

[Cite as *Alexander v. Alexander*, 2009-Ohio-5856.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Graham H. Alexander,	:	
	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	
v.	:	No. 09AP-262 (C.P.C. No. 05DR10-3809)
	:	
Carol M. Alexander,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on November 5, 2009

Christopher J. Minnillo, for appellant.

Wolinetz Law Offices, LLC, and *Barry H. Wolinetz*, for appellee.

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

FRENCH, P.J.

{¶1} Plaintiff-appellant/cross-appellee, Graham H. Alexander, and defendant-appellee/cross-appellant, Carol M. Alexander, appeal the February 13, 2009 Judgment Entry/Decree of Divorce issued by the Franklin County Court of Common Pleas,

Division of Domestic Relations. For the following reasons, we affirm in part and reverse in part.

{¶2} Graham and Carol were married on November 24, 1990, when Graham was 51 years old and Carol was 26 years old. Their first daughter was born in 1992. Graham was diagnosed with prostate cancer in November 1993, and underwent surgery to remove his prostate in January 1994. Prior to the surgery, Graham's sperm was harvested so the parties could have another child. Graham retired from his employment with the Battelle Memorial Institute ("BMI") on December 31, 1994 or January 1, 1995. The parties' second daughter was born in 1996. In February 2005, Carol announced that she was leaving the marriage, and, on July 31, 2005, she gave birth to a third child, who is not Graham's biological child.

{¶3} Graham filed a complaint for divorce on October 5, 2005, alleging gross neglect of duty, adultery, and incompatibility. Carol filed an answer and counterclaim, alleging gross neglect of duty, extreme cruelty, and incompatibility.

{¶4} The parties stipulated to March 31, 2005, as the de facto termination date of the marriage for purposes of valuing and dividing the marital property and stipulated to values of various marital assets as of that date. Prior to trial, the parties resolved the allocation of parental rights except for designation of the residential parent for school placement purposes, establishment of a child support order, and allocation of the children's expenses. In addition to those issues, the trial court determined issues regarding the division of marital property, spousal support, and the parties' motions for contempt. In its Judgment Entry/Decree of Divorce, the trial court, inter alia, granted the

parties a divorce, ordered division of the marital estate, denied spousal support, ordered that no child support was due after crediting Graham with Social Security payments received by the children, and granted Graham's motion for contempt. Of relevance to this appeal are the court's findings regarding the parties' interests in the marital residence, Graham's BMI Employee Pension Plan, Carol's T.Rowe Price mutual fund account, spousal support, child support, and Graham's motion for contempt, each of which we will address more fully and specifically under the appropriate assignment of error.

{¶5} Graham asserts the following assignments of error for our review:

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT'S REFUSAL TO INCLUDE CAROL ALEXANDER'S SURVIVORSHIP INTEREST IN THE EMPLOYEES PENSION PLAN OF [BMI] AS AN ASSET OF THE MARITAL BALANCE SHEET BECAUSE IT WAS TOO SPECULATIVE TO ASSUME THAT MR. ALEXANDER WILL PREDECEASE MS. ALEXANDER WAS ERRONEOUS AND AN ABUSE OF DISCRETION. IF THE NON-INCLUSION OF MS. ALEXANDER'S SURVIVORSHIP INTEREST AS AN ASSET ON THE MARITAL BALANCE SHEET WAS CORRECT, THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY INCLUDING THE PRESENT VALUE OF THE MARITAL PORTION OF MR. ALEXANDER'S EMPLOYEES PENSION PLAN OF [BMI] AS AN ASSET ON THE MARITAL BALANCE SHEET.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN THE DETERMINATION AND VALUATION OF THE APPRECIATION OF MARITAL REAL ESTATE. THE APPRECIATION OF 1710 STONEYBROOK WAS PASSIVE APPRECIATION.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY REFUSING TO AWARD MR. ALEXANDER SPOUSAL SUPPORT. THE TRIAL COURT'S REFUSAL TO AWARD SPOUSAL SUPPORT WAS INEQUITABLE AND AN ABUSE OF DISCRETION.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN FINDING THAT THE T.ROWE PRICE MUTUAL FUND ACCOUNT WAS MS. ALEXANDER'S SEPARATE PROPERTY.

{¶6} In her cross-appeal, Carol asserts the following assignments of error:

1. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DID NOT ACCOUNT FOR MARKET FORCES WHEN DIVIDING THE PARTIES' MARITAL PROPERTY.

2. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT CALCULATED GRAHAM'S CHILD SUPPORT.

3. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FOUND GRAHAM WAS ENTITLED TO AN ADDITIONAL \$25,000 AS HIS SEPARATE PROPERTY INTEREST IN THE MARITAL RESIDENCE.

4. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FOUND CAROL IN CONTEMPT.

{¶7} We begin with Graham's first, second, and fourth assignments of error, which concern the trial court's division of property, including the classification of assets as marital or separate property. A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318. In divorce proceedings, the trial court must classify property as marital or separate property, determine the value of the property,

and divide the marital and separate property equitably between the spouses. R.C. 3105.171(B); *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶16. We review a trial court's classification of property as marital or separate under a manifest weight of the evidence standard and will affirm if some competent, credible evidence supports the classification. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15. We will uphold a trial court's valuation and division of property absent an abuse of discretion. *Roberts* at ¶16; *Middendorf* at 401. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. If there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion. *Middendorf* at 401, citing *Ross v. Ross* (1980), 64 Ohio St.2d 203.

