[Cite as *Bello v. Bello*, 2009-Ohio-5982.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

MARK STEVEN BELLO	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
SHEILA ANN BELLO	:	Case No. 09CAF040041
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 06DRA03121
JUDGMENT:	Affirmed/Reversed in Part & Remanded
DATE OF JUDGMENT ENTRY:	November 10, 2009

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
HAROLD R. KEMP JACQUELINE L. KEMP 88 West Mound Street Columbus, OH 43215	ANTHONY M. HEALD 125 North Sandusky Street Delaware, OH 43015

Farmer, P.J.

{¶1} On April 2, 1982, appellant, Sheila Bello, and appellee, Mark Bello, were married. The parties have seven children, five of which are emancipated and two are still minors, to wit: Dominic born November 4, 1994 and Anthony born August 12, 1998. On March 16, 2006, appellee filed a complaint for divorce.

{¶2} A hearing before a magistrate commenced on October 16, 2007. At the time of the hearing, a third child was still a minor, Mark born May 18, 1990. By decision filed October 24, 2007, the magistrate recommended a divorce, and made recommendations on spousal and child support, property division, and the allocation of parental rights and responsibilities. Both parties filed objections. By judgment entry filed October 22, 2008, the trial court ruled on the objections, sustaining some and overruling others. The trial court filed findings of fact and conclusions of law on March 16, 2009.

{¶3} A final judgment entry decree of divorce was filed on April 2, 2009. Appellant was named the residential parent and legal custodian of the minor children. Appellee was ordered to pay appellant child support in a graduated level from $1,633 per month to $1,315 then $911 as the children became emancipated. Appellee was also ordered to pay appellant spousal support in a graduated level from $3,000 per month to $4,000 then $5,000 as the children became emancipated, ending on February 28, 2018 or until either party died or appellant remarried or cohabitated. The trial court also divided the parties' assets and liabilities.

{¶4} On April 22, 2009, appellant filed an appeal and assigned the following errors:

I

{¶5} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY LIMITING THE DURATION OF SPOUSAL SUPPORT AWARDED TO APPELLANT."

II

{¶6} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION FAILING TO MAKE AN AWARD OF ATTORNEY FEES TO APPELLANT."

III

{¶7} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WITH RESPECT TO ITS DIVISION OF THE PARTIES' ASSETS AND LIABILITIES, SPECIFICALLY AS IT RELATES TO THE USAA CREDIT CARD DEBT."

{¶8} On April 28, 2009, appellee filed a cross-appeal and assigned the following errors:

CROSS-ASSIGNMENT OF ERROR I

{¶9} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION IN THE TRIAL COURT BY DETERMINING THAT THE CROSS-APPELLANT HAD EARNING ABILITY OF $210,000.00 PER YEAR AND ESTABLISHING SPOUSAL SUPPORT AND CHILD SUPPORT IN AMOUNTS AND FOR PERIODS THAT IT ESTABLISHED IN THIS MATTER, BASED ON THAT FINDING."

CROSS-ASSIGNMENT OF ERROR II

{¶10} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION IN THE TRIAL COURT BY DETERMINING THAT THE CROSS-APPELLANT WAS VOLUNTARILY

UNDEREMPLOYED AND IN NOT DETERMINING THAT THE APPELLANT WAS VOLUNTARILY UNDEREMPLOYED AND ESTABLISHING SPOUSAL SUPPORT AND CHILD SUPPORT BASED ON THOSE DETERMINATIONS."

CROSS-ASSIGNMENT OF ERROR III

{¶11} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY ADDRESS THE ISSUE OF THE EFFECTIVE DATE OF SPOUSAL SUPPORT AND HOW THAT AFFECTED THE OTHER PAYMENTS THAT WERE BEING MADE BY THE CROSS-APPELLANT AND ON BEHALF OF THE APPELLANT."

CROSS-ASSIGNMENT OF ERROR IV

{¶12} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION IN FAILING TO FIND THAT THE CROSS-APPELLANT HAD A SEPARATE PROPERTY INTEREST IN THE BUSINESS INTEREST KNOWN AS MARK BELLO D.D.S., INC. AND SETTING IT OFF IN THE PROPERTY DIVISION ORDERED."

CROSS-ASSIGNMENT OF ERROR V

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION BY FAILING TO ADDRESS THE ISSUE OF WHO SHOULD BE OBLIGATED TO PAY THE COST OF SALE AND TAX OBLIGATIONS THAT AROSE FROM THE SALE OF THE BUSINESS KNOWN AS MARK S. BELLO, D.D.S., INC."

