[Cite as *Thompson v. Thompson*, 2024-Ohio-2147.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

DOUGLAS THOMPSON,	:	
	:	Case No. 22CA21
Plaintiff-Appellee,	:	
	:	
v.	:	DECISION AND JUDGMENT ENTRY
	:	
KAREN THOMPSON,	:	
	:	**RELEASED: 05/22/2024**
Defendant-Appellant.	:	

APPEARANCES:

Miles D. Fries, Gottlieb, Johnston, Beam & Dal Ponte, P.L.L., Zanesville, Ohio, for appellant.

Andrew S. Webster, McCauley, Webster & Emrick, Belpre, Ohio for appellee.

Wilkin, J.

{¶1} This is an appeal by Karen Thompson ("Karen") of a Washington County Court of Common Pleas judgment that granted Douglas Thompson's ("Doug") complaint for divorce. On appeal Karen asserts four assignments of error.

{¶2} In her first assignment of error, Karen asserts that the trial court erred when it admitted a statement made by Doug's mother, Nancy Mollenhauer (Nancy), prior to her death, indicating that she wanted Doug to have her house. For purposes of hearsay, we find that the court did not abuse its discretion admitting Nancy's statement under Evid.R. 803(3), which allows admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or

physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health).”

{¶3} In her second assignment of error, Karen asserts that the trial court erred in finding Nancy’s home to be Doug’s separate property. She claimed that the trial court erroneously relied upon testimony that conflicted with the transfer on death (TOD) affidavit executed by Nancy that purported to transfer her home to Karen, after Nancy’s death. Because we find that there is some competent, credible evidence that Nancy intended for her house to be gifted to Doug as his separate property, the trial court’s decision was not against the manifest weight of the evidence. Therefore, we overrule Karen’s second assignment of error.

{¶4} In her third assignment of error, Karen asserts that the trial court erred when it conditioned the award of the Toyota Camry to her upon payment of $6,608.22 to Doug because said payment was not supported by the evidence. We find that the trial court did not abuse its discretion in awarding Doug $6,608.22 therein and thus overrule Karen’s third assignment of error.

{¶5} Finally, in her fourth assignment of error, Karen asserts that the trial court’s award of spousal support in the amount of $450 per month for two years was an abuse of its discretion. We find that the award of spousal support was not unreasonable, arbitrary, or unconscionable. Therefore, we overrule Karen’s fourth assignment of error

{¶6} Accordingly, we affirm the trial court’s judgment.

BACKGROUND

{¶7} Doug and Karen were married on September 10, 2011. They had no children. On August 7, 2020, Doug filed a complaint for divorce. Karen filed an answer and counterclaim. On April 29, 2022, the case went to trial. Doug presented three witnesses, including himself. Karen presented two witnesses, including herself.

{¶8} After the trial, the court issued a decision and entry that granted the divorce due to incompatibility. The entry first discussed the parties' agreed division of certain property, which is not pertinent to this appeal.

{¶9} The entry then discussed the disposition of a 2015 Toyota Camry, which Karen sought to retain as her separate property.

> The parties own a 2015 Toyota Camry that [Karen] drives daily. [She] wants to retain this vehicle. The 2015 Toyota was inherited by [Doug] from his mother with a debt of $10,685.42. The vehicle has a value of about $13,000. Therefore, [Doug] received an equitable value of $2,314.58 as his separate property from his mother. [Doug] used $3,000 in life insurance proceeds received after the death of his mother to pay down the loan on the vehicle. Therefore, there is another $3,000 of the [Doug's] separate property in the equity of the vehicle. The parties paid the debt down on the vehicle by $2,587.28 during the marriage. This equity is marital property and [Doug] would be entitled to $1,293.64 as his half of the marital property. [Doug's] combined separate and marital property portion of this vehicle is $6,608.22. [Karen] refinanced the vehicle in violation of the temporary orders. The debt on the vehicle cannot be used to equitably divide the vehicle. It would be equitable for [Karen] to retain the vehicle along with the debt of the vehicle and pay [Doug] $6608.22 for his portion of the value of the vehicle.

{¶10} Next, the court discussed the transfer Nancy's house by way of the TOD affidavit.

> The parties have real estate located at 490 Muskingum Drive Marietta, OH 45750, that was acquired during the course of the marriage. This real estate was previously owned by [Doug's] mother, Nancy Mollenhauer. Ms. Mollenhauer wanted to give the house to [Doug] as his inheritance, however, [Doug] had numerous tax liens from his business that could have led to the loss of the family home. [Doug's] two siblings each received funds that were roughly equivalent to the value of the home. After consulting with Attorney Robert Ellis, Ms. Mollenhauer, executed a Transfer on Death Designation Affidavit (TOD) on October 8, 2018, which placed the home into [Karen's] name to protect it from tax liens against [Doug's] business. Ms. Mollenhauer expressed her clear intent to Attorney Ellis that the house was going to [Doug], but it needed to be protected from the tax liens. Ms. Mollenhauer did not anticipate that the parties would get divorced. It was Attorney Ellis's idea to execute a TOD to [Karen] because he did not think he had enough time to create a trust or LLC to protect this asset.
>
> [Karen] testified that on or about October 5, 2018, Ms. Mollenhauer told her that she was signing the house over to her and to never put it in [Doug's] name. The Court does not find this testimony to be credible evidence that the real estate was anything other than [Doug's] inheritance. The Court finds by clear and convincing evidence that this real estate is [Doug's] separate property that he was gifted as an inheritance from his mother.