{¶8} Graham's first assignment of error stems from the trial court's treatment of Carol's survivorship interest in his BMI Employee Pension Plan. Upon his retirement, Graham had to elect how his pension benefits would be paid. He could elect either a single life annuity or a joint and survivor annuity, under which Carol would receive a specified percentage of Graham's pension after his death, for the remainder of her life. Under either option, Graham could elect a guaranteed payout period of 10 or 20 years or reject a guaranteed payout period. Election of survivorship benefits and/or a guaranteed payout period would reduce Graham's monthly pension payments.

{¶9} Graham elected a guaranteed 20-year payout and a 100 percent survivorship interest. The guaranteed 20-year payout ensured that, should Graham die within 20 years of his retirement date, Carol or their children would receive his pension

payments until the conclusion of the 20-year period. The 100 percent survivorship interest ensured that, upon Graham's death, Carol will be entitled to receive Graham's pension payments for the rest of her life. Graham's election of the 100 percent survivorship interest reduced his monthly pension payment by \$320.89.

{¶10} There is some overlap between the effects of the guaranteed 20-year payout and the 100 percent survivorship interest. Should Carol survive Graham, regardless of whether he dies within 20 years of his retirement, Carol will begin receiving 100 percent of Graham's monthly pension payments and will receive those payments for the remainder of her life, as a result of the survivorship interest. The effect of the guaranteed 20-year payout becomes most apparent in the situation where Graham and Carol both die within 20 years of Graham's retirement, in which case their children would receive Graham's pension payments until the end of the 20-year period, whereas without the guaranteed payout period, Graham's pension payments would terminate when both Graham and Carol were deceased. The parties do not dispute the meaning or effect of the 100 percent survivorship interest or the guaranteed 20-year payout.

{¶11} Graham and Carol each retained an expert to determine the present value of Graham's pension, including Carol's survivorship interest. The parties stipulated that, as of the de facto termination date, the present value of the marital portion of Graham's pension, based on a 12.55 percent coverage factor, was \$31,939.44, and the present value of Carol's survivorship interest was \$151,905.15. Those values represent averages of the experts' valuations. Although not specifically contained in the parties'

stipulations, the trial court found that the total present value of Graham's pension, including the separate and marital portions and the survivorship interest, was \$406,402.64. The trial court found that \$254,497.49 represented the present value of the pension payable to Graham (\$406,402.64 – \$151,905.15). Application of the 12.55 percent coverture factor (representing the percentage of Graham's employment during the marriage) results in the marital portion of \$31,939.44, as stipulated by the parties. Neither party has contested the trial court's valuations. The court awarded the marital and separate portions of Graham's pension, excluding the survivorship interest, to Graham.

{¶12} The parties' dispute regarding Graham's pension resolves to whether the trial court should have included Carol's survivorship interest, with its stipulated present value of \$151,905.15, on the marital balance sheet. Graham argued that Carol's survivorship interest should be considered a marital asset and divided by the trial court, whereas Carol argued that the survivorship interest was too speculative to be included on the marital balance sheet because she will receive it only if Graham predeceases her. The trial court accepted Carol's position and did not include the survivorship interest on the marital balance sheet. Based on this court's opinion in *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, which it found dispositive, the trial court stated, "[t]o assume that [Graham] will predecease [Carol] within the twenty years of guaranteed payments is too speculative."

{¶13} Graham argues that the trial court misinterpreted the terms of his pension, and we agree. The court concluded that it is too speculative that Graham will

predecease Carol within the guaranteed 20-year payout period, but Carol's entitlement to survivorship benefits is not dependent upon Graham dying within the 20-year payout period. To the contrary, Carol is entitled to survivorship benefits upon Graham's death if Graham predeceases her. The guaranteed 20-year payout period is, for all practical purposes, irrelevant to Carol's receipt of survivorship benefits and, thus, to the question of including the survivorship interest on the marital balance sheet. Whether it was too speculative to assume that Carol will receive survivorship benefits depends only on whether it was too speculative to assume that Graham would predecease her at all. For this reason, we conclude that the trial court abused its discretion by excluding the survivorship interest based on speculation as to whether Graham would predecease Carol within the guaranteed payout period.

{¶14} Even assuming, despite contrary language in the judgment entry, that the trial court did not misconstrue the requirements for Carol's receipt of survivorship benefits, the trial court's inconsistent acceptance of and reliance on actuarial assumptions underpinning the value of Graham's pension demonstrates an abuse of discretion. The parties, via their stipulations, and the trial court, via its valuation, accepted the experts' analytical framework for determining the present values of Graham's pension, including the survivorship interest. "Present valuations are based on the best guesses that can be mustered on a variety of different factors including when a person will retire and when that person will die." *Catron v. Catron* (Dec. 19, 1997), 11th Dist. No. 96-T-5609. Present valuations are not untrustworthy simply because they involve some guesswork, known in expert parlance as assumptions. *Donnelly v.*

Donnelly, 2d Dist. No. 2002-CA-53, 2003-Ohio-1377, ¶53. This court has noted that, in considering future benefits in the division of a marital estate, "the trial court must accept certain actuarial assumptions such as the use of mortality tables and projected interest rates." *Dunham* at ¶59.