CROSS-ASSIGNMENT OF ERROR VI

{¶14} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION BY FAILING TO DIVIDE THE PARTIES' ASSETS AND LIABILITIES IN AN EQUITABLE FASHION."

CROSS-ASSIGNMENT OF ERROR VII

{¶15} "THE COURT ERRED TO THE PREJUDICE OF THE CROSS-APPELLANT AND ABUSED ITS DISCRETION IN FINDING THAT THE CROSS-APPELLANT WAS IN CONTEMPT FOR FAILING TO COMPLY WITH CERTAIN TEMPORARY ORDERS."

I

{¶16} Appellant claims the trial court erred in not ordering permanent spousal support. We disagree.

{¶17} An award of spousal support is in the trial court's sound discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. "An award of sustenance alimony must not exceed an amount which is reasonable." *Kunkle,* at paragraph three of the syllabus.

{¶18} Pursuant to R.C. 3105.18(C), there are many factors to be considered in awarding spousal support:

{¶19} "(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration

of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶20} "(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;

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

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

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

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

{¶25} "(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;

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

{¶27} "(h) The relative extent of education of the parties;

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

{¶29} "(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;

{¶30} "(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;

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

{¶32} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

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

{¶34} In establishing spousal support, the trial court ordered the following in its judgment entry decree of divorce filed April 2, 2009, ¶19:

{¶35} "Mark shall pay spousal support of $3,000 per month commencing November 1, 2007 through the month in which Mark Christian is emancipated. Mark shall pay spousal support of $4,000 per month after the month in which Mark Christian is emancipated until Dominic and Anthony are emancipated. Mark shall pay spousal support of $5,000 per month commencing with the date that all the children are emancipated or custody thereof has changed and ending with February 28, 2018.***

{¶36} "Spousal support shall be paid through the Delaware County Child Support Enforcement Agency with proper poundage by proper enforcement order. Spousal support shall also terminate on the earliest of the following events: 1) the death of either Party; 2) payment of the payment due February 1, 2018; 3) Sheila's remarriage or cohabitation with a non-related adult male.***The Court retains jurisdiction to modify this award based on changed circumstances of the Parties as defined in Section 3105.18 of the Ohio Revised Code."

{¶37} Appellant argues this court's opinion in *Hutta v. Hutta,* 177 Ohio App.3d 414, 2008-Ohio-3756, should be used as a template in this case as the *Hutta* case also involved a long-term marriage with a stay-at-home wife and a professional husband (orthodontist). In *Hutta,* this court reversed the trial court limiting spousal support to eight years based upon the trial court rejecting all other additional income of the husband save his income generated from a very successful orthodontic practice. The *Hutta* decision was limited to the specific facts of the case, ¶36-41:

{¶38} "36. By refusing to consider the significant income that appellee derived from property obtained pursuant to the property settlement, we find that the trial court erred as a matter of law. We also find that the trial court abused its discretion under the totality of evidence presented, which included the parties' standard of living, the long duration of the marriage, the disparate income and earning power of the parties, and appellant's responsibility for caring for the children.

{¶39} "37. Appellant further challenges the trial court's decision to award spousal support for only eight years, which coincides with the parties' youngest child reaching the age of twenty-two. Appellant contends the trial court erred in not awarding spousal support for an indefinite period of time. Appellant relies upon *Kunkle v. Kunkle*, (1990) 51 Ohio St.3d 64, 554 N.E.2d 83, for the proposition that indefinite spousal support may be appropriate under the circumstances of this case (i.e., marriage of long duration, a homemaker spouse with little opportunity of seek meaningful employment outside the home).

{¶40} "38. Appellee argues there is no statutory requirement for a trial court to make an order of spousal support indefinite in cases involving marriages of long duration, although a trial court may do so under reasonable circumstances.

{¶41} "39. In *Kunkle*, the Ohio Supreme Court held, at paragraph one of the syllabus: 'Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities.'

{¶42} "40. We agree with Appellee's contention that *Kunkle* should not be read to mandate permanent spousal support in marriages of long duration. See also, *Sears v. Sears,* Stark App. No. 2001CA00368, 2002-Ohio-4069 (affirming denial of permanent spousal support in case involving thirty-four year marriage with both spouses in their mid-fifties).

