[Cite as *Lanham-Fisher v. Fisher*, 2024-Ohio-4847.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
CARROLL COUNTY

TRACY M. LANHAM-FISHER,

Plaintiff-Appellant,

v.

MICHAEL J. FISHER,

Defendant-Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 23 CA 0970

Civil Appeal from the
Court of Common Pleas of Carroll County, Ohio
Case No. 2023 DRB 30221

BEFORE:
Cheryl L. Waite, Mark A. Hanni, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed in part. Reversed in part.
Judgment entered in favor of Appellant.

Atty. Jeffrey Jakmides and *Atty. Julie Jakmides Mack*, for Plaintiff-Appellant

Atty. Maureen E. Stoneman, for Defendant-Appellee

Dated: September 11, 2024

WAITE, J.

{¶1} Appellant Tracy M. Lanham-Fisher appeals the October 18, 2023 divorce decree of the Carroll County Court of Common Pleas, civil division. Appellant raises three arguments on appeal, beginning with a challenge to the trial court's determination that a joint bank account was separate property belonging to Appellee Michael J. Fisher. Appellant next argues that the court improperly allowed a real estate agent to determine the fair market value of the parties' marital home. Finally, Appellant contests the failure of the court to award spousal support. For the reasons that follow, Appellant's argument pertaining to the savings account has merit and the judgment of the trial court is reversed on this issue. Judgment is entered in favor of Appellant, granting her one-half of the contents of that account at the time of the parties' divorce. However, the remainder of Appellant's arguments are without merit and the court's judgment is affirmed as to those assignments of error.

Factual and Procedural History

{¶2} In November of 2009, Appellee purchased property located on Amsterdam Road in Amsterdam, Carroll County, for $25,000. Appellant and Appellee were dating at the time and lived in separate residences; Appellant in an apartment and Appellee in a house. Shortly after this purchase, both parties moved into the property together, at apparently the same time, and were contemplating marriage. The parties made significant repairs to and remodeled the property. While Appellee downplays Appellant's effort in this regard, the transcripts reveal the parties agreed that significant work was performed remodeling and renovating this property, and that each party contributed money and labor toward these efforts. On October 11, 2012, the parties were married in

Logan, Ohio. They continued to reside together at the Amsterdam Road address until sometime in 2017.

{¶3} In 2017, the parties sold the Amsterdam Road property for $70,000 and jointly purchased property on Apollo Road. This property is located near the residence of Appellee's father. The properties do not abut, but are very close in proximity. The payment arrangement for this property is highly relevant to this appeal. Apparently, the property was listed in some sort of online auction where the entire sale price was due at the time of purchase. Lacking the funds to complete the $94,500 sale, the parties reached an agreement with Appellee's father. Father was to immediately provide the shortfall and the parties were to obtain a loan to repay him. Within a year of the purchase, the parties secured a loan and repaid Appellee's father.

{¶4} The Apollo Road property also required significant renovations and remodeling. To cure this, the parties invested one-half of the proceeds of sale of the Amsterdam Road property to renovate and repair the Apollo Road property. As was the case with the Amsterdam Road residence, several members from each of the parties' families assisted in the renovation and remodeling efforts. After these were concluded, the parties resided at the Apollo Road property together throughout the remainder of their marriage and apparently throughout the divorce proceedings, as the court ordered that both parties were permitted to reside there during the pendency of the divorce.

{¶5} Appellant's divorce complaint was filed April 3, 2023. On May 23, 2023, Appellee filed his answer and counterclaim. In his counterclaim Appellee essentially requested dismissal of Appellant's complaint and asked that divorce be granted based solely on his counterclaim.

{¶6} Appellant filed a motion seeking to list the marital home for sale. Although no judgment entry relative to this motion is in the record, it is apparent from the final divorce decree that the court did not grant her motion. The court did, however, order a local real estate agent, George Kiko, to conduct a market value analysis of the marital home, and for the parties to split the costs of his services. While nothing specific is contained in the record, the parties agreed at oral argument that this real estate agent had been jointly chosen. Appellee called this agent as a witness on the day of trial and introduced his report as an exhibit.