{¶15} The trial court accepted and adopted values based on the experts' analytical framework, which necessarily included actuarial assumptions as to the parties' life expectancies. The assumptions accepted by the trial court in valuing the components of Graham's pension establish the likelihood that Carol will survive Graham and receive survivorship benefits. Indeed, the court's valuation of the total present value of Graham's pension included the stipulated present value of Carol's survivorship interest and the necessary assumption that Graham would predecease Carol. Nevertheless, the trial court rejected those same life expectancies to conclude that it was too speculative whether Carol would survive Graham.

{¶16} Other Ohio courts have affirmed a trial court's ability to consider survivorship interests in a spouse's pension when dividing marital assets. In *Salmon v. Salmon*, 9th Dist. No. 22745, 2006-Ohio-1557, the court specifically rejected an argument that survivorship benefits are too speculative to consider in the equitable division of a marital estate. The appellate court affirmed the offset of the wife's survivorship interest in the husband's pension where there was no evidence that the expert valuator did not consider the possibility of the wife predeceasing the husband when valuing the survivorship interest, stating that "the mere fact that Wife's interest may never be realized does not undermine the fact that Wife's interest *currently* has

some value." *Id.* at ¶17. (Emphasis sic.) See also *Blackledge v. Blackledge*, 5th Dist. No. 03-CA-44, 2004-Ohio-2086; *Levine v. Levine* (Sept. 3, 1999), 4th Dist. No. 98 CA 34; *Wylie v. Wylie* (June 4, 1996), 4th Dist. No. 95CA18 (remanding for a valuation of the parties' survivorship interests).

{¶17} The trial court here aptly noted this court's discussion of the potentially speculative nature of future and contingent benefits in *Dunham*, but *Dunham* is not dispositive. The portion of *Dunham* cited by the trial court involved the valuation of the parties' Social Security benefits and the offset of marital assets to account for the discrepancy in those benefits. In *Dunham*, the trial court followed Supreme Court of Ohio precedent holding that a trial court may consider future Social Security benefits in relation to all marital assets when making an equitable distribution of marital property, despite the federal-law prohibition against dividing Social Security benefits as marital assets. See *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶4.

{¶18} The *Dunham* trial court did not include the wife's spousal or widow benefit on the marital balance sheet before offsetting marital assets to account for discrepancies in the parties' Social Security benefits. The wife's entitlement to any spousal or widow benefit was contingent upon her not remarrying, and her entitlement to the widow benefit was also contingent upon her surviving her husband. The wife presented expert evidence on the present value of the parties' Social Security benefits, and the expert presented alternative figures based on whether the assumption was made that the wife would receive the spousal or widow benefit. The trial court rejected as too speculative the assumption that the wife would never remarry and, accordingly,

rejected the assumption that she would receive either the spousal benefit or the widow benefit.

{¶19} On appeal, we emphasized that, in valuing future benefits, the trial court must accept actuarial assumptions, such as the use of mortality tables, stating as follows:

We note that if the trial court is going to apply *Neville* and consider future Social Security benefits, the trial court must accept certain actuarial assumptions such as the use of mortality tables and projected interest rates. Taking these factors into account, the expert presented alternate figures based on whether the assumption was made that [the wife] would receive the spousal benefit or the widow benefit. * * * In rejecting additional assumptions about remarriage and widowhood, the trial court took a conservative approach and decided that making those assumptions was too speculative. These were matters within the purview of the trial court as the court considered and weighed all the evidence, including the parties' demeanor, health, age, and ability to find gainful employment. The trial court's findings were based on the expert testimony and, therefore, were not against the manifest weight of the evidence.

Dunham at ¶59. There, the trial court weighed the evidence, including an expert valuation excluding spousal or widow benefits, to determine that the assumptions, beyond those encompassed by use of the actuarial tables, upon which the wife's eligibility for benefits depended, were too speculative.

{¶20} While *Dunham* affirmed a trial court's rejection of prerequisite assumptions for the wife's receipt of benefits, *Dunham* is not dispositive of whether Carol's receipt of survivorship benefits is too speculative here. First, this case does not involve speculation as to whether Carol might remarry because the only prerequisite to her

receipt of survivorship benefits is that she survive Graham. Further, whereas the parties in *Dunham* differed in age by only seven years, Carol, who is in good health, is 25 years younger than Graham, who has battled prostate cancer. Moreover, the trial court's valuations incorporate life expectancies based on actuarial tables used by the experts, and those tables suggest that Carol will outlive Graham. It is arbitrary for the trial court to assume, for purposes of valuation, that Carol will outlive Graham, but to conclude that the same assumption is too speculative in compiling the marital balance sheet and dividing the marital assets. For these reasons, we conclude that the trial court abused its discretion by excluding Carol's survivorship interest in Graham's pension from the marital balance sheet. Therefore, we sustain Graham's first assignment of error.