{¶43} "41. However, under the financial facts and circumstances of this case, and being mindful of the purpose of spousal support, we are persuaded that the trial court abused its discretion in limiting spousal support duration to eight years without any stated justification. At the time of divorce, Appellant was age 49. Thus, spousal support would terminate at age 57. The evidence reflected an unlikelihood Appellant could develop a meaningful career outside the home and she would be unable to access retirement accounts until age 59 ½ or social security benefits at age 62. Thus, there exists a gap of at least one and a half years to five years when Appellant would be

without support maintenance before she reaches retirement age. Appellee certainly has the resources and ability to provide continued support until Appellant could achieve retirement age. The record simply does not support the trial court's determination that eight years was reasonable and nor does it provide insight to support the trial court's reasoning in this regard."

{¶44} In the case sub judice, the trial court reviewed the objections to the magistrate's decision on the duration of spousal support and found the following:

{¶45} "The magistrate ordered spousal support to terminate on February 28, 2018. The divorce was filed March of 2006. Through February 28, 2018 will be a period of 12 years. The Parties were married 23.97 years from the date of marriage to the date of filing. The objection is overruled as to the duration of spousal support." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶8.

{¶46} The trial court's findings of fact in relation to the R.C. 3105.18(C) factors to be considered are extensive, including a computerized analysis of the number of children and each parties' net income to determine percentages and amounts for each party. In its findings of fact and conclusions of law filed March 16, 2009 at ¶13, the trial court determined the following in pertinent part:

{¶47} "The Parties were married on April 2, 1982 and separated on or about the end of April of 2003, a period of 23.9 years. The date of trial was October 16, 17, and 18, 2007, a period of 25.5 years to trial. The Parties established a middle class standard of living during the marriage. The parties' equity is marked by the number of children as compared to cash in accounts. The residence has net equity of $18,000 -

$56,000, the dental practice has net equity of $250,000. Mark has a retirement account with $220,000 in it.

{¶48} "Sheila is age 55. Mark is age 52. Both parties are in good physical, mental, and emotional condition. Mark's income and earning ability is $210,000 per year. Sheila's income and earning ability is $14,248 per year.

{¶49} "Sheila has a college degree. Mark has a college degree and post degree work in dentistry. The relative assets and liabilities of the parties, including any court-ordered payments by the Parties and the retirement benefits of the Parties are as set forth herein. Neither Party is prevented from seeking employment outside the home due to that Party being a custodian of a minor child. Sheila took care of the children while Mark completed his training and advanced education. Sheila is considering returning to school in nursing. Sheila did lose income production capacity due to her assumption of marital responsibilities with respect to the children. Spousal support is deductible to the payor and is income to the payee."

{¶50} As cited supra, the trial court retained jurisdiction over the issue of spousal support. It is clear that the trial court addressed the factors of the statute vis-à-vis the amount of available funds. Unlike *Hutta,* the parties did not have any large assets to divide as marital property i.e., three million to each in *Hutta*. The trial court noted the equity of the marriage was the seven children. Except for high life insurance policies, the amounts in bank accounts were minimal as was the equity in the marital property. The only asset of high value was the dental practice ($240,000 plus), which was divided as marital property.

{¶51} Although there may be the trend to establish formulas for spousal support, the judiciary of Ohio has steadfastly rejected formulization of discretionary issues. In this case, the trial court's retention of jurisdiction will enable the trial court to take a second look at spousal support in this ever-changing economy.

{¶52} Upon review, we find the trial court did not abuse its discretion in limiting the duration of spousal support.

{¶53} Assignment of Error I is denied.

II

{¶54} Appellant claims the trial court erred in failing to award her attorney's fees. We agree in part.

{¶55} An award of attorney's fees lies within the trial court's sound discretion. *Rand v. Rand* (1985), 18 Ohio St.3d 356; *Blakemore.*

{¶56} R.C. 3105.73 governs award of attorney's fees and litigation expenses. Subsection (A) states the following:

{¶57} "(A) In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate."

{¶58} In overruling appellant's objection regarding attorney's fees, the trial court stated, "Sheila's eighth objection is that the magistrate ordered each Party to pay his or her attorney fees. After the division of assets and the payment of child support and

spousal support, the Parties are equally able to pay his and her own attorney fees." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶9.