{¶7} A one-day bench trial occurred on October 3, 2023. Appellant, Appellee, Appellee's father, and Mr. Kiko all provided testimony. On October 18, 2023, the court filed the decree of divorce in which it terminated the eleven-year marriage and divided the parties' property, real and personal. Relevant to this appeal, the court determined that a joint savings account at Consumer's National Bank ("CNB"), which held approximately $14,666, was separate property belonging to Appellee, despite the fact that both parties had listed the account as joint property on their respective disclosures and agreed at trial that its contents included the remaining proceeds of the sale of the Amsterdam Road property along with a portion of the parties' state and federal tax refunds over the past five to six years.

{¶8} Also relevant to the appeal, the court awarded Appellant possession of the Apollo Road property, over Appellant's objection. Appellant had asked to sell the property and split the proceeds. The court determined the fair market value of this property was $270,000, and that it had a remaining mortgage in the amount of $92,907.30. The court awarded each party $88,546.50, one-half of the equity in the home. As the parties

disputed whether any mineral interests were associated with the property, the court awarded Appellant one-half of any potential mineral interests in the property, if they are found to exist. Finally, the court declined to award Appellant spousal support. This timely appeal followed.

{¶9} There is some confusion in the record regarding the sale price of the Apollo Road property. The parties testified that the sale price was $94,500, but that they obtained a $95,000 loan to repay Appellee's father. To complicate matters further, the record contains a document showing the parties obtained a mortgage on this property in the amount of $100,000, not $95,000 as the parties' testified. The printout from the county auditor's website marked as Plaintiff's exhibit 2 reflects that James M. Fisher (Appellee's father) purchased three properties as part of parcel number 17-0000304.001 for $90,000. Evidence of record shows that he sold only two of those properties to the parties for $125,000, not $94,500. The other parcel (17-0000305.003) was separately sold to the parties. Neither party explains or attempts to challenge this somewhat contradictory evidence on appeal.

ASSIGNMENT OF ERROR NO. 1

> The trial court made a factual error in determining the fair market value of the marital real estate, and in declining to order the sale of the marital real estate to allow the free market to determine the fair market value.

{¶10} Appellant argues that the trial court based its valuation of the Apollo Road home solely on the testimony of the real estate agent, Mr. Kiko. Appellant complains that this is error because the agent failed to perform a title search to determine whether the

property included mineral interests, did not appraise the property, and did not personally examine the property. The agent estimated the fair market value purely on information received from Appellee, who himself testified that, while he could have bid on the property should it go to auction sale, he did not want to pay market value. Appellant explains the agent testified he would have listed the home at $279,900 if it were for sale and testified that more than twenty percent of listings sell for more than the listed price. Finally, she claims the agent did not know if the property had well water or whether the health department had approved any well.

{¶11} Noting that a trial court has significant discretion in determining the fair market value of the property, Appellee responds by noting that Appellant had agreed to use this particular agent to value the property for trial and paid one-half of the costs to secure his testimony. While the agent did testify that twenty percent of his properties sell above the listing price, this means that the remaining eighty percent sell at, or below, the listed price. Appellee explains that it is common practice for real estate agents to list properties at a higher asking price than they believe the property is worth. Appellee also explains that a title search is not typically undertaken until after a sale concludes. Thus, it is irrelevant and unsurprising that no title search was undertaken by this agent. Also, even if it is discovered that there may be some mineral right associated with this property, Appellee notes that the court awarded Appellant one-half of any such later-discovered mineral interests.

{¶12} "A trial court has broad discretion when allocating marital assets." *Teaberry v. Teaberry*, 2008-Ohio-3334, ¶ 14 (7th Dist.), citing *Neville v. Neville*, 2003-Ohio-3624, at ¶ 5; *Stevens v. Stevens*, 23 Ohio St.3d 115, 120 (1986). "Generally, we would review

the overall appropriateness of the trial court's property division in divorce proceedings under an abuse of discretion standard." *Teaberry* at ¶ 14, citing *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981).

{¶13} Ohio "case law provides that a trial court has some latitude in the means it uses to determine the value of a marital asset; it is neither required to use a particular valuation method nor precluded from using any method." *Miller v. Miller*, 2009-Ohio-3330, ¶ 59 (7th Dist.), citing *Kevdzija v. Kevdzija*, 2006-Ohio-1723, ¶ 23 (8th Dist.).

{¶14} The real estate agent in this case opined in his testimony that the market value of the property (parcel numbers 17-000304.001 and 17-000305.003) is $270,000. The court determined that the parties had $177,092.70 of equity in the property and awarded Appellant one-half of that amount ($88,546.35). Appellee was awarded the remaining one-half of the equity and is required to refinance the remaining mortgage balance within a specific amount of time or the property is to be sold. At the time of the divorce, the remaining mortgage balance was $92,907.30.