{¶21} In his second and fourth assignments of error, Graham maintains that the trial court erred by designating the appreciation on the marital residence as marital property and Carol's T.Rowe Price mutual fund account as Carol's separate property.

{¶22} "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," and "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * and that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(i) and (ii). Marital property also includes "income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." R.C. 3105.171(A)(3)(a)(iii). This is known as active appreciation.

Ostmann v. Ostmann, 168 Ohio App.3d 59, 2006-Ohio-3617, ¶26. Thus, "when *either* spouse makes a labor, money, or in-kind contribution that *causes* an increase in the value of separate property, that increase in value is deemed marital property." *Middendorf* at 400. (Emphasis sic.)

{¶23} "Separate property" includes "[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage" and "[p]assive income and appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(ii) and (iii). Appreciation of separate property "due solely to market forces, such as location and inflation" is passive appreciation and remains separate property. *Sterbenz v. Sterbenz*, 9th Dist No. 21865, 2004-Ohio-4577, ¶5. "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 the separate property is not traceable." R.C. 3105.171(A)(6)(b).

{¶24} A party who wants an asset classified as separate property bears the burden of tracing that asset to his or her separate property. *Dunham* at ¶20, 26. When parties contest whether an asset is marital or separate property, the presumption is that the property is marital, unless proven otherwise. *Miller* at ¶20. On appeal, our job is not to reweigh the evidence, but to determine whether there was competent, credible evidence to support the trial court's findings. *Dunham* at ¶27. With this standard in mind, we examine the trial court's designation of the real estate appreciation as marital property and of the T.Rowe Price mutual fund account as Carol's separate property.

{¶25} Graham and Carol are joint owners of the marital residence, which they purchased in September 1989, prior to the marriage, for \$176,000. The parties stipulated that \$58,441 of the equity was Graham's separate property and that \$20,000 of the equity was Carol's separate property, based on their respective contributions to the down payment. The trial court also found that an additional \$25,000 of equity was Graham's separate property, and we address that finding in our discussion of Carol's cross-appeal. The mortgage on the marital residence was satisfied during the marriage, and the parties stipulated that the value of the residence as of the de facto termination date was \$235,000, reflecting \$59,000 of appreciation. The court stated that "[t]estimony or other evidence showing that the appreciation was solely passive appreciation and not the result of the improvements made during the marriage was not provided." Thus, the court concluded that the appreciation was entirely marital property. Graham argues that the trial court should have apportioned the appreciation as separate property, in a ratio equal to the parties' separate contributions to the real estate.

{¶26} Graham, as the party claiming that a portion of the appreciation was his separate property, had the burden of tracing the appreciation to his separate property contributions and of proving, by a preponderance of the evidence, that the appreciation was passive. See *Brown v. Brown*, 5th Dist. No. 2008 CA 0111, 2009-Ohio-4913, ¶20, 23. The issue is whether Graham presented evidence to establish what increase in value was passive, rather than active. See *Bizjak v. Bizjak*, 11th Dist. No. 2004-L-083, 2005-Ohio-7047, ¶11. Graham contends that the record lacked evidence of labor,

monetary or in-kind contributions from which the appreciation could be considered active, but he testified that, during the marriage, the parties remodeled the bathrooms, insulated and installed a wall in the garage, installed a new rug in the family room, and replaced and upgraded windows in the living room. While Graham maintains that those improvements were in the nature of maintenance and did not increase the value of the real estate, there is no evidence to that effect. Graham presented no evidence as to how much the improvements made over the course of the marriage increased the value of the residence compared to how much appreciation was due to location or inflation. The mere fact that Graham has a separate interest in the residence does not mandate the conclusion that some or all of the appreciation is likewise his separate property.

{¶27} "[A] party who fails to provide adequate evidence as to the amount of passive appreciation fails to meet his burden of tracing the appreciation as separate property," and courts should not speculate "when the evidence is devoid of a *cause* for the increase." *Bizjak* at ¶12, citing *McLeod v. McLeod*, 11th Dist. No. 2000-L-197, 2002-Ohio-3710, ¶31. (Emphasis sic.) "[C]ourts should not simply conclude, without any evidence, that some of the appreciation must be passive. The party claiming the appreciation is due to 'enhanced market value' *must* prove it first." *Bizjak* at ¶23. (Emphasis sic.) Thus, in *Lynch v. Lynch*, 12th Dist. No. CA2008-02-028, 2008-Ohio-5837, the trial court did not err by designating appreciation not specifically related to improvements as marital property despite the husband's separate contribution of the entire down payment on the property because, "[a]lthough [the husband] was able to trace his separate property interest in the down payment of the home, he was unable to

trace the appreciation." *Id.* at ¶15. Based on the record, the trial court did not err by concluding that Graham failed to satisfy his burden of tracing appreciation to his separate property interests or by classifying the appreciation as marital property. Because competent, credible evidence supports the trial court's designation of the appreciation as marital property, we overrule Graham's second assignment of error.