{¶11} Finally, the entry discussed Karen's request for spousal support.

> In accordance with R.C. 3105.18, 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*; [Doug's] annual income is about $33,800 and [Karen's] annual income is about $16,000.
>
> *(b) The relative earning abilities of the parties;* Based upon his business and his education, [Doug] has twice the earning ability of [Karen].
>
> *(c) The ages and the physical, mental, and emotional conditions of the parties;* The parties are relatively the same age. Both parties are in relatively good physical health. [Karen] is in better emotional condition than [Doug].

(d) The retirement benefits of the parties; Neither party has a retirement plan outside of social security. [Doug] expects to receive $1,463 per month at full retirement age and [Karen] expects to receive $921 per month at full retirement age.
(e) The duration of the marriage; The parties were married about nine years.
(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; Not applicable as the parties have no minor children.
(g) The standard of living of the parties established during the marriage; The parties maintained a relatively low standard of living during the marriage as they accumulated more debt than assets, other than an inheritance from [Doug's] mother.
(h) The relative extent of education of the parties; [Doug] is a high school graduate and has certificates for emergency medical services and computer repair. [Karen] has a GED.
(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties; [Doug] has real estate from his mother that was awarded as his separate property. [Doug] also has an ongoing computer business that also carries a lot of tax liability for unpaid taxes. [Karen] does not have any assets.
(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; Not applicable.
(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; It is not likely that [Karen] would seek any additional job training at her age as she usually works minimum wage jobs.
(l) The tax consequences, for each party, of an award of spousal support; There was no evidence submitted at trial as to the tax consequences of an award of spousal support.
(m) The lost income production capacity of either party that resulted from that party's marital responsibilities; There was no evidence as to lost income from either of the parties' marital responsibilities.
(n) Any other factor that the court expressly finds to be relevant and equitable. The parties found it appropriate that [Doug] pay [Karen's] rent in the amount of $450 per month during the pendency of the divorce. (Emphasis sic.)

{¶12} The court made the following pertinent rulings:

> [Karen] shall pay [Doug] $6,608.22 for his portion of the value of the 2015 Toyota Camry.
> [Doug] is awarded the real estate located at 490 Muskingum Drive, Marietta, Ohio as his separate property. [Karen] shall convey this property to [Doug].
>
> The Court orders [Doug] to pay [Karen] spousal support in the amount of $450 per month plus 2% processing charge for a total of $459 per month, commencing on November 1, 2022. The spousal support shall continue for a period of (2) years.

It is this judgment that Karen appeals.

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN ADMITTING STATEMENTS MADE BY A DECEDENT WHICH CONSTITUTED HEARSAY AND DID NOT FALL WITHIN THE HEARSAY EXCEPTION CONTAINED IN EVIDENCE RULE 804(B)(5).

II. THE TRIAL COURT ERRED IN ADMITTING EXTRINSIC EVIDENCE TO CONTRADICT THE UNAMBIGUOUS LANGUAGE CONTAINED IN THE TRANSFER ON DEATH DESIGNATION AFFIDAVIT.

III. THE TRIAL COURT ERRED IN CONDITIONING THIS AWARD OF AN ASSET TO APPELLANT UPON PAYMENT OF A SUM OF MONEY THAT WAS NOT SUPPORTED BY THE EVIDENCE.

IV. THE TRIAL COURT'S AWARD OF SPOUSAL SUPPORT CONSTITUTED AN ABUSE OF DISCRETION.

I. First Assignment of Error

{¶13} Karen asserts that the trial court erred by permitting several witnesses, including attorney Robert Ellis, Gary Thompson, and Doug to testify to statements that were purportedly made by Nancy, who was deceased. Nancy's statements as restated by these witnesses were inadmissible hearsay, i.e., "a

statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted in the statement." Evid.R. 801(C). Unless covered by an exception, hearsay is typically not admissible as evidence. *State v. Hill*, 2018-Ohio-67, 104 N.E.3d 794, ¶ 24 (4th Dist.).

{¶14} Karen admits that under Evid.R. 804(B)(5) a decedent's statement may be admissible as an exception to hearsay if (1) the decedent's estate is a party (b) the statement was made before the death, and (3) the statement was offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent. Absent compliance with all three requirements, a decedent's statement cannot be admitted as an exception to hearsay.

{¶15} Karen maintains that the first and third requirements are not met. Nancy's estate is not a party to this divorce, and witnesses who testified to Nancy's statements were called in Doug's case in chief, not on rebuttal. .

{¶16} In response, Doug argues that the trial court did not abuse its discretion when it admitted statements made by his deceased mother, Nancy, concerning the disposition of her home.

{¶17} Doug claims that decisions addressing the admissibility of evidence are reviewed under an abuse-of-discretion standard of review, and even if the action taken by the court is an abuse of discretion, the judgment will not be disturbed, unless the abuse affected the substantial rights of an adverse party.

{¶18} Doug maintains that Nancy's statement that she wanted Doug to have her house was admissible as an exception to hearsay under Evid. R. 803(3)

because it expressed her existing state of mind as having a plan to give her house to Doug. Doug argues that the court did not abuse its discretion in admitting Nancy's statement.