{¶59} Appellant argues she will have difficulty in paying her legal fees as they total over $32,000. Appellant's income is $8.00/$8.50 an hour or $13,260 to $14,248 per year depending on how many hours per week she works. See, Judgment Entry Findings of Fact and Conclusions of Law filed March 16, 2009 at ¶6. Appellee's earning ability is $210,000 per year, although he is planning on working in Oregon for the V.A. making $175,000 per year. See, Judgment Entry Findings of Fact and Conclusions of Law filed March 16, 2009 at ¶7. However, included in appellant's "income" is the child and spousal support awards, thereby increasing her yearly income significantly. In subtracting child and spousal support from appellee's income, his income is reduced significantly.

{¶60} Undoubtedly the payment of attorney's fees will be a hardship for both parties. Given the lack of available funds to each party, we find the trial court did not abuse its discretion in not awarding attorney's fees to appellant.

{¶61} As for appellant's contempt action against appellee filed March 6, 2007 for non-payment of child and spousal support, the trial court found the following:

{¶62} "Sheila's motion in contempt was for Mark's failure to pay for child support and spousal support and for Mark's failure to pay ½ the tax refund. Mark was $1,830.47 in arrears as of October 31, 2007. Mark's attorney is holding the tax refunds totaling $10,399 (Sheila's Exhibit 23). This objection is sustained. Mark immediately pay the $1,830.47. Mark's attorney immediately release ½ of the tax refund less the amount

paid to Mr. Zimmerman for appraisal fees to Sheila. Mark may keep the other ½." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶12.

{¶63} The trial court did not address the issue of attorney's fees. We remand this issue to the trial court to determine attorney's fees for the contempt action, and order appellee to pay said amount.

{¶64} Assignment of Error II is granted in part and denied in part.

III

{¶65} Appellant claims the trial court erred in dividing the parties' assets and liabilities, specifically, the USAA credit card debt. We agree in part.

{¶66} The trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb. v. Holcomb* (1989), 44 Ohio St.3d 128; *Blakemore.*

{¶67} On the issue of the USAA credit card debt, the trial court found the following:

{¶68} "Sheila's fifth objection is that the Magistrate ordered Sheila to pay all sums in excess of $6,800 on the Parties' joint USAA credit card.

{¶69} "The complaint was filed on March 16, 2006. The complaint listed the balance of the USAA credit card to be $6,800. Mark's Exhibit T shows that the balance of the USAA credit card was $8,499.99 as of March 15, 2006. From March 20, 2007 to March 28, 2007, Sheila charged $11,902.46 on this card. Sheila was served on April 3, 2006. This objection is overruled. Sheila should be responsible for all charges in

excess of $8,500. The $8,500 balance as of March 15, 2006 is a marital debt and should be paid equally by the Parties." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶6.

{¶70} During the time that the divorce was pending, appellee was responsible for child and spousal support and the mortgage payments. Appellant admitted that the majority of the credit card charges were for attorney's fees. T. at 576. Appellant explained she did not go on a spending spree, but bought tires for a vehicle, paid the balance of her tooth implant, and purchased a webcam for one of the children. T. at 576-577. When appellee left the marital residence, he gave appellant a check in the amount of $9,000, telling her he was sorry for leaving. T. at 578. Other than the check, appellant had only the USAA credit card in her name. T. at 580. Also purchased on the credit card were a dishwasher, a washer and dryer, a gas range, a new bed, and new mattresses for some of the children, all of which was to their mutual benefit. T. at 582-584. The marital residence was ordered sold with any equity to be split jointly. We find that apart from the amounts charged as attorney's fees, the debt on the USAA account should be divided equally.

{¶71} Assignment of Error III is granted in part and denied in part. The matter is remanded to the trial court to determine what portion of the USAA debt constitutes attorney's fees. That amount is appellant's obligation. The remaining amount should be classified as joint debt and be divided equally.

CROSS-ASSIGNMENT OF ERRORS I AND II

{¶72} Appellee claims the trial court erred in determining appellee's earning ability was $210,000 and he was voluntarily underemployed. Appellee also claims the

trial court erred in failing to determine that appellant was voluntarily underemployed. We disagree.

{¶73} This issue is examined under the abuse of discretion standard. *Blakemore.*

{¶74} Appellee argues his income from the Veterans Administration in Oregon will be $175,000 and that is the amount that should be attributed to him. Prior to the Oregon position, the historical income of appellee was over $250,000. See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶2. Appellee argues the parties "borrowed" from the dental practice to sustain their large family which was reported as "income" because of the corporate format that the business operated under. Appellee's Brief at 13. Therefore, appellee argues he never actually earned the amounts reported in the income tax returns.

{¶75} Whether appellee "borrowed" the funds and used them or received them in the form of a paycheck, the funds were still income he received from the result of his labor.