{¶15} Among Appellant's concerns, she takes issue with the fact that while she was awarded $88,546.35, Appellee was awarded not only that same amount but was also awarded possession of the property, which is apparently valued at least at $270,000. She contends it is inequitable for any party to retain possession of the house, which after their renovation and remodeling work might mean Appellee would get a higher return on any later sale. For these reasons, Appellant contends the trial court should have ordered a sale of the property and ordered the parties to split the sale proceeds, as she requested. Appellee vehemently objected to a sale of this property, at least in part due to its proximity to his father's property.

{¶16} The majority of Appellant's arguments are directed at the valuation method of the property. Appellant objected to having this agent declared an expert witness, and instead requested that he be admitted as a fact witness, however the court accepted him as an expert witness. The real estate agent produced what the court referred to as a report, however, analysis of the real estate is limited to only one paragraph. As to the real estate, the report states in full:

> Carroll County Parcel numbers 170000304001 and 170000305003 situated in Lee Township. Carrollton Schools. Comprising 21.37 acres. Mostly wooded with two-acre pond. No mineral rights. Improvements include pole design ranch home built 1988, no basement, with three bedrooms, 1 ½ bathrooms, nicely decorated with two car attached garage. Approximately 1,800 SF. Outbuildings include 62'x30' vinyl sided pole barn built 2020 with 10'x30' lean-to. Overhead doors, no concrete. Private setting. Taxes are $966.01 per half year.

(Defendant's Exh. B.)

{¶17} The agent testified that in the normal course of evaluating the market value of a property, he conducts research through the county auditor website, views the property, conducts a walk-through of any buildings, and makes comparisons utilizing the multiple listing service. This agent did not provide much additional information in his testimony. He mentioned that the house is a "pull construction home," which means the foundation is more akin to a pole barn (wooden foundation) than traditional home construction using cement block footers. He conceded he was unsure whether the house

was supplied by well water, but testified that this would not have noticeably changed his valuation. He also conceded he was unsure whether, if the house was supplied with well water, the health department had approved of any such well, which is required. He testified that the real estate market had slowed over the course of the previous year.

{¶18} While Appellant relies heavily on the agent's contention that he would have listed the house for sale at considerably more that the court's valuation, the listed price is irrelevant, as the property was not ordered to be sold. The initial price at which a real estate agent would have listed the property provides no assistance in determining the fair market value of the property. The listed price is not necessarily the market value of a property, and the record reflects initial listing prices tend to be higher than market value in order to give the seller an opportunity to negotiate with a potential buyer.

{¶19} The agent's report and his testimony were admittedly lacking in detail. Ideally, this witness would have provided more information as to how he arrived at the value of the home. Nevertheless, it is clear from the record the factors he took into consideration and that he did review comparisons from the multiple listing service in order to come up with his opinion regarding its value. Appellant was aware of the agreed-to agent's opinion on the value of the marital property prior to trial. If she sought to question the agent further on his process in arriving at his valuation, she could have done so through cross examination. She could have also obtained her own expert to rebut the agent's valuation.

{¶20} While an appraisal or a more thorough market analysis may have been preferable in valuing the property in question, the parties were responsible to provide the trial court with the evidence in this record. Because a trial court is afforded great

discretion in the manner of setting the valuation of a marital asset, absent any indication of an abuse of discretion, that valuation may not be reversed on appeal. The record is devoid of any evidence that the trial court abused its discretion. Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> The trial court erred in holding that the joint CNB savings account was separate property of Husband.

{¶21} Appellant contends that the contents of the parties' joint CNB account were improperly designated as separate property belonging to Appellee. Although the parties focus their attention, here, on whether the Amsterdam Road property was separate or marital property, that is only one fact that must be weighed. While the nature of that property is relevant and should be considered, this issue also concerns one-half of the proceeds of sale of that property, which the parties deposited into the joint CNB bank account. It appears this account was opened for the purpose of holding these funds during the course of the parties' marriage. The remainder of the sale of the Amsterdam Road property proceeds were used to remodel the parties' second property, on Apollo Road. It is relevant that other marital funds were also deposited into the account and that both parties listed this bank account as joint property on their respective financial disclosures.