Law

1. Standard of Review

{¶19} "[T]rial courts typically enjoy broad discretion to determine whether a declaration falls within a hearsay exception." *State v. Sims*, 2023-Ohio-1179, 212 N.E.3d 458, ¶ 53 (4th Dist.), citing *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97. "[A]n abuse of discretion implies that a court's attitude is unreasonable, arbitrary or unconscionable." *Id.*, citing *State v. Clinton*, 153 Ohio St.3d 422, 2017-Ohio-9423, 108 N.E.3d 1, ¶ 60 citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "When applying the abuse-of-discretion standard of review, appellate courts must not substitute their judgment for that of the trial courts." *Clay v. Clay*, 2022-Ohio-1728, 190 N.E.3d 40, ¶ 11 (4th Dist.), citing *In re Jane Doe 1*, 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991).

2. Evid.R. 803(3)

{¶20} Evid.R. 803(3) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (3) Then Existing, Mental, Emotional, or Physical Condition. A statement of the declarant's then *existing state of mind*, emotion, sensation, or physical condition (such as intent, *plan*, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or

> believed unless it relates to the execution, revocation, identification, or terms of declarant's will. (Emphasis added.)

State v. Sheets, 4th Dist. Jackson No. 21CA6, 2023-Ohio-2591, ¶ 117.

> Several courts have found a decedent's statements regarding a party's future inheritance to be admissible under Evid.R. 803(3) as reflecting the decedent's then-existing state of mind and intent for the future. *See, e.g.,* [*Knowlton v. Schultz*, 179 Ohio App.3d 497, 2008-Ohio-5984, 902 N.E.2d 548, ¶39 (1st Dist.)] (involving a decedent's statement to his daughter that she would receive income from a trust after his death); *McGrew v. Popham*, 5th Dist. Licking, 2007-Ohio-428, 902 N.E.2d 548, ¶30 (involving a decedent's statement regarding her intent that property be transferred to certain individuals upon her death); *Brown v. Ralston*, 7th Dist. Belmont, 2016-Ohio-4916, 67 N.E.3d 15, ¶48 (involving a decedent's statements regarding his intent to transfer property to his granddaughter upon his death); *Ament* at ¶29 (involving a decedent's statements of intent to grant proceeds of insurance policies to certain family members).

Pirock v. Crain, 2020-Ohio-869, 152 N.E.3d 842, ¶ 86 (11th Dist.).

Analysis

{¶21} Robert Ellis, an attorney who represented Nancy, testified that Nancy intended for Doug to have her house upon her death because she had gifted assets to her other two children during her lifetime. Ellis testified that upon his advice, Nancy transferred her house to Karen only to protect it from Doug's taxes until he could pay them off. Arguably, Nancy's statement reflected a "plan" that after her death and after Doug paid off his taxes, her home was to pass to Doug. Courts have found such inheritance plans to be an exception to hearsay under Evid.R. 803(3). *See Pirock* and cited cases, supra. Therefore, we find that the trial court's determination that Nancy's statements were admissible as an

exception to hearsay under Evid.R. 803(3) was not unreasonable, arbitrary or unconscionable. Accordingly, we overrule Karen's first assignment of error.

II. Second Assignment of Error

{¶22} In her second assignment of error Karen asserts that the trial court erred in admitting extrinsic evidence to contradict the unambiguous language contained in the TOD affidavit. Karen claims that to the degree that Nancy expressed any intention to transfer her home to anyone else, even if accurate, cannot be used to contradict the unambiguous language of the TOD affidavit because such testimony violates the parol evidence rule.

{¶23} Karen maintains that written instruments such as a TOD affidavit are to be interpreted pursuant to their language. Karen argues that in construing written documents like deeds, trusts, wills, and TOD affidavits, assuming that the language is unambiguous, that language reflects the intent of the parties in those documents and courts will not insert words into those documents. Under the parol evidence rule, extrinsic evidence cannot be considered to contradict the plain meaning of a written agreement. As an example of this rule, Karen quotes *Chapin v. Nameth*, a case involving a survivorship account:

> The survivorship rights under a joint and survivorship account of the co-party or co-parties to the sums remaining on deposit at the death of the depositor may not be defeated by extrinsic evidence that the decedent did not intend to create in such surviving party or parties a present interest in the account during the decedent's lifetime.

7th Dist. Mahoning No. 08 MA 18, 2009-Ohio-1025, ¶ 23.

{¶24} Karen maintains that the TOD affidavit herein unambiguously states that upon Nancy's death, the property was to pass to her (Karen). Therefore, the trial court erred in admitting the testimony of Ellis and Doug who claimed that Nancy intended her home to pass to Doug.

{¶25} In response Doug claims that the trial court properly identified and equitably divided the marital and separate property in this case pursuant to R.C. 3105.171.

{¶26} Doug maintains that there are two standards of review pertinent to Karen's second assignment of error. The first pertains to a trial court's determination of marital and separate property, which requires a factual determination. That decision is subject to a manifest-weight-of-the-evidence review, which is very deferential. The second is that after the court has determined marital and separate property, the court awards each spouse their respective separate property and then distributes the remaining marital property equally, unless such a division would be inequitable. This determination is reviewed under an abuse of discretion standard of review, i.e., the court's decision will not be disturbed unless it is unreasonable, arbitrary, or unconscionable.

{¶27} Doug maintains that the parol evidence rule does not apply. He recalls that marital property includes all property acquired during the marriage by either spouse. Thus, holding of title to property by one spouse individually or both spouses in a form of co-ownership does not determine whether the property is marital or separate.

{¶28} Under R.C. 3105.171(A)(6)(a)(i-vii), separate property includes property acquired in numerous ways, including any gift of property made after the marriage that is proven by clear and convincing evidence.