{¶76} Upon review, we find no error in determining appellee's income to be $210,000.

{¶77} As for the voluntary underemployment arguments, we find the trial court did not make any determination, and appellee did not file objections, regarding this issue. Civ.R. 53(D)(3)(b).

{¶78} Cross-Assignments of Error I and II are denied.

CROSS-ASSIGNMENT OF ERROR III

{¶79} Appellee claims the trial court erred in determining the spousal support order should commence on November 1, 2007. We disagree.

{¶80} In ruling on appellant's objection regarding the amount of child support, the trial court stated the following:

{¶81} "Sheila's argument ignores the fact that the Magistrate's Decision also ordered Mark to pay the first mortgage of $2,000 per month and the second mortgage of $100 per month until the residence sold. However, to disentangle the relationship between the Parties, it is better to start spousal support effective November 1, 2007." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶3.

{¶82} Appellee argues in setting the commencement date of November 1, 2007, the amounts he paid during the pendency of the objections were unaddressed and he deserves credit for those amounts. According to appellee, during the time the objections were pending, he was paying the mortgages, insurance, tuition, child support, and the USAA credit card bill. Appellee's Brief at 19.

{¶83} The parties were still married during the pendency of the objections, October 24, 2007 to October 22, 2008, almost a year. The magistrate set the date of spousal support as, "commencing the month after the month in which the sale of the real estate takes place***." See, Magistrate's Decision filed October 24, 2007 at Decision No. 18. This arbitrary date could be manipulated and in fact left the parties in limbo. Further, in establishing spousal support, the trial court credited appellee "with all payments that the (sic) has made on the first and second mortgage on or after

November 1, 2007." See, Judgment Entry Decree of Divorce filed on April 2, 2009 at ¶19.

{¶84} Upon review, we find no error in the trial court choosing November 1, 2007 to commence spousal support.

{¶85} Cross-Assignment of Error III is denied.

CROSS-ASSIGNMENT OF ERROR IV

{¶86} Appellee claims $70,000 he used to purchase his first dental practice from a $75,000 gift given to him by his uncle should have been credited to him as separate property. We disagree.

{¶87} In its judgment entry ruling on objections filed October 22, 2008 at ¶14, the trial court found the following on the $70,000:

{¶88} "Mark's second objection is that the Court did not recognize the separate property of Mark in the dental practice, specifically with respect to the $70,000 that came from Mark's uncle. While the court does not disbelieve Mark's assertion that $70,000 came from his uncle, there is no evidence of the check. Also substantial improvements ($350,000) were made to the practice after its purchase. The evidence is not sufficient to uphold a tracing. This objection is overruled."

{¶89} It is clear that the first practice was sold and merged into the purchase of the second practice. T. at 308. There was no direct tracing of the original assets. T. at 307-308; *Peck v. Peck* (1994), 96 Ohio App.3d 731.

{¶90} Cross-Assignment of Error IV is denied.

CROSS-ASSIGNMENT OF ERROR V

{¶91} Appellee claims the trial court erred in failing to determine who was obligated to pay the cost of sale and tax obligations for the dental practice. We disagree.

{¶92} In its judgment entry ruling on objections filed October 22, 2008 at ¶13, the trial court found "[n]o evidence was presented on the cost of closing out the corporation."

{¶93} We note in the same paragraph, the trial court sustained appellee's objection regarding capital gains on the sale of the practice. The trial court ordered the capital gains tax to be paid from the sale of the practice prior to the equitable distribution between the parties. See, Judgment Entry Decree of Divorce filed April 2, 2009 at ¶16.

{¶94} Cross-Assignment of Error V is denied.

CROSS-ASSIGNMENT OF ERROR VI

{¶95} Appellee claims the trial court erred in dividing the USAA credit card debt.

{¶96} We addressed this matter in Appellant's Assignment of Error III.

{¶97} Cross-Assignment of Error VI is granted in part and denied in part.

CROSS-ASSIGNMENT OF ERROR VII

{¶98} Appellee claims the trial court erred in finding he was in contempt for failing to comply with certain temporary orders. We disagree.