{¶28} Graham's fourth assignment of error asserts that no competent, credible evidence supports the trial court's designation of Carol's T.Rowe Price mutual fund account as separate property. In support of his argument, Graham contends that Carol did not recall the amount originally deposited in the account, did not recall the account balance on the date of the marriage, and allegedly testified in her deposition that deposits were made into this account after the date of the marriage.

{¶29} Carol testified that she established the T.Rowe Price mutual fund account in her maiden name, prior to the marriage, and that neither she nor Graham made any contribution to that account during the marriage. Carol submitted seven years of statements for this account, representing the only statements currently maintained by T.Rowe Price, each of which indicated no contributions or withdrawals during the relevant time frame. While Graham's counsel attempted to impeach Carol's credibility with deposition testimony that she was not sure whether she made deposits into the account during the marriage, Carol explained that she deposited money during the marriage only into another T.Rowe Price account, an IRA that the parties stipulated was a marital asset. The trial court found Carol's testimony credible and concluded that the T.Rowe Price mutual fund account was separate property. In applying a manifest

weight standard of review, we defer to the trial court's decisions regarding the credibility of the witnesses and the weight to be given the evidence. See *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77. The trial court's designation of the T.Rowe Price mutual fund account as Carol's separate property was supported by competent, credible evidence and is not against the manifest weight of the evidence. Accordingly, we overrule Graham's fourth assignment of error.

{¶30} Graham's third assignment of error concerns the trial court's denial of his request for spousal support. Graham contends that the only explanation for the court's refusal to award him spousal support is "the conclusion that it would be fair for [him] to deplete his premarital savings and assets in order to maintain a reasonable lifestyle while [Carol] is able to increase her savings at [an] astounding rate." Graham goes on to argue that the trial court's decree lacks sufficient information for this court to review the decision to deny spousal support.

{¶31} Upon request, after determining the division of property in a divorce proceeding, a court may award reasonable spousal support in favor of either party. R.C. 3105.18(B). An award of spousal support is governed by R.C. 3105.18(C), which requires the trial court to consider specified factors in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms, and duration of support. The record must show that the trial court considered the statutory factors, but the court need not expressly comment on each factor. *Chelsey v. Chelsey*, 10th Dist. No. 08AP-455, 2008-Ohio-5697, ¶6, citing *McClung v. McClung*, 10th Dist. No. 03AP-156, 2004-Ohio-240, ¶21. A trial court possesses wide latitude in

determining the appropriateness of spousal support. *Wilder v. Wilder*, 10th Dist. No. 08AP-669, 2009-Ohio-755, ¶10. We review a trial court's order regarding spousal support for an abuse of discretion. *Neal v. Neal* (Sept. 30, 1996), 10th Dist. No. 96APE02-150, citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93.

{¶32} Review of the Judgment Entry/Decree of Divorce reveals that the trial court considered the evidence in light of each of the factors set forth in R.C. 3105.18(C) and carefully considered the parties' respective estimates of their monthly living expenses under R.C. 3105.18(C)(1)(n), which permits a court to consider any other factor it deems relevant and equitable. The court acknowledged the disparity in the parties' ages and health, but noted Graham's testimony that his health issues did not restrict his day-to-day functioning. The court found that the parties maintained a moderate standard of living during the marriage. While Carol's income and earning potential exceed Graham's, the court found that Graham had a total gross income of \$76,149 in 2007. Each party received marital assets with a tax-affected value of \$319,086.26, and Graham received \$785,636.63 in separate property, more than nine times the amount of Carol's separate property. Graham has no debts, and Carol's only debts are the mortgage on her current residence and loans from her parents.

{¶33} After considering the required statutory factors, the trial court concluded that an award of spousal support was not reasonable or appropriate. The court stated that, although Graham's monthly income is lower than Carol's, he has substantial separate assets, no debt, and no mortgage obligation. Graham does not attack any of the trial court's factual findings with respect to the factors listed in R.C. 3105.18(C), but,

instead, simply contests the trial court's conclusion. The spousal support statute does not require a court to provide an equal standard of living to both parties, only that it consider all the factors and fashion an appropriate and reasonable award. *Dunham* at ¶77, citing *Goldbach v. Goldbach* (Dec. 29, 1993), 9th Dist. No. 92CA005510. In this instance, having reviewed the trial court's discussion of the spousal support factors, we cannot conclude that the trial court abused its discretion by concluding that spousal support was not reasonable or appropriate. Accordingly, we overrule Graham's third assignment of error.

{¶34} Having considered and determined each of Graham's assignments of error, we turn to Carol's cross-appeal.

{¶35} In her first assignment of error, Carol maintains that the trial court abused its discretion by not accounting for losses sustained on marital property subsequent to the stipulated de facto termination date in its division of property. The classification of property as marital property and the valuation of that property is dependent upon the duration of the marriage, which is defined by statute. R.C. 3105.171(A) provides, in relevant part, as follows:

(2) "During the marriage" means whichever of the following is applicable:

(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers

equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, "during the marriage" means the period of time between those dates selected and specified by the court.

