's second assignment of error.

{¶40} In his third assignment of error, Jonathan argues that the trial court erred when it awarded \$30,000 to Kelly for attorney fees. We disagree.

{¶41} R.C. 3105.73(A) allows a trial court in a divorce proceeding to award attorney fees to a party "if the court finds the award equitable." In making that determination, "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." *Id.* We review a trial court's award of attorney fees under an abuse of discretion standard. *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶12.

{¶42} Jonathan argues that the trial court erred in awarding fees to Kelly because (1) Kelly could have obtained their joint bank records without asking Jonathan to produce them, and (2) Kelly had two attorneys. A review of the court's decision, however, reveals other grounds for the court's award. The court considered the relative assets of the parties, including Jonathan's history of receiving sizable gifts to supplement his income and Kelly's need for public assistance. The court also considered the difficulty in obtaining information about "the various trusts" from which Jonathan received payments, and did not rely on Kelly's efforts to obtain the parties' joint bank records, as Jonathan suggests. Finally, the court also found Jonathan in

contempt of the October 2006 Order and awarded fees related to the filing of the contempt motion.

{¶43} The court did not discuss Kelly's use of two attorneys. As the trial court concluded, however, Kelly's fees and Jonathan's fees were fairly comparable.

{¶44} The trial court's decision reflects careful decision making consistent with R.C. 3105.73, and the court's findings are reasonable. We discern no abuse of discretion. Accordingly, we overrule Jonathan's third assignment of error.

{¶45} In his fourth assignment of error, Jonathan argues that the trial court erred when it awarded spousal support to Kelly in the amount of \$500 per month for five years. We disagree.

{¶46} R.C. 3105.18(B) authorizes a trial court in a divorce proceeding to "award reasonable spousal support to either party." R.C. 3105.18(C) provides that, "[i]n determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support," a court must consider certain specified factors.

{¶47} A trial court enjoys wide latitude in determining the appropriateness and the amount of spousal support. *Wilder v. Wilder*, 10th Dist. No. 08AP-669, 2009-Ohio-755, ¶10. We will not reverse an award of spousal support absent an abuse of discretion. *Rodehaver v. Rodehaver*, 10th Dist. No. 08AP-590, 2009-Ohio-329, ¶11.

{¶48} Here, Jonathan argues that the trial court erred because the court (1) interpreted the term "income" too broadly, (2) failed to consider that Jonathan must work less than full-time because he is the primary caregiver for the children, and

(3) failed to consider that Kelly obtained a teaching assistant's degree during the marriage. We address each of these arguments.

{¶49} First, we do not agree that the trial court interpreted the term "income" too broadly for purposes of awarding spousal support. While R.C. 3105.08 does not define "income" for these purposes, it does require the trial court to consider the "income of the parties, from all sources." R.C. 3105.18(C)(1)(a).

{¶50} The trial court used \$46,327 as the figure representing Jonathan's income, the same figure the court used for purposes of calculating child support. The court's discussion of child support reveals its reasoning.

{¶51} The court considered the parties' tax returns from 2000 to 2007. Over these seven years, Jonathan reported an average income of just over \$11,000 from interest and dividends. The court recognized, however, that Jonathan would not be receiving additional income from stocks because they had been sold. The court stated: "So while this was a significant source of income for the parties during the course of the marriage, the Court has no basis for establishing income from a source which no longer exists." Thus, contrary to Jonathan's suggestion, the court did not consider income from the stocks that had been sold.

{¶52} The court also considered income derived from payments received from Andrew and Sondra. Using Kelly's exhibits, the court calculated annual payments of \$23,525 in 2004, \$33,000 in 2005, \$42,400 in 2006, and \$45,900 in 2007. After subtracting the payments coming from Andrew and Sondra's personal account, the court arrived at an annual average of \$29,437.50. The court added to this figure an

annual employment-related imputed income of \$16,889.60 to arrive at the total annual income figure for Jonathan of \$46,327.

