

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VIRGINIA FAYE BATTEN

Plaintiff-Appellant

-vs-

WILLIAM HENRICHS BATTEN

Defendant-Appellee

: JUDGES:

:
: Hon. W. Scott Gwin, P.J.
: Hon. Sheila G. Farmer, J.
: Hon. Patricia A. Delaney, J.

: Case No. 09-CA-33

: O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Court of
Common Pleas, Domestic Relations
Division, Case No. 2005 DR 00106

JUDGMENT:

Affirmed in part; Reversed in part and
Remanded

DATE OF JUDGMENT ENTRY:

April 23, 2010

APPEARANCES:

For Plaintiff-Appellant:

RANDY S. KUREK
250 E. Broad St., Suite 900
Columbus, OH 43215

For Defendant-Appellee:

GERALD L. STEBELTON
P.O. Box 130
109 N. Broad St.
Lancaster, OH 43130-0130

Delaney, J.

{¶1} Plaintiff-Appellant, Virginia Batten appeals the May 12, 2009 Judgment Entry – Decree of Divorce issued by the Fairfield County Court of Common Pleas, Domestic Relations Division. Defendant-Appellee is William Batten.

STATEMENT OF THE FACTS AND THE CASE

{¶2} Appellant and Appellee were married on September 15, 1984. One child was born of the marriage, and is now emancipated.

{¶3} Appellant filed her complaint for divorce on March 5, 2005. Appellee filed an answer and counterclaim. During the pendency of the case, the judge originally assigned to the case retired from the bench. Upon motion by Appellee, the Ohio Supreme Court assigned the retiring judge to preside over the case.

{¶4} A trial was held on October 12, 2007, two and half years after the filing of the complaint. On the morning of trial, Appellant voluntarily dismissed her complaint and the 17-day trial proceeded on Appellee's counterclaim.

{¶5} Appellee is an urologist and is self-employed through his medical practice. His gross income from the medical practice in 2006 was \$475,000. Appellant was a career homemaker for a majority of the marriage. She has a high school diploma and she had been taking courses at Columbus State University for an associate's degree in accounting. The trial court established the termination date of the marriage as December 31, 2005. At the time of the termination of the marriage, Appellant was 48 years old and Appellee was 50 years old.

{¶6} In addition to Appellee's income from his medical practice, Appellee had interest in several other business ventures. The parties had numerous bank and

investment accounts with substantial cash balances; however, the parties lived a frugal lifestyle.

{¶7} One year later, the trial court issued its Findings of Fact and Conclusions of Law on October 7, 2008 and then filed a judgment entry clarifying the previous entry on December 2, 2008. The trial court subsequently filed the Decree of Divorce on May 12, 2009.

{¶8} Since June 2005, Appellant had been receiving \$5,000 per month in spousal support. The trial court found that Appellant was entitled to spousal support in the amount of \$7,500 per month from May 12, 2009 to December 31, 2012. From January 1, 2013 to December 31, 2014, Appellant would be entitled to \$2,500 per month in spousal support. The trial court judge determined the amount and duration of spousal support based on his conclusion that the parties' marriage was not a long-term marriage. The trial court further found that the amount of spousal support was appropriate based on Appellant obtaining her associate's degree in accounting and employed in the accounting field by December 31, 2010.

{¶9} Appellant timely appealed the trial court's decision and herein raises the following Assignments of Error.

ASSIGNMENTS OF ERROR

{¶10} Appellant raises nine Assignments of Error:

{¶11} "I. THE TRIAL COURT'S DETERMINATION AS TO THE DE FACTO TERMINATION DATE OF THE MARRIAGE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND CONTRARY TO LAW.

{¶12} “II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN VALUING ASSETS AS OF DIFFERENT DATES, WITHOUT A DETERMINATION AS TO WHY IT WOULD BE EQUITABLE TO DO SO.

{¶13} “III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DETERMINING THAT HUSBAND HAD CERTAIN SEPARATE PROPERTY, WHEN THE PROPERTY WAS NOT PROPERLY IDENTIFIED AND TRACED.