The Ohio Supreme Court has recognized that the circumstances of a particular case may make a date prior to trial more equitable for the determination and valuation of marital assets. *Berish* at 320. Therefore, "a trial court must be permitted to utilize alternative valuation dates, such as the time of permanent separation or de facto termination of the marriage, where reasonable under the facts and circumstances presented in a particular case." *Id.* at 321.

{¶36} A court's decision to apply a de facto termination date falls well within the court's broad discretion and will not be disturbed on appeal absent an abuse of that discretion. *Heyman v. Heyman*, 10th Dist. No. 05AP-475, 2006-Ohio-1345, ¶32. Here, the parties stipulated to a de facto termination date and stipulated to the value of marital assets as of that date. Carol concedes that the trial court did not err by using the de facto termination date to determine the marital property values, but she contends that the court abused its discretion by not accounting for subsequent losses due to market forces after the de facto termination date. Thus, Carol essentially argues that the trial court should have revalued the parties' assets as of the date of trial to account for market losses, despite the express stipulation that the parties' marriage effectively terminated years before. We reject Carol's argument.

{¶37} Based on the parties' stipulation, the trial court found that the duration of the parties' marriage was from November 24, 1990 through March 31, 2005. "It is the

duration of marriage that determines the valuation of the marital estate. Therefore, once the duration of marriage is established, assets and liabilities are determined in accordance with those dates." *Grody v. Grody*, 10th Dist. No. 07AP-690, 2008-Ohio-4682, ¶14 (rejecting an argument that the trial court erred in valuing marital assets based on a de facto termination date despite appellant's claim that use of that date resulted in an inequitable valuation and division). This court has previously concluded that a trial court abuses its discretion by valuing a marital asset based on present value rather than its value at the time of an accepted de facto termination date. See *Crowder v. Crowder* (Aug. 5, 1999), 10th Dist. No. 98AP-1124 ("Given the uncontroverted factual record and the trial court's initial finding that the marriage ended on November 1, 1991, we must hold that the trial court abused its discretion in failing to use November 1991 as the valuation date for the marital residence.").

{¶38} The value of assets may not remain consistent over time, and it may be expected that the values, especially of investment assets, may differ between the final hearing date and an earlier de facto termination date. Nevertheless, a court must exercise its discretion to choose a date upon which to value the parties' assets in an equitable manner. Here, the parties stipulated to a de facto termination date of their marriage for purposes of valuing and dividing marital assets. The trial court's use of that date to determine the duration of their marriage and to value the marital assets, including assets subject to changing market forces, was not unreasonable, arbitrary or unconscionable. Further, the trial court did not abuse its discretion by not altering the

value of assets based on market losses between the de facto termination date and trial. Accordingly, we overrule Carol's first assignment of error.

{¶39} Carol's second assignment of error arises from the trial court's calculation of Graham's child support obligation. The trial court completed a child support worksheet, which it attached to the Judgment Entry/Decree of Divorce, and determined that Graham's annual income for child support purposes was \$54,445.58 and that Carol's annual income for child support purposes was \$125,500. The trial court did not include in either party's income \$16,800 in Social Security benefits that the parties' children receive as a result of Graham's retirement. Based on the parties' incomes, the court concluded that, when insurance is provided, Graham's annual child support obligation is \$7,839 and that Carol's annual child support obligation is \$16,623. The trial court then credited Graham with the amount of the children's Social Security benefits and, because that amount exceeded his support obligation, concluded that Graham was not required to pay child support.

{¶40} Carol's arguments under this assignment of error are two-fold. First, she argues that the trial court erred by crediting the \$16,800 in Social Security benefits against Graham's child support obligation without ordering that she receive a portion of those benefits equal to Graham's pre-credit support obligation. Secondly, she argues that the trial court erred by not including the \$16,800 in Graham's income for purposes of determining his child support obligation. An appellate court reviews child support issues for an abuse of discretion. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105.

{¶41} In *Williams v. Williams*, 88 Ohio St.3d 441, 2000-Ohio-375, the Supreme Court of Ohio resolved a conflict among Ohio appellate districts regarding the treatment of Social Security benefits paid on behalf of a child when determining child support. In *Williams*, the parties' minor child received Social Security payments as a result of her father's disability. The Supreme Court held, at the syllabus, that "[a] disabled parent is entitled to a full credit in his or her child support obligation for Social Security payments received by a minor child due to the parent's disability." The Supreme Court rejected the position previously espoused by some courts of appeals that the Social Security benefit amount should, instead, be deducted from the combined child support obligation of both parents and that the remainder of the joint obligation be apportioned between the parents. The court reasoned, at 444, as follows:

* * * [T]he Social Security payments made on the child's behalf are not mere gratuities from the federal government, nor do they constitute earnings by the child * * *. Instead, the payments arise simply because the obligor has paid into the Social Security system and was found to be disabled. As stated by the Supreme Court of Alaska in *Miller v. Miller* (1995), 890 P.2d 574, 576: "[T]he employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary, should be deemed to have a vested right to the payments prescribed by the statutory scheme, which in effect comprises the terms of the insurance policy. He has earned the benefits; he is not receiving a gift." We agree with this rationale and find that Social Security payments are tantamount to earnings by the disabled parent.