{¶99} As cited supra, the trial court found appellee in contempt as follows:

{¶100} "Sheila's motion in contempt was for Mark's failure to pay for child support and spousal support and for Mark's failure to pay ½ the tax refund. Mark was $1,830.47 in arrears as of October 31, 2007. Mark's attorney is holding the tax refunds totaling

$10,399 (Sheila's Exhibit 23). This objection is sustained. Mark immediately pay the $1,830.47. Mark's attorney immediately release ½ of the tax refund less the amount paid to Mr. Zimmerman for appraisal fees to Sheila. Mark may keep the other ½." See, Judgment Entry Ruling on Objections filed October 22, 2008 at ¶12.

{¶101} Appellee averred prior hearings were held on this issue:

{¶102} "The issue of whether or not the Temporary Orders could be determined to be current could not have even been passed upon inasmuch as that issue was addressed at a prior hearing on December 11, 2006 and revisited in the hearing on April 30, 2007. In those hearings those issues were raised and rejected. That transcripts for those hearings were not ordered and were not available for review by the Court. Had they been the Court would have seen that the evidence established that Cross-Appellant was not only current but had, in fact, paid out significantly more than what he was required to under any of the Temporary Orders of this Court." Appellee's Brief at 23.

{¶103} In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, the Supreme Court of Ohio held the following:

{¶104} "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. See *State v. Skaggs* (1978), 53 Ohio St.2d 162. This principle is recognized in App.R. 9(B), which provides, in part, that '***the appellant shall in writing order from the reporter a complete transcript or a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record.***.' When portions of the transcript necessary for resolution of assigned

errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." (Footnote omitted.)

{¶105} Cross-Assignment of Error VII is denied.

{¶106} The judgment of the Court of Common Pleas of Delaware County, Ohio, Domestic Relations Division is hereby affirmed in part and reversed in part.

By Farmer, P.J.

Wise, J. concur and

Hoffman, J. concurs in part and dissents in part.

__s/ Sheila G. Farmer_____

_s/ John W. Wise_____

_____

JUDGES

SGF/sg 0917

Hoffman, J., concurring, in part, and dissenting, in part

{¶107} I concur in the majority's analysis and disposition of Appellant's first assignment of error.

{¶108} I concur, in part, with the majority's analysis and disposition of Appellant's second assignment of error. I agree the trial court did not abuse its discretion in not awarding Appellant attorney fees for the divorce action. I dissent from the majority's decision to reverse and remand the issue of attorney fees for the contempt action as I do not find this issue raised or argued in Appellant's brief under this assignment of error.

{¶109} I also concur, in part, and dissent, in part, with the majority's analysis and disposition of Appellant's third assignment of error. I agree the debt liability for the USAA credit card needs to be redetermined. In the first instance, the order for Appellant to pay all sums in excess of $6,800.00 should be corrected to reflect sums in excess of $8,500.00, rather than $6,800.00. And while I agree some purchases after March 15, 2006, ought properly be considered marital debt, I would not limit the trial court's recalculation of Appellant's individual charges to only her attorney fees.

{¶110} Turning to Appellee's cross-appeal, I concur in the majority's analysis and disposition of Appellee's first, second, third, fifth and seventh cross-assignments of error.

{¶111} I respectfully dissent from the majority's decision to overrule Appellee's fourth cross-assignment of error.

{¶112} I cannot reconcile the trial court's conclusion it believed Appellee's assertion $70,000.00 came from his uncle to purchase the first dental practice yet

denied finding it was his separate property. While the existence of a check or other paper trail would be the best demonstrative evidence of the origin of the $70,000.00, I do not believe written documentation is a necessary prerequisite for tracing. Because both parties acknowledged they did not have any money to make the initial investment to acquire the practice and given the trial court's indication it believed Appellee's testimony with regard to the origin of the $70,000, I would sustain this cross-assignment of error and remand this issue to the trial court for redetermination of whether the $70,000.00 is marital or separate property under all the evidence submitted regarding Appellee's dental practice.

{¶113} Finally I concur, in part, and dissent, in part, from the majority's disposition of Appellee's sixth cross-assignment of error for the reasons set forth supra in my discussion of Appellant's third assignment of error.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

MARK STEVEN BELLO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
SHEILA ANN BELLO	:	
Defendant-Appellant	:	CASE NO. 09CAF040041

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, Domestic Relations Division is affirmed in part and reversed in part. The matter is remanded to said court to determine attorney's fees for the contempt action, and order appellee to pay said amount. Also, the trial court is to determine what portion of the USAA debt constitutes attorney's fees. That amount is appellant's obligation. The remaining amount should be classified as joint debt and be divided equally. Costs to be divided equally between the parties.

__s/ Sheila G. Farmer_____

_s/ John W. Wise_____

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JUDGE