{¶14} “IV. THE TRIAL COURT’S DETERMINATION RELATING TO SPOUSAL SUPPORT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND CONTRARY TO LAW, IN THAT THE AWARD WAS FOR A DEFINITE PERIOD OF TIME, AND HAD A SPECIFIC DATE WHEN THE SUPPORT WOULD BE MODIFIED.

{¶15} “V. THE TRIAL COURT ERRED IN NOT AWARDING TO PLAINTIFF REASONABLE ATTORNEYS FEES, AND IN NOT CONSIDERING THE AMOUNT OWED AS A MARITAL DEBT.

{¶16} “VI. THE TRIAL COURT ERRED IN NOT ISSUING A DECISION ON THE CONTEMPT MATTER PENDING AGAINST CLARK DUPLER.

{¶17} “VII. THE TRIAL COURT ERRED ON EVIDENTIARY RULINGS, TO THE PREJUDICE OF PLAINTIFF.

{¶18} “VIII. THE TRIAL COURT ERRED IN ITS DETERMINATION AS TO PLAINTIFF’S EARNING ABILITY, BASED UPON THE TESTIMONY OF STEVEN ROSENTHAL.

{¶19} “IX. THE TRIAL COURT ERRED IN NOT CONTINUING THE TRIAL TO ENABLE PLAINTIFF TO COMPLETE DISCOVERY.”

I.

{¶20} In her first Assignment of Error, Appellant argues the trial court erred in establishing the termination date of the parties' marriage. We disagree.

{¶21} R.C. 3105.171(A)(2) provides that, except when the court determines that it would be inequitable, the date of the final hearing is usually the date of termination of the marriage. *Combs v. Combs*, Stark App. No. 2008CA00169, 2009-Ohio-1683, ¶21. Thus, R.C. 3105.171(A)(2) creates a statutory presumption that the proper date for the termination of a marriage, for purposes of the division of marital property, is the date of the final divorce hearing. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 630, 725 N.E.2d 1165. However, the trial court has broad discretion in choosing the appropriate marriage termination date and this decision cannot be disturbed on appeal absent an abuse of discretion. See *Berish v. Berish* (1982), 69 Ohio St.2d 318, 321, 432 N.E.2d 183.

{¶22} R.C. 3105.171(A)(2) establishes an alternative date for determining what is marital property:

{¶23} "(A) As used in this section:

{¶24} " * * *

{¶25} "(2) 'During the marriage' means whichever of the following is applicable:

{¶26} "(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;

{¶27} "(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."

{¶28} Courts, however, should be reluctant to use a de facto termination of marriage date unless the evidence clearly and bilaterally shows that it is appropriate based on the totality of the circumstances. *Boggs v. Boggs*, Delaware App. No. 07 CAF 02 0014, 2008-Ohio-1411, ¶66 citing *Day v. Day* (1988), 40 Ohio App.3d 155, 158, 532 N.E.2d 201; *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 689 N.E.2d 112; *Schnieder v. Schnieder* (1996), 110 Ohio App.3d 487, 674 N.E.2d 796.

{¶29} Generally, the trial court has broad discretion in choosing the appropriate marriage termination date and this decision cannot be disturbed on appeal absent an abuse of discretion. *Boggs*, supra citing *Berish v. Berish*, supra. "The abuse of discretion standard is based upon the principle that a trial court must have the discretion in domestic relations matters to do what is equitable given the facts and circumstances of each case." *Jefferies v. Stanzak* (1999), 135 Ohio App.3d 176, 179, 733 N.E.2d 305 citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. Therefore, in order to find an abuse of discretion there must be a determination that the trial court's judgment is "unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶30} In the case sub judice, the trial court determined that the totality of the circumstances necessitated a de facto termination date of December 31, 2005. Appellee moved out of the marital property in January 2005. The trial court found the testimony showed that the parties believed that the marriage ended at the time of

separation. Neither party accessed the other party's individual banking or investment accounts after that time.