{¶29} Doug claims that the issue for our review is whether the court properly and equitably divided the marital and separate property under R.C. 3105.171. Doug asserts that property acquired by one or both spouses during the marriage is presumed to be marital in nature unless it is shown to be separate, which may occur through a gift to one spouse. Doug maintains when determining "whether a gift has occurred under 3105.171(A)(6)(a)(vii), courts routinely allow for evidence beyond the confines of the deed or other document granting title." Doug cites two cases in support, *Barkley v. Barkley*, 119 Ohio App.3d 155, 694 N.E.2d 989 (4th Dist. 1997) and *Suppan v. Suppan*, 9th Dist. Wayne No. 17AP0015, 2018-Ohio-2569.

{¶30} Given that property acquired by either party during the marriage is presumed marital, Doug argues that the need for evidence outside the TOD affidavit is necessary so the parol evidence rule is not applicable. As supported by the testimony of attorney Ellis, Doug, and others, Nancy intended to gift her house to Doug. Therefore, the trial court's decision should be affirmed.

Law

1. Standard of Review

{¶31} The issue raised in this assignment of error is whether the trial court properly identified Nancy's house as Doug's separate property. "When a trial court grants a divorce, the court must determine what constitutes the parties'

marital property and what constitutes their separate property." *Barkley* at 159, citing R.C. 3105.171(B). "The trial court's characterization of the parties' property involves a factual inquiry." *Id.*, citing Wright *v. Wright*, 4th Dist. Hocking No. 94CA2, 1994 WL 649271 (Nov. 10, 1994). We review such determinations under the standard of manifest weight of the evidence. *Id.*, citing *Wylie v. Wylie*, Lawrence No. 95CA18, 1996 WL 292044 (May 30, 1996); *Miller v. Miller*, Washington No. 93CA7, 1993 WL 524966 (Dec. 1, 1993).

{¶32} "A judgment of a trial court will not be reversed as being against the manifest weight of the evidence if the court's judgment is supported by some competent, credible evidence." *Id.*, citing *Sec. Pacific Natl. Bank v. Roulette*, 24 Ohio St.3d 17, 20, 492 N.E.2d 438 (1986), 440; *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus (1978).

> This standard of review is highly deferential and even 'some' evidence is sufficient to sustain the judgment and prevent a reversal. A reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony.

Id. citing, *In re Jane Doe I* , 57 Ohio St.3d 135, 566 N.E.2d 1181 (1991); *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 461 N.E.2d 1273 (1984).

2. Marital Property and Separate Property

{¶33} "When a trial court grants a divorce, the court must determine what constitutes the parties' marital property and what constitutes their separate property." *Evans v. Evans*, 2014-Ohio-4450, 20 N.E.3d 1139, ¶ 26, (4th Dist.), citing *Barkley*; R.C. 3105.171(B). " 'Marital property' means * * * [a]ll real

property that currently is owned by either or both of the spouses, including [property] that was acquired by either or both of the spouses during the marriage[.]" R.C. 3105.171(A)(3)(a)(i). "Thus, property acquired during the marriage is presumed to be marital in nature unless it can be shown to be separate." *Barkley*, 119 Ohio App. 3d at 160, 694 N.E.2d 989 (4th Dist. 1997).

{¶34} R.C. 3105.171(H) states that "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." We interpreted RC. 3105.171(H) to mean that

> the form of title is relevant to, but not conclusive of, the classification of property as being *either* marital or separate. In other words, property held jointly may ultimately be determined to be separate. "In other words, property held jointly may ultimately be determined to be separate while other property held individually may, in fact, turn out to be marital." (Emphasis sic.; citations omitted)

Barkley at 161.

{¶35} "Separate property includes '[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.' " *Suppan v. Suppan*, 9th Dist. Wayne No. 17AP0015, 2018-Ohio-2569, ¶ 21, quoting R.C. 3105.171(A)(6)(a)(vii); *Barkley*.

{¶36} Even though a written instrument (deed) transfers property to both a husband and the wife, which is presumed to be marital property, courts, including ours, have considered testimony to determine whether the property was in fact

gifted to one of the spouses as their separate property. *See Suppan* and *Barkley*.

Analysis

{¶37} The TOD affidavit transferred Nancy's home to only Karen while she and Doug were married. Consequently, because the property was acquired and owned by Karen during her marriage with Doug, it was presumed to be marital property absent clear and convincing evidence that the property was intended to be Karen or Doug's separate property. The trial court had an obligation to assess whether the house was indeed marital property or whether it was the separate property of either Karen or Doug. Consistent with this obligation, the court heard testimony from the parties and others.

{¶38} Robert Ellis testified that he was an attorney whose practice was in estate planning and he had represented Nancy. Ellis stated that Nancy discussed with him how she would like her estate to pass to her three children. Nancy stated that she had already provided $25,000 to her daughter Laurie and a $50,000 insurance policy to her son Gary. Thus, she told Ellis that she wanted her home at 490 Muskingum Drive to go to Doug. Ellis testified that he believed using a deed to transfer her house while she was alive was not a viable option because it would have disqualified her for Medicaid if she needed to do so. Ellis opined that using the TOD affidavit to transfer the house after Nancy's death avoided that problem.