{¶53} While Jonathan makes various arguments about the court's determination of his income, he does not dispute the court's calculation of the various payments he received from Andrew and Sondra, the amounts of those payments or their original sources. He does not offer a different income figure. Nor does he offer any support for the proposition that a determination of income for purposes of spousal support may not include consideration of recurring payments of this nature.

{¶54} In *Freeland v. Freeland*, 4th Dist. No. 02CA18, 2003-Ohio-5272, ¶16, the Fourth District Court of Appeals acknowledged that "[n]either the Revised Code nor case law fully defines 'income' for purposes of awarding spousal support. Thus, a trial court appears to possess discretion in determining what constitutes 'income.'" In that court's view, however, "a trial court should typically use the figures shown on a party's annual income tax return. See, generally, Evid.R. 1002. If a trial court chooses not to use a party's annual income tax return in assessing 'income,' the court should explain its reasons." *Id.*

{¶55} Here, the trial court reviewed the parties' annual income tax returns for purposes of determining their income, but determined that the returns did not correlate exactly with the payment records Kelly produced. In contrast to the trial court decision making at issue in *Freeland*, however, the trial court here reviewed the records carefully, broke the payments into separate categories, and, for purposes of determining

an income figure, eliminated payments made from Andrew and Sondra's personal accounts.

{¶56} The trial court relied, in part, on *Santisi v. Santisi* (Aug. 13, 1999), 11th Dist. No. 98-T-0062, for purposes of calculating child support, but the opinion also relates to calculating spousal support. In *Santisi*, the Eleventh District Court of Appeals affirmed a trial court's spousal support award based, in part, on gifts of \$500 per month received from the husband's father. While the trial court awarded both spousal and child support using these figures, the appellate court looked exclusively at the definitions provided in R.C. 3113.215, which applies to child support calculations. Specifically, the court looked to the broad definition of gross income and the exclusion of nonrecurring or unsustainable income, which relates to income the parent does not expect to receive on a regular basis. The court concluded that the husband had failed to establish that he did not expect to continue to receive the monthly gifts and affirmed the award.

{¶57} Here, while the amounts of the payments varied over a period of years, substantial payments ranging from just over \$23,000 to just under \$46,000 occurred every year, and the court based these figures on copies of checks written to Jonathan. Jonathan did not testify that he expected these payments to cease after the divorce. Therefore, it was reasonable for the court to conclude that these payments would continue and to include them in its calculation of Jonathan's income for purposes of calculating spousal support.

{¶58} Next, we address Jonathan's assertion that the trial court failed to consider his status as the primary caregiver for the children and his inability to work full-time. Contrary to this suggestion, the trial court did consider the impact of the children on employment opportunities for both parties. The opinion states:

(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;

There are three minor children from this marriage. The parties have agreed to shared parenting of these children. When not in school, the parties will need to arrange for appropriate care for the children or care for the children themselves. At the time of trial the Husband was working from home and testified to having flexibility with his work schedule.

{¶59} In its discussion of child support, the court also noted that Jonathan was working 30 to 40 hours per week, at a rate of \$8.12. The court calculated Jonathan's income by using the 40-hour figure. The court imputed a similar income figure to Kelly, who, as noted, will share parenting responsibilities with Jonathan. The evidence supports the court's findings in this respect.

{¶60} Finally, Jonathan argues that the trial court did not consider that Kelly had obtained a teaching assistant's degree. Kelly testified that she took an at-home course to obtain a certificate that would allow her to be a teacher's assistant. Jonathan directs us to no evidence indicating how much Kelly could earn as a teaching assistant or whether she could earn more from that position than she currently earns. Therefore, we cannot conclude that the identification of the certificate would have changed the court's calculation of spousal support.

{¶61} For all these reasons, we conclude that the trial court did not err in calculating spousal support. Therefore, we overrule Jonathan's fourth assignment of error.