{¶22} Appellee contends the sale proceeds of the Amsterdam property cannot be considered joint property. He argues that the property was titled in his name, alone, although he concedes that he and Appellant were contemplating marriage at the time it

was purchased and they intended it to be their marital home. Appellee also cites to Appellant's testimony, where she mentioned that she was not familiar with the septic system at the property because it was not her house. However, this reliance is disingenuous and misleading. Appellant was asked whether Appellee or his father paid for the septic system. She answered that she was not sure where this money came from. As they were not married at the time, Appellee's finances were none of her business. Appellee claims that the decision to invest one-half of the sale proceeds from the Amsterdam Road property into the new, clearly jointly-owned home was only proof of his generosity, not of joint ownership of the Amsterdam Road property. Appellee also contends that the mere act of placing the sale proceeds into a joint account did not make these funds marital property. Appellee admits that the account also contained the parties' joint tax refunds. Appellee argues, however, that Appellant would often transfer one-half of the tax refunds out of that joint account at any given time. Thus, he claims the monies she left behind in the account were solely his.

{¶23} "A domestic relations court is required, when granting a divorce, to equitably divide and distribute the marital property." *Teaberry*, *supra,* at ¶ 14, citing R.C. 3105.171(B). "In order to do this, the trial court must determine what constitutes marital property and what constitutes separate property." *Id*.

{¶24} In relevant part, R.C. 3105.171(A)(3) provides:

> (b) "Marital property" does not include any separate property.
>
> . . .

> (6)(a) "Separate property" means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:
>
> . . .
>
> (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;
>
> . . .
>
> (b) The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.

{¶25} When the issue before a trial court is whether certain property is marital or separate property belonging only to one party, the burden of proof falls on the party asserting that the property is separate. *Yarosz v. Montgomery*, 2024-Ohio-652, ¶ 23 (7th Dist.).

> The burden must be sustained by a preponderance of the evidence. *Tupler v. Tupler* (Jan 12, 1994), Hamilton App. Nos. C–920852, C–920887. The proponent must satisfy two burdens. First, that the property satisfies one of the six definitions of separate property in R.C. 3105.171(A)(6)(a). Second, if it has been commingled, that the property can be traced to its prior separate identity. *Guenther v. Guenther* (Oct. 19, 1994), Wayne App.

> No. 2827. Oral testimony as evidence of the separate nature of the property, without documentary proof, may or may not be sufficient to carry the burden.

Fisher v. Fisher, 2004-Ohio-7255, ¶ 9 (2d Dist.).

{¶26} "The burden is more complex when the commingled property is fungible, as it is here. Substantiation in some form is then required. That is made more difficult by the passage of time and by multiple conversions that may have taken place during it." *Id.* at ¶ 17.

{¶27} When determining whether property is marital or separate, a reviewing court looks to whether "the relevant financial and legal history of the property is traceable and shows that the separate nature of the property was maintained during the marriage . . . Transmutation only occurs if there is commingling of separate and marital property and if the history of the separate property cannot be traced." (Citations omitted.) *Akers v. Akers*, 2015-Ohio-3326 ¶ 13 (7th Dist.). This is referred to as the "source of the funds rule," and the "starting point for tracing the history of the property is determining the source of the funds." *Favri v. Favri*, 2022-Ohio-2063, ¶ 18 (7th Dist.), citing *Akers, supra; Goodman v. Goodman*, 144 Ohio App.3d 367, 375 (7th Dist. 2001).

{¶28} Our review of the record reveals the parties were living in separate residences prior to the purchase of the house on Amsterdam Road. Although the parties were not yet married at the time of the purchase, Appellee testified that they were planning to marry at the time. (Trial Tr., p. 135.) Appellee stresses that the house was listed in his name alone, at the time of purchase. However, this fact, without more, is irrelevant. "[E]xcept as otherwise provided in this section, 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." *Favri v. Favri*, 2021-Ohio-3588, ¶ 33 (7th Dist.), citing R.C. 3105.171(H). Thus, Appellee needs to establish more than the name listed on the deed.

{¶29} There was conflicting evidence as to who paid the mortgage. Appellant testified that she made some of the payments, particularly when Appellee experienced periods of temporary unemployment. Appellee concedes that he was laid off from his job for periods of time and that Appellant worked two jobs, but he claimed that she never made any payments on the mortgage. He did concede that the parties shared living expenses during this time. (Trial Tr., p. 134.) The parties married two to three years after the purchase of the Amsterdam Road property. Five years later, they jointly purchased the Apollo Road home.