{¶39} Ellis testified that after giving Nancy that advice, Doug informed Ellis that he owed $80,000 in taxes. Ellis testified that Doug's taxes would result in a

lien placed on the house. Ellis claimed that while considering legal options to protect the house from Doug's taxes, he learned that Nancy was in the hospital having suffered from a stroke. Ellis quickly prepared the TOD affidavit concerned that Nancy could pass away. He took the instrument to the hospital and explained to Nancy that he had drafted the TOD affidavit to transfer her house to Karen to protect the house from Doug's outstanding taxes, which would attach to the house. Ellis testified that he advised Nancy that upon her death the house would be transferred to Karen and "she would hold the property for [Doug] until he could clean up his tax issues." Nancy executed the document.

{¶40} Ellis testified that he did not offer alternatives to transfer the house such as placing the house in a trust or putting it in an LLC because he was concerned with Nancy's health there might not be enough time to pursue those options. Ellis did not discuss with Nancy what might happen if Doug and Karen divorced.

{¶41} Doug confirmed that Ellis provided estate planning for his mother, Nancy. He also confirmed that Ellis prepared the TOD affidavit, which Doug understood would transfer Nancy's house upon her death to himself and Karen. Doug testified that Nancy had provided other assets to his two other siblings and consequently wanted her house to go to him.

{¶42} Karen was next to testify and she claimed that Doug was "mean" to Nancy; he would "talk down to her." Karen testified that she had discussions with Nancy regarding who Nancy wanted to leave her house to when she died. Karen stated that animosity developed between Doug and Nancy because Doug

thought that she was not grateful enough for the assistance that he was providing to her.

{¶43} Karen testified that after a stay in the hospital due to a fall, Nancy was transferred to a nursing home for rehabilitation. While at the rehabilitation facility, Karen claimed that Doug went to Nancy's room and she (Karen) waited outside. Eventually, Karen went into Nancy's room and found her crying and Nancy told her "I'm signing this house over to you. Don't you ever put it in Doug's name." Counsel then asked Karen if she had any other conversations with Nancy about the disposition of her house. Karen responded that before Nancy's statement to her in the nursing home, Nancy was going to transfer the house to Karen and Doug because of Doug's taxes.

{¶44} Exercising its discretion, the trial court found the testimony of Ellis and Doug to be more credible than Karen's. Thus, the court concluded that Nancy intended for her house to be transferred to her son, Doug. The TOD affidavit was utilized to transfer the property to Karen upon Nancy's death not for the purpose of giving her home to her daughter-in-law, Karen, as separate property, but to protect the house from Doug's taxes until he could pay them off.

> In reviewing the propriety of a trial court's exercise of discretion, reviewing courts are guided by the presumption that the findings of the trial court are correct, since the 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.

In re Collier, 85 Ohio App. 3d 232, 239, 619 N.E.2d 503 (4th Dist. 1993), citing *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 138, 566 N.E.2d 1181 (1991).

We follow *In re Collier*'s guidance and decline to disturb the trial court's finding that Nancy ultimately intended the ownership of her home to be transferred to Doug. We will not second guess the trial court's credibility determinations.

{¶45} Karen argues that even if the testimony supports a finding that the house is Doug's separate property, the parol evidence rule precluded the trial court from considering that testimony because it contradicts the unambiguous language of the TOD affidavit that transferred the property to Karen.

{¶46} The parol evidence rule provides that "if contracting parties integrate their negotiations and promises into an unambiguous, final, written agreement, then evidence of prior or contemporaneous negotiations, understandings, promises, representations, or the like pertaining to the terms of the final agreement' is inadmissible.' " *Spencer v. Huff*, 4th Dist. Scioto No. 7CA2543, 1998 WL 391948, *3, quoting *Miller v. Barry*, 81 Ohio App.3d 385, 390, 611 N.E.2d 352 (10th Dist. 1992). However, "parole evidence is admissible to explain ambiguous terms in a contract." *Master Feed Mill, Inc. v. Elevators Mut. Ins. Co.*, 4th Dist. Highland No. 657, 1988 WL 4416, *2 (Jan. 19, 1988), citing *Hosford v. Automatic Control Systems, Inc.* 4th Dist. Scioto No. 97CA2543, 14 Ohio App. 3d 118 (1984) * 3.

{¶47} Initially we find that Karen waived the parol evidence argument here because she did not raise it as a defense in the trial court. "Generally, the failure to raise an issue or argument at the trial court level that is apparent at the time constitutes a waiver of such issue." *State v. James*, 4th Dist. Ross No. 13CA3371, 2013-Ohio-5322, ¶ 9, citing *State v. Awan,* 22 Ohio St.3d 120, 489

N.E.2d 277 (1986), syllabus. Nevertheless, "[a]ppellate courts may * * * consider a forfeited argument using a plain-error analysis." *Matter of S.W.*, 2023-Ohio-793, 210 N.E.3d 36, ¶ 43 (4th Dist.), citing *Risner v. Ohio Dept. of Nat. Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.3d 718, ¶ 27. "The plain error doctrine is not, however, readily invoked in civil cases." *Id*. at ¶ 44. "Thus, 'the doctrine is sharply limited to the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Id*., citing *Davidson v. Goldfuss*, 79 Ohio St.3d 116, 122, 679 N.E.2d 1099 (1997).

{¶48} Karen objected to testimony supporting that Nancy intended to transfer her house to Doug, but only on hearsay grounds. There was no objection by Karen that this testimony was extrinsic evidence outside the TOD affidavit and under the parol evidence rule should not have been considered by the trial court. And we find this failure to object does not "seriously affect[ ] the basic fairness, integrity, or public reputation of the judicial process." *Id*. Consequently, we do not apply plain error herein.