{¶31} On the record before us, we cannot find the trial court abused its discretion in determining the de facto termination date of the marriage was December 31, 2005.

{¶32} Appellant's first Assignment of Error is overruled.

II.

{¶33} Appellant argues in her second Assignment of Error that the trial court erred in valuing assets on different dates, rather than valuing all assets as of December 31, 2005. We disagree.

{¶34} Generally, the court must choose a specific date for purposes of valuation and use it consistently; a party cannot pick and choose what dates to value certain items of marital property. *Brown v. Brown*, Licking App. No. 2008CA0111, 2009-Ohio-4913, ¶43 citing *Frohman v. Frohman*, Trumbull App. No.2001-T-0021, 2002-Ohio-7274. However, in certain cases it may be necessary for the trial court to use different dates for valuation purposes. *Id.* However, this exception is very limited in scope, and when using different valuation dates, the court must clearly set forth its reasons for doing so. *Id.*

{¶35} As stated above, the parties have numerous marital assets. Upon a review of the record, the trial court valued the majority of the assets as of the de facto termination date of the marriage on December 31, 2005. The assets for which the trial court utilized a different valuation date, we find the trial court clearly set forth its explanations for doing so and was not an abuse of discretion.

{¶36} Appellant's second Assignment of Error is overruled.

III.

{¶37} Appellant argues in her third Assignment of Error that the trial court erred in determining that Appellee had certain separate property when the property was not properly identified and traced. We disagree.

{¶38} A trial court has broad discretion in dividing marital assets and liabilities in a divorce action. *Lee v. Lee*, Licking App. No. 2008CA112, 2009-Ohio-5250, ¶¶85-87 citing *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. Accordingly, an appellate court is limited to a determination of whether, under the totality of the circumstances, the trial court abused its discretion in dividing the property. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597, 599.

{¶39} R.C. 3105.171(A)(6)(a) defines separate property as "(ii) Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage."

{¶40} However, "[t]he 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). Therefore, traceability is central when determining whether separate property has "lost its separate character" after being commingled with marital property. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300, 1302. The party seeking to establish an asset as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property. *Peck* at 734, 645 N.E.2d 1300. The characterization of property as separate or marital is a mixed question of law and

fact, not discretionary, and the characterization must be supported by sufficient, credible evidence. *Kotch v. Kotch*, 178 Ohio App.3d 358, 2008-Ohio-5084, 897 N.E.2d 1191, ¶19 citing *McCoy v. McCoy* (1995), 105 Ohio App.3d 651, 654, 664 N.E.2d 1012; *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 676 N.E.2d 1210. Once the characterization has been made, the actual distribution of the asset may be properly reviewed under the more deferential abuse-of-discretion standard.

{¶41} Appellant argues the trial court erred as to the determination of whether certain inherited funds and trust accounts were separate or marital property. In the Findings of Fact and Conclusions of Law, the trial court observed that much of the case revolved around the parties' financial investments and whether the marital funds had been commingled with Appellee's inherited funds. The trial court stated that it had reviewed the hundreds of exhibits and found that Appellee demonstrated by a preponderance of the evidence that the funds claimed to be separate property by Appellee were traceable as separate property.

{¶42} Based on the entire record in this matter, we find the trial court's characterization of the assets as separate property to be supported by sufficient and credible evidence.

{¶43} Appellant's third Assignment of Error is overruled.

IV.

{¶44} Appellant argues in her fourth Assignment of Error the trial court erred in determining the amount and duration of spousal support. We agree.

{¶45} Pursuant to R.C. 3105.18(B), a trial court may award reasonable spousal support to either party upon request and after the court determines the division or disbursement of property under R.C. 3105.171.

{¶46} In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, terms of payment, and duration of spousal support, R.C. 3105.18(C)(1) directs the trial court to consider all 14 factors set forth therein:

{¶47} “(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;

{¶48} “(b) The relative earning abilities of the parties;

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

{¶50} “(d) The retirement benefits of the parties;

{¶51} “(e) The duration of the marriage;

{¶52} “(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;

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

{¶54} “(h) The relative extent of education of the parties;

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

{¶56} “(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;

{¶57} “(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;

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

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

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

{¶61} In addition, R.C. 3105.18(C)(2) states that in determining whether spousal support is reasonable and in determining the amount and terms of payment of spousal support, each party shall be considered to have contributed equally to the production of marital income.