{¶30} Appellee does not contend that the Amsterdam Road property was gifted to him, and he concedes that he and Appellant moved in together at the same time from their previously separate residences. This is not a situation where he lived alone in the house or made years of payments before Appellant moved into the residence.

{¶31} As noted by Appellant, the deed transferring the Amsterdam Road property following their sale of the property to a new owner does contain a reference to her, even though the property was not listed in her name. This deed includes language stating that "Michael J. Fisher (Appellee) and Tracey Marie Fisher (Appellant) the Grantors in the foregoing deed, and acknowledging the signing thereof to be their voluntary free act and deed" transferring the property to the new owners. (Defendant's Exh. 3, p. 3.) On this same page, both Appellant and Appellee signed to transfer the deed.

{¶32} On review, we are tasked with determining whether Appellee provided evidence to the trial court demonstrating that he purchased the Amsterdam Road property with his own funds intending it to be separate property, and whether he thereafter maintained the separate nature of the proceeds of its sale. Based on this record, he failed to meet that burden.

{¶33} First, Appellee presented no evidence whatsoever regarding the funds used for the Amsterdam Road purchase. He generally states that he purchased the property in his name, but fails to explain the source of the funds used for its purchase. Hence, the record is devoid of evidence to satisfy the critical factor of the original source of funds used to purchase the allegedly separate property. Again, there is evidence of record that both parties paid for the mortgage and maintenance.

{¶34} More problematic, there is a great deal of evidence in this record establishing both that the parties' joint efforts substantially increased the value of the Amsterdam Road property, and that the funds that resulted from the sale of this property were comingled to the point where the funds are not traceable.

{¶35} Beginning with the former, there is evidence of record that the Amsterdam Road property increased substantially in value due to joint renovations and the remodeling efforts performed and funded by both parties and their families. Significantly, even assuming Appellee originally purchased the property with his own funds, he bears the burden of proving that any increase in value to the property at the time of sale was not the result of remodeling or renovations completed as a joint effort. Appellee was required to show that the net gain of $45,000 from the sale of the Amsterdam Road property resulted from something other than renovations or remodeling the parties jointly

undertook. Appellee has ignored this aspect of his argument both to the trial court and on appeal.

{¶36} Appellant and Appellee moved into the house at approximately the same time in 2009. The property had been purchased for $25,000. The parties agree that each of them made contributions, both monetary and through their personal labor, to remodel and renovate the Amsterdam Road property during the approximately eight years they lived there, and that the parties were married for most of the years they resided at the property. They sold the Amsterdam Road property in 2017 for $70,000, a $45,000 profit.

{¶37} We have consistently held that when remodeling or renovation has been performed on a property during marriage that increased the property value, the increased profit is a marital asset, regardless whether the property at issue may separately belong to only one spouse. In *Miller v. Miller,* 2009-Ohio-3330 (7th Dist.), the wife owned property prior to the marriage. After the parties married and the husband moved into the residence, they jointly undertook significant remodeling and renovation work. Although the parties disputed the market value of the property at the time of the divorce, there was no question that the value at this time was substantially higher and this increase was due to the renovation and remodeling efforts. *Id.* at ¶ 49. Accordingly, we held that the property was a mixed asset, both separate and marital, at the time of the divorce. *Id.*

{¶38} In another case arising out of this district, we reviewed the issue of whether labor performed by one party on separate property belonging to that party resulted in a mixed marital asset where the labor increased the value of the property. *Lucas v. Lucas,* 2011-Ohio-6411 (7th Dist.). In *Lucas,* we reviewed two properties. The first was the parties' marital home. The wife had inherited twenty percent of the property and they

used sale proceeds from their previous marital home to purchase the remaining eighty percent. However, the husband performed labor when renovating the property which increased its value considerably.

{¶39} Citing R.C. 1305.171(A)(3)(a)(iii), we stated "active appreciation on a separate asset from labor during marriage is considered a marital asset regardless of which spouse rendered the labor." *Id.* at ¶ 16. We cited to caselaw from the Ohio Supreme Court holding that "when either spouse makes a labor contribution to increase the value of separate property, the increase is deemed marital." *Id.,* citing *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 400 (1998). Thus, the increase due to the husband's labor constituted a marital property. Significantly, even though twenty percent of the property was wife's separate property, "the increased value on the entire property from the labor of both the husband and the wife is a marital asset." *Id.* at 18. With this in mind, we remanded the matter for the purpose of determining how much of the increase in value arose from the work performed by husband on wife's separate portion of the property.