{¶49} Even if Karen had not waived her parol evidence argument, we find it inapplicable herein. "The parol evidence rule states that 'absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements.' " *Galmish v.*

Cicchini, 90 Ohio St. 3d 22, 27, 2000-Ohio-7, 734 N.E.2d 782, quoting 11 Williston on Contracts (4 Ed.1999) 569-570, Section 33:4. However, the rule does not prohibit extrinsic evidence that proves the contract was induced by fraud. *Id*. at 28. "The principal purpose of the parol evidence rule is to protect the integrity of written contracts." *Id*. at 27, citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 440, 662 N.E.2d 1074 (1996). While typically applied to contracts, the parol evidence rule has also been found to apply to other written documents such as deeds. *See Grimes v. Grimes*, 4th Dist. Washington No. 8CA35, 2009-Ohio-3126.

{¶50} We find that a trial court's statutory obligation under R.C. 3105.171(B) in a divorce is to identify the parties' marital and separate property and then equitably divide the marital property distinguishes it from a case involving contract interpretation for purposes of the parol evidence rule. Important to a court's analysis in a divorce case is that "[m]arital property includes all real 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." (Emphasis sic.) *Barkley*, 119 Ohio App. 3d 155, 160, 694 N.E.2d 989 (4th Dist. 1997), citing R.C. 3105.171(A)(3)(a)(i). "Thus, property acquired during the marriage [by either spouse] is *presumed* to be *marital* in nature unless it can be shown to be separate." (Emphasis added.) *Id.* Further, R.C. 3105.171(H) states: "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property."

{¶51} In evaluating whether such presumed marital property is indeed marital or whether it could be one of the spouse's separate property, we find that employing the parol evidence rule where a written instrument is involved in the transfer of that property is unduly restrictive. That is not to say that the written instrument is irrelevant depending on the evidence in the case. A written instrument may be dispositive or persuasive in identifying whether the property is marital or separate. Rather, we are stating that in the unique environment of a trial court's obligation to classify property as marital or separate, the analysis should not be limited by the parol evidence rule. For example, separate property may result from "[a]ny gift of any real or personal property * * * that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." *Barkley* at 168; *See also Suppan* 9th Dist. Wayne No. 17AP0015, 2018-Ohio-2569.

{¶52} In sum, because we find that the trial court acted within its discretion in finding the testimony by attorney Ellis and Doug to be credible in supporting the proposition that Nancy intended to gift her house to her son, Doug, we do not disturb that finding. Therefore, we overrule Karen's second assignment of error.

III. Third Assignment of Error

{¶53} In her third assignment of error, Karen asserts that the trial court erred in conditioning the award of the Camry to her upon payment of $6,608.22 to Doug was not supported by the evidence.

{¶54} Karen claims that the Camry when left to Doug was subject to a loan with $10,685.42 still outstanding. She alleges that Doug's claim that he

used $3,000 of insurance proceeds from his mother to pay down the outstanding loan was not supported by the evidence.

{¶55} Karen stated that she and Doug refinanced the Camry in November of 2018. From November of 2018 to January of 2020, marital funds were used to pay down the loan. The parties separated on January 23, 2020, at which time Karen assumed full financial responsibility. Thus, Karen claims that the trial court's determination that $2,587.28 in marital funds was used to pay down the Camry loan is not supported by the evidence, as it fails to credit her for the loan payments she has paid since January of 2020.

{¶56} Karen further maintains that the loan on the Camry still has over $10,000 outstanding, and as such has only $2,000 of equity. At most, the court should have awarded Doug $1,000. Thus, Karen argues that the trial court erred in awarding Doug $6,608.22.

{¶57} In response, Doug claims that the record does not support Karen's assertion. Doug maintains that the trial court did not condition Karen's receipt of the Camry upon a payment of $6,608.22 to him. Instead, Karen's real argument seems to be that the trial court did not equitably divide the assets between the parties.

{¶58} Doug argues that the trial court found that he inherited the Camry with a $10,658.42 balance remaining on its loan. Each party testified that Doug used $3,000 in life insurance proceeds to pay down the loan on the Camry, and the parties received a loan for the remainder. Payments were made on the loan

during the marriage from November 2018 to August 2020 in the amount of $2,587.28.

{¶59} Doug claims that when Karen took out the 2021 loan on the Camry, she used most or all of the equity that the parties accrued in the Camry, and made it impossible for the trial court to equitably divide the vehicle between the parties. The trial court provided each party with their separate property interest in the vehicle while dividing any marital interests between them. The trial court provided the basis for the computation of Doug's equity in its decision and determined it to be $6,608.22. Doug concludes that the trial court's decision in this regard was not unreasonable, arbitrary, or unconscionable.

Law

{¶60} Karen's appeal involves two standards of review. First she challenges the trial court's findings that Doug made a $3,000 payment toward the Camry. She also challenges the trial court's determination that $2,587.28 in marital payments were made toward the Camry.

> The determination of whether a certain item of property constitutes marital property or separate property is a factual determination. When reviewing a trial court's characterization of property as either marital property or separate property, we must determine whether the trial court's decision is against the manifest weight of the evidence.

Rinehart v. Rinehart, 4th Dist. Gallia No. 96 CA 10, 1998 WL 282622, *2 (May 18, 1998), citing *Thomas v. Thomas*, Scioto App. No. 96 CA 2423, * 15 (July 14, 1997).