The rationale set forth in *Williams* applies equally to Social Security payments as a result of a parent's retirement. See *Marder v. Marder*, 12th Dist. No. CA2007-06-069, 2008-Ohio-2500, ¶22.

{¶42} Carol acknowledges the *Williams* holding, but she nevertheless argues that the trial court erred by crediting the Social Security benefits against Graham's child support obligation while permitting Graham to remain the payee on the children's Social Security checks and without ordering that she receive \$7,839 of the annual Social Security benefits. Carol cites no case law in support of her assertion that she was entitled to the children's Social Security payments and that the trial court's failure to order payment to her constituted an abuse of discretion. Our research has revealed no Ohio case involving an obligor who receives a credit for Social Security payments to the obligor's children as a result of the obligor's disability or retirement and who also receives the payments as the representative payee on behalf of the children.

{¶43} While we can foresee a situation in which an obligor's credit for Social Security payments made to his or her children, coupled with the obligor's retention of the Social Security benefits, could lead to a finding of an abuse of discretion, we discern no abuse here. Although Graham remains the representative payee on the children's Social Security checks, the trial court's decree strips from Graham any discretion regarding the use of those funds. Specifically, in its discussion of child support, the court ordered Graham to pay half of the Social Security benefits toward the children's private school tuition. This amounts to approximately \$700 per month, more than Graham's monthly support obligation under the child support worksheet before the Social Security credit. The court further ordered Graham to deposit the remainder of the Social Security benefits into the children's respective 529 accounts. Only after the application of the Social Security benefits toward the children's tuition is any remaining

tuition cost divided according to the parties' respective percentages based on their income, i.e., 30 percent to Graham and 70 percent to Carol. Thus, although Graham remains the representative payee on the children's Social Security checks, the trial court has assured that the benefits are directed solely to the benefit of the children. In this instance, we cannot conclude that the trial court abused its discretion by crediting the children's Social Security benefits against Graham's child support obligation without ordering that Carol directly receive a portion of those benefits.

{¶44} Carol also argues that the trial court erred by not including the \$16,800 in Social Security benefits as part of Graham's annual income for purposes of determining the parties' child support obligations. In the trial court, Carol relied on *Hendricks v. Hendricks* (Nov. 15, 1988), 10th Dist. No. 88AP-507, in which this court stated that gross income, under the child support worksheet, includes Social Security benefits. The trial court rejected Carol's reliance on *Hendricks*, finding it unclear whether that case meant that Social Security benefits should be added to the disabled parent's income or be included elsewhere in the overall child support calculation. Instead, the trial court relied on *Williams*, stating that the Supreme Court did not find that Social Security benefits, although "tantamount to earnings by the disabled parent," should be included in the disabled parent's income on the child support worksheet. The trial court emphasized the *Williams* holding that "a disabled parent is entitled to a full credit in his or her child support obligation for Social Security payments received by a minor child." *Id.* at 444. The trial court then stated that it was following *Williams* by not including the Social Security benefits in Graham's income. The trial court's discussion suggests that

the credit mandated by *Williams* and the inclusion of the Social Security benefits as part of Graham's income are mutually exclusive, a position we reject.

{¶45} *Williams* does not explicitly state whether Social Security benefits on behalf of a child should be included in a disabled parent's gross income for purposes of determining the parties' combined and individual child support obligations, even though the disabled parent is clearly entitled to a credit for those benefits against his or her support obligation. The Supreme Court did acknowledge, however, that Social Security benefits arise because of the parent's payment into the Social Security system prior to disability and are tantamount to earnings. Additionally, in explaining the rationale for the position it ultimately endorsed, the Supreme Court stated, "since the Social Security payments are deemed income of the disabled parent that enure to the sole benefit of the child, * * * courts allow that parent to receive a credit against his or her support obligations." *Id.* at 443.

{¶46} Other Ohio appellate courts, both before and after the Supreme Court's decision in *Williams*, have explicitly held that a child's Social Security benefits should be included in the disabled parent's income for purposes of determining child support. See *Hirzel v. Ooten*, 4th Dist. No. 06CA10, 2008-Ohio-7006; *Huff v. Huff*, 9th Dist. No. 20934, 2003-Ohio-1304; *In re Mudrak* (Jan. 22, 1997), 7th Dist. No. 94-B-32; *Edmonds v. Edmonds* (Sept. 19, 1994), 4th Dist. No. 93CA1604; *Johnson v. Johnson* (Sept. 10, 1992), 2d Dist. No. 13204, citing *Robinson v. Robinson* (July 30, 1987), 2d Dist. No. 86 CA 56. In light of *Hendricks*, *Williams*, and these cases, we similarly conclude that the trial court should have included the children's \$16,800 Social Security benefit in

Graham's gross income to determine the parties' support obligations. Given the amount of Social Security benefits paid to the children in this case, Graham's revised support obligation may still not equal the Social Security benefits, for which Graham is entitled to a dollar-for-dollar credit, but the trial court must undertake the appropriate calculations to make that determination. For these reasons, we sustain in part and reverse in part Carol's second assignment of error, and remand this matter for the trial court to recalculate the parties' support obligations after adding the amount of the children's Social Security benefits to Graham's gross income on the child support worksheet.