{¶40} The *Lucas* Court also considered a second parcel owned by the parties, which was a rental property. The property was purchased using only funds inherited by the wife. We noted that the burden remained with the wife to prove that the appreciation in value at time of divorce was not the result of labor performed by the husband. *Id.* at ¶ 22. The evidence clearly showed that although most, if not all, of the money to fund the renovations came from the wife, the labor was performed by the husband. Again, the *Lucas* Court found that the wife failed to present evidence that the husband's renovations did not cause the increased property value. If husband contributed to the increase, the

increased value was marital property. The Court remanded the matter to correct the trial court's allocation of the increased value of the property to the wife. *Id.* at ¶ 27.

{¶41} Turning to the matter at hand, the Amsterdam Road property was purchased for $25,000 in 2009. The parties lived there together. The parties married in 2012 and sold the property for $70,000 in 2017.

{¶42} During the eight years they lived there, the parties agree that significant remodeling and renovations took place. Each party contributed to those efforts, which led to a $45,000 profit above the original purchase price. (Trial Tr., p. 140.) The following colloquy occurred between Appellant's counsel and Appellee during his testimony:

> Q Now, is it also true that both you and [Appellant] worked very hard to improve that Amsterdam Road property?
>
> A We did.
>
> Q And, and she put time, effort and money…
>
> A She did.

(Trial Tr., p. 140.)

{¶43} In accordance with our prior holdings, even if Appellee could prove that he, alone, paid the down payment on the property using his own separate funds, and there is no evidence of this in the record, at the very least the $45,000 profit is marital property caused by the parties' joint efforts.

{¶44} Following the sale of the Amsterdam Road house, after paying the remaining mortgage and associated costs, the parties received funds in the amount of

$44,785.57 which they deposited into a joint CNB account. Appellee testified that the account was opened in 2017 in both of the parties' names for the purpose of depositing the remaining proceeds of the sale of the Amsterdam Road property. Appellee provided no documentary evidence of the deposit into the CNB account. There is no showing of the exact deposit amount or the date these sale proceeds were deposited.

{¶45} Since that deposit in 2017, both parties testified that the parties' joint tax refunds, both federal and state, were deposited into the account. Appellant usually transferred one-half of the funds into another account from which she paid the parties' bills. Appellee contends this transfer proves that the parties split their tax returns and shows they intended to keep their money separate. However, as there is no dispute the parties' tax returns were joint property that was commingled with all of the other funds in the account, the fact that Appellant made periodic withdrawals does not support Appellee's contention. Further, the record shows Appellant actually used the money she removed from the account in dispute to pay the parties' joint bills.

{¶46} Even if some portion of the sale of the Amsterdam Road property was shown to be entirely separate property, and the record lacks the necessary support for this, the parties commingled these funds in their joint account and Appellee did not clearly trace at trial any money he claims as separate property. Again, even if Appellee had proven at trial that the Amsterdam Road property was purchased and maintained as separate property, and he did not, the increase in value of that property is still marital. Lastly, Appellee did not provide any evidence with which a court could trace any claimed separate funds. Appellee had the burden of proof on this issue.

{¶47} It appears that approximately $14,666 remained in the CNB account at the time of trial. As it is apparent that Appellee did not provide the evidence necessary to support his contention that the CNB account funds are his separate property, we reverse the trial court's decision on this issue and enter judgment in favor of Appellant. The contents of the CNB account at time of trial should be split equally between the parties. Accordingly, Appellant's second assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 3

> The trial court erred in holding that spousal support is not appropriate in this case, incorrectly stating that the Parties "have similar levels of income" when Husband's income exceeds Wife's by nearly 40% and failing to consider the factors set forth in O.R.C. 3105.18(C)(l)(a-n).

{¶48} Appellant objects to the trial court's decision not to award her spousal support. She also claims that the court incorrectly considered the fact that she received $100,000 in cash as part of the division of assets. Appellant believes this is irrelevant. Because Appellee also received $100,000 in cash, the parties' awards in this regard balance each other out. Appellant contends the fact that she must now find a place to reside in a time where the real estate market continues to surge, while Appellee was awarded possession of the Apollo Road residence at less than its fair market value, proves her need for spousal support.