{¶61} Under a manifest-weight-of-the-evidence review, a "[trial] court's characterization [of property as marital or separate] 'will not be reversed if it is

supported by some competent, credible evidence.' " *Harrington v. Harrington*, 4th Dist. Gallia No. 08CA6, 2008-Ohio-6888, ¶ 11, quoting *Nance v. Nance*, Pike No. 95CA553, 1996 WL 104741, *5 (Mar. 6, 1996).

{¶62} Karen also alleges that the trial court's award of $6,608.22 to Doug was inequitable as compared to the value of the Camry, which was awarded to her. "Trial courts enjoy broad discretion when dividing marital property in a divorce proceeding." *Jenkins v. Jenkins*, 4th Dist. Highland No. 19CA19, 2021-Ohio-153, ¶ 32, citing *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131, 541 N.E.2d 597 (1989). Therefore, "an appellate court will not reverse a trial court's decision regarding the allocation of marital property absent an abuse of that discretion." *Id.*, citing *Elliott v. Elliott*, 4th Dist. Ross No. 05CA2823, 2005-Ohio-5405, ¶ 17.

{¶63} "The Supreme Court has defined an " 'abuse of discretion' as an unreasonable, arbitrary, or unconscionable use of discretion, or as a view or action that no conscientious judge could honestly have taken." *State v. Brady*, 119 Ohio St. 3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23, citing *State v. Cunningham,* 113 Ohio St.3d 108, 2007-Ohio-1245, 863 N.E.2d 120, ¶ 25. The failure to engage "in a ' "sound reasoning process" ' " in equitably allocating marital property is an abuse of discretion. *Jenkins* at 32, quoting *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14, quoting *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

Analysis

{¶64} On April 4, 2019, Doug inherited a 2015 Toyota Camry pursuant to his mother's will. Both parties testified that when Doug inherited the Camry it had a loan with $10,685.42 outstanding. Regarding the value of the Camry, each party submitted a value taken from Kelley Blue Book. Doug's was $13,883, which is the resale value of the vehicle between private parties. Karen's was $12,561, which was the trade-in value. The court's finding that the Camry was worth $13,000 is reasonable as it is in between the values the parties provided. It appears that by subtracting the amount of the loan balance of $10,685.42 from $13,000, the value of the Camry, the court found that the Camry had equity of $2,314.58 and awarded that amount to Doug, as his separate property. Karen does not contest this award in her appeal. Therefore, it remains intact.

{¶65} Karen first claims that there is no evidence supporting the trial court's finding that Doug paid the Camry loan down by $3,000 with life insurance proceeds he received from his mother. We disagree.

{¶66} Doug did not submit any documentary evidence showing that he paid the Camry loan down by $3,000. However, both he and Karen testified that Doug paid $3,000 toward the loan on the Camry. *See Cochrane Associates Inc. v. Northwood Inn*, 6th Dist. Lucas No. L-86-152, 1986 WL 14267 (Testimony alone is sufficient to prove that a payment has been made.)

{¶67} Therefore, the trial court's finding that Doug paid $3,000 toward the Camry loan was supported by some evidence. Accordingly, the trial court's

determination that Doug paid $3,000 toward the car loan is not against the manifest weight of the evidence

{¶68} Karen next argues that the trial court's determination that $2,587.28 in marital funds were used to pay down the Camry loan was not supported by the evidence. We disagree.

{¶69} On November 6, 2018, the parties took out a loan on the Camry for $7,685.42 (Camry loan). This loan also supports that Doug paid $3,000 toward the Camry loan because the balance on the Camry loan was $10,685.42 when he inherited the Camry from his mother. Doug made payments on that loan from its inception in November 2018 through January 2020 because Karen did not have a paying job during that time.

{¶70} Because these payments were made during the marriage, i.e., between September 10, 2011 (the date of the parties' marriage) through August 7, 2020 (the date Doug filed his divorce complaint), they were marital funds. The only evidence that provided a payoff on the Camry loan near the date of the termination of the parties' marriage was Exhibit G, which indicated that the loan balance on the Camry loan was $5,098.14 as of September 18, 2020. It appears that the trial court subtracted that $5,098.14, September 18, 2020 balance from the original principal balance of $7,685.42 to find that the marital payments made totaled $2,587.28.

{¶71} Karen also received possession of the Camry in January 2020, and she received the full benefit of the asset. She further refinanced the Camry loan a second time in September 2021, in which she borrowed additional money

besides what was necessary to pay off the then-existing lien on the Camry. This loan was taken out outside of the marital duration and was solely in Karen's name. Because the second loan was outside the duration of the parties' marriage and Karen testified to assuming full responsibility for the second refinance, this loan was not taken into consideration when the trial court determined the marital payments nor when the court allocated the equity in the Camry.

{¶72} Therefore, contrary to Karen's argument, the trial court's calculation that the parties made $2,587.28 in marital payments on the Camry loan was supported by some evidence. Accordingly, the trial court's decision in this regard was not against the manifest weight of the evidence.

{¶73} Thus, it appears that the trial court's award of $6,608.22 to Doug was the sum of the following: (1) $2,314.58 (Camry's equitable value when inherited by Doug), (2) $3,000 (Doug's payment with life insurance proceeds), and (3) $1,293.64 (Doug's half of the $2,587.28 marital payments). In turn, Karen received the Camry with an equity of approximately $7,901.86 ($13,000 (fair market value) less $5,098.14 (payoff). Under these facts, we find that the trial court's award of $6,608.22 to Doug was not unreasonable, arbitrary, or unconscionable. Therefore, we overrule Karen's third assignment of error.