{¶62} Trial courts must consider all of the factors listed in R.C. 3105.18(C). However, this court has previously held that a trial court need not acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C), and we may not assume that the evidence was not considered. *Hutta v. Hutta*, 177 Ohio App.3d 414, 2008-Ohio-3756, 894 N.E.2d 1282, ¶127 citing *Clendening v. Clendening*, Stark App. No.

2005CA00086, 2005-Ohio-6298, 2005 WL 3150321, at ¶ 16, citing *Barron v. Barron*, Stark App. No. 2002CA00239, 2003-Ohio-649, 2003 WL 294353. The trial court must set forth only sufficient detail to enable a reviewing court to determine the appropriateness of the award. *Id.*, citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197.

{¶63} The trial court found that Appellant was entitled to spousal support in the amount of \$7,500 per month from May 12, 2009 to December 31, 2012. From January 1, 2013 to December 31, 2014, Appellant would be entitled to \$2,500 per month in spousal support. At the date of termination of the spousal support, Appellant would be 57 years old. The trial court judge determined the amount and duration of spousal support based on his conclusion that the parties' approximate 21-year marriage (determined as of the date of termination) did not qualify as a long-term marriage.

{¶64} The trial court further found that the amount of spousal support was appropriate based on Appellant obtaining her associate's degree in accounting and employed in the accounting field by December 31, 2010. Appellant would be 53 years old. The trial court found the evidence showed that Appellant could earn approximately \$30,000 per year. If Appellant obtained her bachelor's degree in accounting by December 31, 2012, her income would be higher and she could work towards obtaining her license as a Certified Professional Accountant. In 2012, Appellant would be 55 years old. The trial court concluded that by providing her with \$7,500 per month in spousal support until 2012, Appellant would have sufficient funds to maintain the lifestyle she was accustomed to and preserve her marital assets, while she paid for and completed her college education.

{¶65} As an initial matter, we find that the trial court's decision includes sufficient information regarding the 14 “(18)(C)” factors to enable us to assess whether the award is fair, equitable, and in accordance with the law. We note that an award of spousal support will be reversed on appeal only if an abuse of discretion is shown. *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24, 550 N.E.2d 178, 181. The term “abuse of discretion” connotes more than an error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or capricious. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140. A reviewing court may not substitute its judgment for that of the trial court unless, considering the totality of circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597.

{¶66} Upon our review of the trial court's determination as to the duration of spousal support, we find the trial court abused its discretion. Our decision is based in part on the case of *Hutta v. Hutta*, supra. In *Hutta*, the parties were married for 21 years. During the marriage, the parties enjoyed a luxurious standard of living. The husband was a self-employed orthodontist with a lucrative practice. The wife, who had an associate's degree, was a career homemaker for a majority of the marriage. At the time of the divorce, the parties were in their late forties and in good health. It was estimated that the wife had the earning potential of \$20,000 to \$25,000 per year.

{¶67} In determining spousal support for the wife, the trial court awarded support for eight years. *Id.* at ¶37. We reversed the decision of the trial court, finding that under the factual circumstances of the case, the trial court abused its discretion in limiting the

spousal support duration to eight years. *Id.* at ¶41. In our decision, we relied upon *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554, N.E.2d 83.

{¶68} The Ohio Supreme Court held in *Kunkle*, 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.”

{¶69} In the present case, we find the trial court's finding that the parties' approximate 21-year marriage was not a long term marriage to be unreasonable. In *Kraft v. Kraft*, Fairfield App. No. 08-CA-0039, 2009-Ohio-5444, ¶55, we stated: “[A] marriage of long duration ‘in and of itself would permit a trial court to award spousal support of indefinite duration without abusing its discretion or running afoul of the mandates of *Kunkle*.’ *Vanke v. Vanke* (1994), 93 Ohio App.3d 373, 377, 638 N.E.2d 630, quoting *Corpac v. Corpac* (Feb. 27, 1992), Franklin App. No. 91AP-1036. ‘Generally, marriages lasting over 20 years have been found to be sufficient to justify spousal support of indefinite duration.’” (Citations omitted).