{¶49} Appellee responds, without support, that the parties' salaries fall in the same tax bracket. He also claims that the difference between the parties' paychecks are

minimal. Appellee asserts that the trial court made the appropriate findings based on all factors on which the parties presented evidence.

{¶50} An award of spousal support is within the sound discretion of the trial court. *Waller v. Waller*, 2005-Ohio-4891, ¶ 40 (7th Dist.), citing *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67 (1990). However, this discretion is not unlimited and is guided in large part by the spousal-support statute, R.C. 3105.18. Within the limits provided by statute, a trial court is granted broad discretion to determine an equitable award under the facts and circumstances of each case. *Waller* at ¶ 60, citing *Kunkle* at 67. "An abuse of discretion is more than an error of judgment; it requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable." *State v. Nuby*, 2016-Ohio-8157, ¶ 10 (7th Dist.), citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶51} R.C. 3105.18(C)(1) details the factors a trial court must consider when evaluating a request for spousal support. These are as follows:

> (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;
>
> (b) The relative earning abilities of the parties;
>
> (c) The ages and the physical, mental, and emotional conditions of the parties;
>
> (d) The retirement benefits of the parties;
>
> (e) The duration of the marriage;

(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;

(g) The standard of living of the parties established during the marriage;

(h) The relative extent of education of the parties;

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

(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;

(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;

(l) The tax consequences, for each party, of an award of spousal support;

(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

(n) Any other factor that the court expressly finds to be relevant and equitable.

{¶52} As noted by Appellee, neither party offered evidence as to some of these factors. Appellant focuses her arguments on her perception that there exists a disparity of income levels and the court's consideration of the cash amount she was awarded, which is identical to Appellee's cash award, was improper. Appellant is concerned that she has only her (lower) income and the cash awarded to her on which to rely in order to obtain housing and pay her other living expenses, while Appellee, who makes more money and was given the same cash award, was also allowed to retain possession of their house.

{¶53} Beginning with Appellant's arguments as to salary, although she describes the difference in the two incomes as 40%, there actually is a 25% difference. And while Appellee counters that the actual paychecks are only $400 apart, the only two documents in the record show Appellant is paid $1,691.91 and Appellee takes home $2,374.31, a difference of $682.40. (Plaintiff's Exh. 10, 11).

{¶54} As to the court's consideration of Appellant's cash award, this factor is an appropriate consideration. See *O'Grady v. O'Grady*, 2004-Ohio-3504, ¶ 87 (11th Dist.) ("the presence of significant liquid assets in a distribution of property is a factor that may be considered by the trial court when awarding spousal support.") Appellant is correct in that Appellee was awarded the same amount of cash, as well as possession of the house, and valuable automobiles and equipment. However, Appellee must now refinance and pay the mortgage that remains due and owing on the Apollo Road property in the same

unfavorable financial atmosphere Appellant is faced with. It is also worth noting Appellant herself testified that Appellee often is laid off of work.

{¶55} The record reflects that the trial court considered the relevant factors on which evidence was presented at trial. While Appellee plays down the difference between the two salaries and both parties have provided incorrect figures, there is nothing in the record showing a great disparity exists and no evidence of record to suggest the trial court's decision with regard to spousal support amounts to an abuse of discretion. Accordingly, Appellant's third assignment is without merit and is overruled.

Conclusion

{¶56} Appellant argues that the trial court improperly allowed a real estate agent to determine the fair market value of the marital home and erroneously determined that a joint savings account was separate property belonging to Appellee. Appellant also contests the failure of the court to award spousal support. For the reasons provided, Appellant's argument pertaining to the savings account has merit, and the judgment of the trial court is reversed and judgment is entered in favor of Appellant on that issue, awarding her one-half of the contents of that account at the time of the divorce. However, the remainder of Appellant's arguments are without merit and the court's judgment as to these issues is affirmed.

Hanni, J. concurs.

Dickey, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first and third assignments of error are overruled and her second assignment is sustained. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Carroll County, Ohio, is affirmed in part and reversed in part. Judgment is hereby entered in favor of Appellant, awarding her one-half of the contents of the CNB account as of the time of divorce. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.