{¶62} In his fifth assignment of error, Jonathan argues that the trial court erred in awarding child support to Kelly. Jonathan states that the shared parenting plan identifies him as the school placement parent and that "child support normally flows to the school placement parent, not from the school placement parent." He also argues that the trial court deviated from guideline calculations without any explanation.

{¶63} First, we reject Jonathan's suggestion that the trial court did not adequately explain its decision regarding child support. The court made detailed findings of fact and conclusions of law specific to the child support award. After carefully explaining its decision on income figures for both parties, the court calculated the child support obligation according to the child support worksheet applicable to shared parenting orders. The court concluded: "According to the worksheet, the Husband is to pay to the Wife the sum of \$745.42 per month for the support of the three minor children" plus a processing charge. The court took this sum directly from the child support worksheet, which indicates no deviations from the guideline amount. Thus, there was no deviation for the court to explain.

{¶64} Second, we reject Jonathan's characterization of the parties' parenting responsibilities. The shared parenting plan states that "[b]oth Parents shall be the residential parent and legal custodian of the minor children." The children are to attend school in the Upper Arlington school district, "so long as a parent resides in the school

district. In the event that neither parent resides in the Upper Arlington School District, Father shall be the residential parent solely for school placement purposes."

{¶65} The plan provides for Kelly to exercise parenting time, pursuant to local rules, with some additions and exceptions. During the school year, Kelly has the children every other weekend from Friday at 6:00 p.m. until Monday at 8:15 a.m. and every Tuesday evening. During weeks following Jonathan's weekend, Kelly also has the children on Thursday evening. During the summer, Jonathan and Kelly split parenting time equally. Thus, contrary to Jonathan's assertion, the plan does not provide for the children to spend "almost all of their time with" him.

{¶66} A child support award calculated according to the worksheet and guidelines is presumed to be the correct amount of child support. R.C. 3119.03. The decision to deviate from the actual obligation is discretionary, and we will not reverse it absent an abuse of discretion. See *In re Custody of Harris*, 168 Ohio App.3d 1, 2006-Ohio-3649, ¶¶60-61. We discern no abuse of discretion here. The court considered the appropriate factors carefully and imposed an award according to the worksheet. Therefore, we overrule Jonathan's fifth assignment of error.

{¶67} In his sixth assignment of error, Jonathan broadly argues that the court erred by making factual and legal findings arbitrarily and capriciously. In support, Jonathan states that the trial court "exhibited a clear bias" toward Kelly. Having reviewed the trial court record thoroughly, we reject Jonathan's assertions. It is not impermissible for a trial court to question witnesses, and the court's questions here did not constitute advocacy of a particular viewpoint. Having already determined that the

trial court's findings of fact and conclusions of law were proper and supported in the record, we cannot conclude that its decision reflects an improper bias. In fact, Jonathan fails to note that the court's decision includes a finding of contempt against Kelly.

{¶68} Nor do we agree that the court's credibility determinations were improper or made only as a means to achieve a predetermined end. We agree with the trial court's conclusion that financial misconduct occurred when Jonathan violated the October 2006 Order by allowing Andrew to sell stocks Jonathan owned. We also agree that Jonathan's application for public assistance, just after the February and March 2007 stock sales and without disclosure of the sale proceeds or monthly payments from his parents, reflects poorly on his and Andrew's credibility. Having made these credibility determinations, the trial court relied primarily on the documentary evidence, which Jonathan had an equal opportunity to submit and a better opportunity to obtain.

{¶69} In the end, we conclude that the manifest weight of the evidence supports the trial court's findings and conclusions. Neither the trial transcript nor the trial court's decision indicates that those findings and conclusions were the result of judicial bias. Therefore, we overrule Jonathan's sixth assignment of error.

{¶70} In summary, we overrule all six of Jonathan's assignments of error. Accordingly, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

*Judgment affirmed.*

SADLER and TYACK, JJ., concur.

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