{¶70} We recognized in *Hutta*, however, that *Kunkle* does not stand for the proposition that permanent spousal support is mandated in marriages of long duration. ¶40. However, under the facts of *Hutta*, we determined eight years of spousal support was unreasonable. In the present case, we likewise find that five years of spousal support to be unreasonable under the facts and circumstances of this case.

{¶71} The trial court's decision as to the amount and duration of spousal support is based upon the length of the parties' marriage and also upon Appellant's completion of her associate's degree. Appellant has not been in the workforce since 1986. During the parties' marriage, Appellant worked almost exclusively in the home and assisted to some degree with Appellee's medical practice. Appellant is pursuing an associate's degree in accounting, but she will obtain her degree and enter the work force at the age of 53. She could obtain her bachelor's degree at the age of 55.

{¶72} As in *Hutta*, Appellee has the resources and ability to provide continuing support to Appellant. Upon the record before us, we find the trial court erred as to the amount and duration of the spousal support.

{¶73} Appellant's fourth Assignment of Error is sustained.

V.

{¶74} In her fifth Assignment of Error, Appellant argues the trial court erred in not awarding Appellant reasonable attorney's fees and in not considering the amount owed as a marital debt.

{¶75} An award of attorney's fees lies within the trial court's sound discretion. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 481 N.E.2d 609; *Blakemore*.

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

{¶77} "(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.”

{¶78} The trial court denied Appellant’s request for attorney’s fees and litigation expenses. In its denial, the trial court reviewed the procedural history of the case wherein Appellant had previously requested and was awarded attorney’s fees to prepare her case. During the pendency of the case, the trial court noted that Appellant changed attorneys several times and filed numerous motions regarding discovery and production of over 28,000 documents. The trial court found that Appellant had adequate funds available to her to retain counsel and present her case in a proper manner.

{¶79} Upon this record, we cannot find the trial court abused its discretion in denying Appellant’s motion for additional attorney’s fees and litigation expenses.

{¶80} Appellant fifth Assignment of Error is denied.

VI.

{¶81} Appellant argues in her sixth Assignment of Error the trial court erred in failing to find Clark Dupler in contempt of court for his failure to appear in court. Mr. Dupler prepared the parties’ joint income tax returns while married and Appellee’s separate tax return. The record shows that Mr. Dupler appeared in court pursuant to a show cause order and was cross-examined by Appellant.

{¶82} We find the trial court’s silence on the issue of contempt to be an implicit denial of the motion. “If a trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled.” *Swinehart v. Swinehart*, Ashland App. No. 06-COA-020, 2007-Ohio-6174, ¶26. The record shows

Mr. Dupler appeared in court and that Appellant had an opportunity to cross-examine Mr. Dupler. A denial of the motion for contempt was warranted under this scenario.

{¶83} Appellant also argues within this Assignment of Error that the trial court erroneously and belatedly denied a motion for additional attorney's fees and expenses related to the retention of expert witnesses. We find this argument is in no way related to Appellant's sixth Assignment of Error as it is stated, in contravention of App.R. 16. Accordingly, we find it to be not well taken.

{¶84} Appellant's sixth Assignment of Error is overruled.

VII.

{¶85} Appellant argues in her seventh Assignment of Error that the trial court made several erroneous evidentiary rulings prejudicial to Appellant. The admission or exclusion of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 31 OBR 375, 510 N.E.2d 343. A reviewing court must not disturb a trial court's evidentiary ruling unless the ruling is found to be an abuse of discretion. *Id.*, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 16 O.O.3d 169, 404 N.E.2d 144.