IV. Fourth Assignment of Error

{¶74} Karen maintains that the trial court's award of spousal support was an abuse of the court's discretion. Karen relies on R.C. 3105.18(C)(1)(m), which requires a court to consider "lost income production capacity of a party that

resulted from that party's marital responsibilities" when determining whether to award spousal support. Karen maintains that for a substantial period of the marriage, she worked in "[Doug's] business, for no pay whatsoever." Thus, she claims that she not only lost income during that four-year period, but also social security that she would have earned.

{¶75} Karen also complains that the trial court's entry contained no explanation of how it determined that $450 per month for two years was sufficient spousal support, which is necessary when awarding spousal support.

{¶76} Under these circumstances, she claims that $450 per month for two years in supposal support is unreasonable, arbitrary, and unconscionable; It should have been more.

{¶77} In response, Doug maintains that courts assess whether spousal support is appropriate and if so for what amount by evaluating all the factors listed in R.C 3105.18(C). Further, courts have discretion to determine whether spousal support is reasonable. Doug claims that if the record reflects that the trial court considered the statutory factors in sufficient detail for a reviewing court to determine whether the spousal support is fair, equitable and in accordance with the law, then a reviewing court must uphold the award.

{¶78} Doug claims that the lost income production capacity in R.C. 3105.18(C)(1)(m) typically involves a party remaining at home to care for children, or a spouse quitting their job to work for the other spouse. In this case, the court considered the lost-income-factor from R.C. 3105.18(C)(1)(m), but

determined that there was no evidence that either Karen or Doug suffered an income loss.

{¶79} Therefore, Doug maintains that the trial court did not abuse its discretion in awarding Karen spousal support of $450 per month for two years. Accordingly, he asserts that we should affirm the trial court's award of spousal support.

Law

1. Standard of Review

{¶80} "Trial courts generally have broad discretion and 'wide latitude' when evaluating the appropriateness, reasonableness, and amount of a spousal support award." *Eichenlaub v. Eichenlaub*, 2018-Ohio-4060, 120 N.E.3d 380, ¶ 11 (4th Dist.), citing *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990); *Bolinger v. Bolinger*, 49 Ohio St.3d 120, 122, 551 N.E.2d 157 (1990); *Cherry v. Cherry,* 66 Ohio St.2d 348, 421 N.E.2d 1293 (1981). Thus, a "trial court's determination of spousal support pursuant to R.C. 3105.18 will not be reversed unless, considering the totality of the circumstances, the trial court abused its discretion." *Gulker v. Gulker*, 4th Dist. Scioto No. 5CA2377, 1996 WL 446799, *3, citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 95, 518 N.E. 2d 1197 (1988).

{¶81} As we recognized supra an " ' "abuse of discretion' " [means] an ' " 'unreasonable, arbitrary, or unconscionable' " ' use of discretion, or a view or action that no conscientious judge could have honestly have taken." ' " (Brackets and ellipses sic) *Eichenlaub* at ¶ 11 quoting *State v. Kirkland*, 140 Ohio St.3d 73,

2014-Ohio-1966, 15 N.E.3d 818 ¶ 67, quoting *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, 894 N.E.2d 671, ¶ 23. And "[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." Hutchinson, 85 Ohio App. 3d 173, 176, 619 N.E.2d 466 (4th Dist. 1993), citing *In re Jane Doe 1*, 57 Ohio St.3d 135, 566 N.E.2d 1181 (1991).

2. R.C. 3105.18

{¶82} R.C. 3105.18(C)(1) states 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 * * * the court *shall* consider *all* of the following factors * * * ." (Emphasis added.) One of those factors is "[t]he lost income production capacity of either party that resulted from that party's marital responsibilities." R.C. 3105.18(C)(1)(m).

Analysis

{¶83} The trial court's entry listed every factor from R.C. 3105.18(C)(1), and included a brief analysis discussing each factor as it applied to the facts of this case. Under several of these factors the trial court found that Doug fared better than Karen, e.g., Doug's income is approximately twice Karen's income, and Doug will receive approximately $500 more per month in retirement than Karen will receive. In considering most of the other factors, the court essentially found that neither party had a significant advantage over the other, or the factor was not applicable.

{¶84} Regarding R.C. 3105.18(C)(m), the court simply found that "[t]here is no evidence as to lost income from either parties' marital responsibilities." Karen argues that she lost income and the social security that she would have earned for much of her marriage by working for Doug's business without pay. Typically, however, in addressing R.C. 3105.18(C)(1)(m), courts find that a spouse loses income because that spouse forgoes taking a job to take care of a family obligation, like raising children. *See Beck v. Beck*, 8th Dist. Cuyahoga No. 75510, 1999 WL 1206588, *14. In the instant case, the parties did not have children. And although Karen may not have been paid personally while working for Doug's business, her work contributed to marital income.

{¶85} Furthermore, lost income is merely one of the 14 enumerated factors the trial court was required to consider, and after considering those factors, the court did in fact order Doug to pay Karen spousal support of $450 per month for two years. Therefore, we find that the trial court's order of spousal support was not unreasonable, arbitrary or unconscionable.

CONCLUSION

{¶86} We overrule all four of Karen's assignments of error. Therefore, we affirm the trial court's judgment entry of divorce.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Smith, P.J. and Abele, J.: Concur in Judgment and Opinion.

For the Court,

BY: ____________________________
Kristy S. Wilkin, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.