{¶47} Carol's third assignment of error stems from the trial court's award of \$25,000 in separate property from the marital residence to Graham as the result of his \$25,000 payment to reduce the parties' mortgage in February 1993. Graham made that payment using separate funds from the sale of his premarital residence, but Carol maintains that the payment was commingled with the equity in the marital residence and that Graham did not adequately identify the portion of equity traceable to his \$25,000 payment.

{¶48} The commingling of separate property with other property of any type does not destroy its identity as separate property, except when it is no longer traceable. R.C. 3105.171(A)(6)(b). Thus, traceability is the key to determining whether separate property retains its separate character after being commingled with marital property. *Garish v. Garish* (Mar. 10, 1998), 10th Dist. No. 97APF06-813. The party seeking to classify a particular asset as separate property must prove its traceability by a preponderance of the evidence. *Id.*

{¶49} Carol apparently does not dispute that Graham was able to trace the source of the \$25,000 payment to his separate property, but argues that the court erroneously assumed that the \$25,000 payment equated to \$25,000 of equity in the marital residence. The parties purchased the marital residence for \$176,000, and they stipulated that the value of the residence, as of the de facto termination date, was \$235,000. The parties further stipulated that their respective contributions to the down payment equate to equal dollar amounts of equity and constitute separate property. Given this treatment of the down payments, and the residence's appreciation in value, the trial court did not abuse its discretion by awarding Graham \$25,000 of equity as his separate property based on his \$25,000 payment from his separate property.

{¶50} Carol also argues that the trial court erred by failing to consider whether Graham's \$25,000 payment was transmuted into marital property. Prior to the enactment of R.C. 3105.171, transmutation, the process of converting separate property into marital property by commingling, was the law in Ohio. *Kondik v. Kondik*, 11th Dist. No. 2008-P-0042, 2009-Ohio-2300, ¶61. Under R.C. 3105.171, however, "[s]eparate property is presumed to retain its separate nature as long as it is traceable, regardless of whether it has been commingled with other property." *Long v. Long*, 176 Ohio App.3d 621, 2008-Ohio-3006, ¶39, quoting *Jones v. Jones*, 4th Dist. No. 07CA25, 2008-Ohio-2476, ¶21. Because Graham's \$25,000 payment toward the mortgage principal was traceable to his separate property, it remained his separate property. Accordingly, we overrule Carol's third assignment of error.

{¶51} Carol's final assignment of error concerns the trial court's finding that she was in contempt. The court found Carol in contempt based on her receipt of three months of the children's Social Security checks, in violation of the Agreed Magistrate's Order, filed January 19, 2006, which provided that Graham "shall retain the children's social security checks * * * [and] keep the funds in a separate account to be used solely for the children's education." The trial court ordered Carol to pay Graham \$500 in attorney fees related to the motion for contempt and to reimburse the amount that Graham paid toward the children's tuition during those months. When reviewing a finding of contempt, including the imposition of penalties, we apply an abuse of discretion standard. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶12, citing *In re Contempt of Morris* (1996), 110 Ohio App.3d 475, 479.

{¶52} The prima facie elements of contempt in this context include the existence of a court order and the appellant's non-compliance with the terms of that order. See *LeuVoy v. LeuVoy* (May 25, 2000), 10th Dist. No. 99AP-737, citing *Morford v. Morford* (1993), 85 Ohio App.3d 50. The burden then shifts to the defendant to establish any defense she may have for nonpayment. See *Morford* at 55, citing *Rossen v. Rossen* (1964), 2 Ohio App.2d 381. Intent is not a prerequisite to a finding of contempt, but a court may consider whether the party has attempted to comply or attempted to flout the court order. *Morford* at 55, citing *Pugh v. Pugh* (1984), 15 Ohio St.3d 136.

{¶53} Here, there is no dispute about the existence or terms of the agreed order. Nor is there any dispute that Carol received the children's Social Security checks for three months, beginning in August 2006, in non-compliance with the court order.

Graham testified that he continued to pay his portion of the children's tuition "out of [his] pocket" during that time. (Tr. 193.) The trial court found credible Graham's testimony that Carol told him that she had the payee on the Social Security checks changed. The court recognized that the Social Security Administration ultimately determined whether to change the payee, but found it unrealistic to conclude that it did so without information from Carol. While Carol denied that she intentionally initiated the change in payee, the trial court was well within its discretion to judge the parties' credibility and conclude that Graham's testimony was more credible. Therefore, we conclude that the trial court did not abuse its discretion by finding Carol in contempt or by imposing the stated sanctions. Accordingly, we overrule Carol's fourth and final assignment of error.

{¶54} For these reasons, Graham's first assignment of error is sustained and his second, third, and fourth assignments of error are overruled; Carol's first, third, and fourth assignments of error are overruled and her second assignment of error is sustained in part and overruled in part; and we affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, and remand this matter for further proceedings consistent with this decision and applicable law.

*Judgment affirmed in part,
reversed in part, and cause remanded.*

KLATT and SADLER, JJ., concur.