{¶86} Appellant first argues the trial court erred when it permitted the affidavit of Jeanine DeVine, Appellee's witness as to an investment account, to be admitted into evidence. The record shows that Appellant conducted a deposition of Ms. Devine as to the content of the affidavit. We cannot find Appellant therefore suffered any prejudice from the admission of the affidavit.

{¶87} Appellant next argues that it was contrary to law to permit the bifurcation of testimony of Victor Christopher, Appellee's valuation expert as to Appellee's business

interests. Appellee cites no law as to what the bifurcation is contrary to in support of her position. As such, we can find no abuse of discretion in permitting the testimony of Mr. Christopher to proceed as such.

{¶88} In her third issue, Appellant states the trial court abused its discretion in admitting a letter from Appellee's father in regards to Appellee's inheritance to Appellee's father. We find the record supports the trial court's decision as to the status of Appellee's separate property beyond the letter from Appellee's father.

{¶89} Appellant argues in her fourth issue that the trial court erred in permitting the retired Judge S. Farrell Jackson to preside as the judge in the divorce proceeding. During the pendency of the divorce action, Judge Jackson retired from the bench. Judge Mowery was elected to the bench. The Ohio Supreme Court appointed Judge Jackson to preside over the case by Certificate of Assignment on March 6, 2007. Appellant filed an affidavit of disqualification on June 18, 2007. On June 22, 2007, the Ohio Supreme Court denied Appellant's affidavit of disqualification. Pursuant to the Ohio Supreme Court's determination of the matter, we find Appellant's argument to be not well taken as to the appointment of Judge Jackson to continue to preside over this complex divorce proceeding.

{¶90} Appellant's seventh Assignment of Error is overruled.

VIII.

{¶91} Appellant argues in her eighth Assignment of Error the trial court erred by relying on Appellee's expert, Steven Rosenthal, as to Appellant's earning ability in making its determination about spousal support. Appellant's arguments go to the credibility of Mr. Rosenthal and the accuracy of his determination of Appellant's earning

capacity. As a reviewing court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (Feb. 10, 1982), Stark App. No. CA-5758.

{¶92} While find that the record could support the trial court's reliance on Appellant's earning capacity after she completed her education, in Appellant's fourth Assignment of Error, we determined the trial court erred as to the determination of the amount and duration of spousal support due to the trial court's finding that the parties did not have a long-term marriage. Upon remand, the amount and duration of spousal support will be re-determined by the trial court.

{¶93} We overrule Appellant's eighth Assignment of Error.

IX.

{¶94} Appellant argues in her final Assignment of Error the trial court erred in denying Appellant's motion to continue the trial to allow Appellant to conduct additional discovery. The decision to grant or deny a motion to continue is a matter entrusted to the broad discretion of the trial court. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 9, 615 N.E.2d 617. Ordinarily a reviewing court analyzes a denial of a continuance in terms of whether the court has abused its discretion. *Ungar v. Sarafite* (1964), 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921; *State v. Wheat*, Licking App. No.2003-CA-00057, 2004-Ohio-2088. Absent an abuse of discretion, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748.

{¶95} In the trial court's October 7, 2008 Findings of Fact and Conclusions of Law, the trial court addressed Appellant's requests for additional time for discovery. The trial court found that of the 28,000 pages of material Appellant received in discovery, in addition to Appellant's materials, Appellant had sufficient discovery to adequately present and defend her interests in the case.

{¶96} We find the trial court did not abuse its discretion in denying Appellant's motion to continue the trial to conduct additional discovery.

{¶97} Appellant's ninth Assignment of Error is overruled.

{¶98} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is hereby affirmed in part; reversed in part and remanded as to amount and duration of spousal support. The case is remanded for further proceedings consistent with this opinion and judgment entry.

By: Delaney, J.

Gwin, P.J. and

Farmer, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VIRGINIA FAYE BATTEN	:	
	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
WILLIAM HENRICHS BATTEN	:	
	:	
	:	
	:	Case No. 09-CA-33
Defendant-Appellee	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed in part; reversed in part and remanded for further proceedings consistent with this opinion and judgment. Costs to be split between Appellant and Appellee.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER