[Cite as *Hamrick v. Hamrick*, 2024-Ohio-2517.]

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

HILDEGARD HAMRICK

Appellee

v.

SCOTT HAMRICK

Appellant

C.A. No. 2023CA0024-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 17DR0505

DECISION AND JOURNAL ENTRY

Dated: June 28, 2024

STEVENSON, Presiding Judge.

{¶1} Defendant-Appellant Scott Hamrick ("Husband") appeals from the judgment of the Medina County Court of Common Pleas, Domestic Relations Division. For the reasons set forth below, this Court affirms.

I.

{¶2} Plaintiff-Appellee Hildegard Hamrick ("Wife") and Husband were married on July 7, 1995. Wife filed a complaint for divorce in November 2017. Husband filed an answer and counterclaim. In January 2018, the trial court issued an order for temporary child support that designated Husband as the child support obligor and ordered him to pay support in the amount of $617.17 per month for the parties' two children. The children were emancipated at the time of the final hearing of this matter.

{¶3} While the case was pending, both parties filed numerous motions to show cause and to compel discovery against one another. As of final hearing, Wife's three motions to show

cause for Husband's alleged failure to pay child support had been held in abeyance and were pending before the trial court for determination. Husband's request for attorney fees pursuant to his motion to compel the production of documents from Wife had also been reserved for final hearing.

{¶4} The case eventually proceeded to trial in November 2022. Wife's complaint for divorce was dismissed for failure to prosecute. The trial went forward on Husband's counterclaim. Following post-trial briefs, the trial court issued a decree of divorce.

{¶5} Husband timely appealed from the judgment entry of divorce and asserts five assignments of error for our review. We will address Husband's first and second assignments of error out of order for ease of analysis.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN ITS CLASSIFICATION AND DIVISION OF THE PARTIES' REAL ESTATE.

{¶6} The parties do not dispute that their interests in real estate, 159 Claremont Drive, Brunswick, Ohio ("Claremont"), and 4107 Dennis Lane, Brunswick, Ohio ("Dennis Lane"), were acquired during the marriage. Wife purchased Dennis Lane in September 2017, after the parties' separation, and relocated there with the children. Husband remained at Claremont, the marital residence. Both parties claimed at trial that their respective residences were their separate property because each was purchased using funds from individual inheritances. The trial court found that both parties "failed to provide * * * a sufficient tracing of funds to allow the Court to find separate property interests of [Wife] or [Husband] in the respective properties." The trial court concluded that Dennis Lane and Claremont (collectively "the Properties") were both marital property subject

to division. The trial court further found that no evidence was presented as to the Properties' value because the parties did not have appraisals conducted. The court ordered that the Properties be sold and the proceeds divided equally between the parties as a sale was the only way to accomplish equal division absent evidence of the Properties' value.

{¶7} Husband argues that the trial court erred in determining that Claremont was marital property and should have found that the equity in Claremont is his separate property. In support, Husband states that Claremont was purchased for $157,000 solely with funds received from an inheritance and that Wife did not deny or contradict his testimony on that fact. He further argues that the trial court abused its discretion by ignoring the parties' desire to retain their separate residences and ordering the sale of the Properties. We disagree with Husband.

{¶8} "The distribution of assets in divorce proceedings is governed by R.C. 3105.171." *Bucalo v. Bucalo*, 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, ¶ 11. Prior to distributing any assets, "the trial court is required to determine whether property is marital or separate property." *Id.* citing R.C. 3105.171(B). The presumption is that property acquired during the term of the marriage is marital property unless it can be shown to be separate. *Collins v. Collins*, 9th Dist. Summit No. 27311, 2015-Ohio-2618, ¶ 38. Separate property includes, but is not limited to, "[a]n inheritance by one spouse by bequest, devise, or descent during the course of the marriage[.]" R.C. 3105.171(A)(6)(a)(i). "The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Eikenberry v. Eikenberry*, 9th Dist. Wayne No. 09CA0035, 2010-Ohio-2944, ¶ 19. Therefore, in this case, it was Husband's burden to establish by a preponderance of the evidence that Claremont is his separate property.

{¶9} "'The classification of property as marital or separate is a question of fact that this Court reviews under a civil manifest weight standard.'" *Mullett* v. *Mullett*, 9th Dist. Summit No. 28512, 2017-Ohio-7152, ¶ 18, quoting *Hahn v. Hahn*, 9th Dist. Medina No. 11CA0064-M, 2012-Ohio-2001, ¶ 20. When reviewing the manifest weight of the evidence,

> this Court "must determine whether the trier of fact, in resolving evidentiary conflicts and making credibility determinations, clearly lost its way and created a manifest miscarriage of justice." In weighing the evidence, we must always be mindful of the presumption in favor of the finder of fact. "Only in the exceptional case, where the evidence presented weighs heavily in favor of the party seeking reversal, will the appellate court reverse."

Kim v. Kim, 9th Dist. Summit Nos. 28684, 29144, 2020-Ohio-22, ¶ 10. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Constr. Co*. 54 Ohio St.2d 279 (1978), syllabus.

{¶10} First, the record reflects that Husband offered no documentary evidence establishing that he received an inheritance, maintained that inheritance in a separate bank or investment account to preserve its separate nature, or that he then used those funds as the sole source of the payment for Claremont. Outside of his own testimony, he provided no evidence establishing that Claremont was purchased with non-marital funds and that the equity in the home was traceable to funds from an inheritance.

{¶11} Next, Husband's argument that Wife did not deny he has a separate property claim in Claremont completely mischaracterizes the record. Because Wife did not present a case due to the dismissal of her complaint, her only testimony was on cross-examination, and she was not asked by opposing counsel whether she admitted or denied that Husband had a separate property interest in Claremont. Thus, Wife never even expressed an opinion on whether Husband had a separate property claim to Claremont.

{¶12} Furthermore, the record reflects that Claremont was purchased during the marriage, in 1998. The parties later took out a home equity line of credit ("HELOC") on Claremont. Husband testified that the HELOC was for "if *we* needed the money" (emphasis added) and to purchase his and Wife's vehicles. The HELOC was later refinanced into a mortgage in the names of both Husband and Wife. One of the exhibits admitted into evidence at trial was the foreclosure complaint filed against the parties for failure to pay property taxes on Claremont. Attached to that complaint is a judicial report which states that the property is titled to Husband and Wife and that the deed reflecting the same was filed on July 20, 1998. All the foregoing evidence supports the presumption that Claremont is marital property. *Collins,* 9th Dist. Summit No. 27311, 2015-Ohio-2618, at ¶ 38.

{¶13} The trial court, as the finder of fact, was in the best position to judge the credibility of the parties' testimony and the evidence. In the absence of documentary evidence to support Husband's separate property claim, the trial court was free to reject his testimony and find that it was not credible evidence of a separate property claim. In addition, competent, credible evidence was presented to support the trial court's finding that Claremont was marital property, which the trial court was free to accept. Accordingly, we cannot say that the trial court lost its way and created such a manifest miscarriage of justice that its judgment that Claremont is marital property must be reversed. *Kim,* 9th Dist. Summit Nos. 28684, 29144, 2020-Ohio-22, at ¶ 10.

{¶14} Last, we turn to Husband's argument that in ordering the sale of the Properties, the trial court erred in failing to consider the parties' desire to retain their separate residences. This argument raises the issue of whether the trial court erred in dividing the parties' marital property under R.C. 3105.171, not whether the property is separate or marital. Husband argues that because the Properties were both purchased with funds from the parties' respective inheritances it is their

desire to retain them and keep them in their families. He also complains that he has "limited assets and income, which render him unable to purchase a new home if required to sell the marital residence."

{¶15} The trial court maintains "'broad discretion when fashioning its division of marital property.'" *Barlow v. Barlow*, 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, ¶ 13, quoting *Bisker v. Bisker*, 69 Ohio St.3d 608, 609 (1994). "Our review is limited to a determination of whether the trial court's division of property amounted to an abuse of discretion." *Fletcher v. Fletcher*, 9th Dist. Summit No. 16689, 1995 WL 29008, *2 (Jan. 25, 1995), quoting *Briganti v. Briganti,* 9 Ohio St.3d 220, 222(1984). An abuse of discretion implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶16} R.C. 3105.171(F) lists nine specific factors for the trial court to consider when dividing the parties' marital property. The parties' wishes and the ability of a party to afford to replace an asset are not among those listed factors. There is a catch-all provision, "[a]ny other factor that the court expressly finds to be relevant and equitable" under R.C. 3105.171(F)(10), which may permit the court to consider the wishes of the parties' or Husband's alleged financial hardship if it elected to do so. There is nothing in the record or the decree of divorce that indicates whether the trial court specifically considered those two factors. However, even if it did not as Husband alleges, it was not required to. Therefore, we cannot say the trial court's ordering the sale of the Properties was "unreasonable, arbitrary, or unconscionable" so as to constitute an abuse of discretion. *Blakemore* at 219.

{¶17} Husband's second assignment of error is overruled.

ASSIGNMENT OF ERROR I

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO FIND THE APPELLEE GUILTY OF ECONOMIC MISCONDUCT AND FAILING TO AWARD THE APPELLANT A DISTRIBUTIVE AWARD.

{¶1} The trial court concluded that neither party committed financial misconduct that would require or allow the court to make a distributive award to compensate either one or adjust the marital distribution of assets. Husband alleges that Wife engaged in various acts of economic misconduct and that the trial court erred in failing to award him a distributive award to compensate him. We disagree.

{¶18} Pursuant to R.C. 3105.171(E)(4), the trial court may compensate one spouse with a distributive award or a greater share of marital property if it finds that the other spouse "has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets * * *."

> Financial misconduct under R.C. 3105.171(E)(4) necessarily implicates wrongdoing such as one spouse's interference with the other's property rights or the offending spouse's profiting from the misconduct. Thus, in the context of the statute, financial misconduct requires some element of wrongful intent or scienter[.] In order to determine whether financial misconduct occurred, a court must look to the reasons behind the questioned activity or the results of the activity and determine whether the wrongdoer profited from the activity or intentionally dissipated, destroyed, concealed, or fraudulently disposed of the other spouse's assets. The party alleging the existence of financial misconduct bears the burden of proof.

(Internal citations and quotations omitted.) *Kim,* 9th Dist. Summit Nos. 28684, 29144, 2020-Ohio-22, at ¶ 25.

{¶19} This Court has adopted the reasoning that irresponsible financial decisions and even dishonest financial behavior, in and of themselves, do not constitute financial misconduct under R.C. 3105.171. *Bucalo*, 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, at ¶ 30. For the

trial court to find the requisite financial misconduct it must conduct a two-pronged analysis. The trial court must find (1) a wrongdoing by one spouse that interferes with the other spouse's property rights and (2) that the wrongdoing results in profit to the wrongdoer "or stems from an intentional act meant to defeat the other spouse's distribution of assets." *Id*.

{¶20} "When reviewing whether a trial court erred in its finding regarding financial misconduct, this court applies the manifest weight of the evidence standard. *Kim* at ¶ 26. Accordingly, we incorporate the manifest weight of the evidence standard as outlined above.

Credit Card and Vehicle Debt

{¶21} Husband contends that Wife engaged in financial misconduct when she accumulated $50,000 in credit card and vehicle debt during the pendency of the proceedings in violation of the mutual restraining order and without any explanation.

{¶22} The plain language of the mutual restraining order prohibits both parties from "[o]btaining credit or incurring debt in the *name of the other party or in the parties' joint names*[.]" (Emphasis added.) Nothing in that order prohibits one party from obtaining credit in his or her own name as Wife did here. Therefore, the fact that Wife obtained credit in her own name did not violate the mutual restraining order and is not financial misconduct. Accordingly, Husband did not meet his burden of proving by a preponderance of the evidence that Wife's accumulation of personal debt constituted financial misconduct.

401(K) Loan

{¶23} Husband argues that Wife committed financial misconduct when she borrowed from her 401(k) plan in violation of the mutual restraining order. Husband points to no other evidence or makes no other argument than Wife's violation of the order to establish her financial misconduct. While Husband is correct that Wife's act of borrowing from her 401(l) violated the

mutual restraining order, and we do not condone that violation, that act alone does not constitute financial misconduct.

{¶24} As previously noted, to prove financial misconduct, the party alleging the same has the burden to prove *both* of the following: (1) a wrongdoing by one spouse that interferes with the other spouse's property rights *and* (2) that the wrongdoing results in profit to the wrongdoer or "stems from an intentional act meant to defeat the other spouse's distribution of assets." (Emphasis added.) *Bucalo*, 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, at ¶ 30. When considering whether financial misconduct occurred, a court must "look to the reasons behind the questioned activity or the results of the activity and determine whether the wrongdoer profited from the activity or intentionally dissipated, destroyed, concealed, or fraudulently disposed of the other spouse's assets." *Id.*

{¶25} We turn first to the question of whether Wife interfered with Husband's property rights. In the divorce decree, the trial court addressed the impact of Wife's 401(k) loan on Husband's share of marital assets by ordering that the 401(k) account be split equally between the parties and that Wife's share be reduced by the balance of the loan. By ordering that Wife's share be reduced by the balance of the loan, the trial court insured that she paid back what she owed without disturbing Husband's share. Thus, Husband received his full property interest in this asset. Husband failed to produce any evidence to the trial court that there would be any tax consequences or loss of potential investment gains as a result of Wife's loan from her 401(k).

{¶26} On appeal, Husband fails to argue how Wife's loan from her 401(k) interfered with his property rights. His argument is limited to Wife's violation of the mutual restraining order. This Court has repeatedly said that "'[a]n appellant bears the burden of formulating an argument on appeal and supporting that argument with citations to the record and to legal authority.'" *King*

v. Divoky, 9th Dist. Summit No. 29769, 2021-Ohio-1712, ¶ 13, quoting *State v. Watson*, 9th Dist. Summit No. 24232, 2009-Ohio-330, ¶ 5. "Moreover, it is not the duty of this Court to develop an argument in support of an assignment of error, even if one exists." *King* at ¶ 13, citing *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). Accordingly, Husband failed to meet his burden of proving that Wife's actions interfered with his property rights because he received an equal share of the balance.

{¶27} While failure to satisfy the first prong of the test is sufficient since the test for proving financial misconduct is in the conjunctive, Husband also failed to meet his burden under the second prong, i.e., that Wife's intention was to interfere with his distribution of assets. *Bucalo*, 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, at ¶ 30. As previously noted, Husband must show Wife acted with "wrongful intent or scienter" to prove financial misconduct, not merely that she did not follow an order. *See Kim*, 9th Dist. Summit Nos. 28684, 29144, 2020-Ohio-22, at ¶ 25. In his merit brief, he alleges that "[t]he sole purpose of [Wife's] conduct was to prevent [Husband] from obtaining an equitable division of property and to defeat his interests in marital property." However, other than this statement, Husband again makes no citation to the record to support that claim or any argument that Wife acted with wrongful intent or scienter. In addition, our review of the hearing transcript reveals that the only questions posed to Wife about the loan during cross-examination by Husband's counsel were to affirm that she took the loan out during the pendency of the divorce without either leave of court or Husband's knowledge. There was no discussion or inquiry about her intent in doing so. Husband had an opportunity to examine Wife further on this issue to satisfy his burden, but he failed to do that.

{¶28} In affirming the trial court's opinion, we do not conclude that violating a restraining order can never be the basis for a finding of financial misconduct, just that a party alleging financial

misconduct has the burden to show wrongful intent beyond a violation of the order standing alone. Because the record here does not reveal Wife's state of mind in taking out the 401(k) loan, we cannot say this is the exceptional case that requires reversal on the weight of the evidence.

Business Funds

{¶29} Husband argues that the evidence at trial showed Wife committed financial misconduct when she removed large sums of cash from Husband's business, B & H Plumbing, for her personal use without Husband's consent and then concealed those funds from him.

{¶30} According to both Husband and Wife's testimony, during the marriage the parties' arrangement was that Wife kept the books and paid the bills for both the business and their household. Wife testified that she wrote checks payable to cash that she in turn either cashed or deposited into the parties' joint checking account, then used those funds to pay the bills. Wife testified that her personal checking account was not used. Husband testified that he wrote checks out of the business account as well, a fact that was reflected in Husband's exhibits. Husband claims that Wife failed to provide an accounting of the cashed checks and that he was unaware of the manner in which the funds were being spent. Husband's allegation is contradicted by the record.

{¶31} Husband testified that he knew Wife maintained a list of the checks she wrote on a yellow legal pad in the office of B & H Plumbing and that she placed the corresponding receipts and check stubs in boxes that were kept in a closet there. Husband used those records to reimburse the business checking account. According to Wife, the older records were stored in boxes at Claremont. Husband admitted that at all times he had possession of and unimpeded access to all the aforementioned account records and documents, yet he never looked at them. Husband's exhibits, which included copies of the checks and corresponding stubs, reflect that a notation was

made either on the memo line, the stub, or both as to the reason for the expenditures. Thus, Husband could have inspected the records that were in his possession if he had questions or concerns regarding how the funds were being spent by Wife, and had he done so, would have obtained that information. Husband failed to produce any records that support his claim that Wife was concealing, dissipating, or fraudulently disposing of the funds. Husband's lack of knowledge of how the funds were being spent was a result of his own failure to review the records that were in his possession, not Wife's concealment of the same.

{¶32} Accordingly, Husband has not met his burden of proving by a preponderance of the evidence that Wife's regular practice of cashing business checks and using the funds to pay business and marital expenses constituted financial misconduct. Both parties agreed to that method of paying their bills. Husband was aware of the system Wife used to keep track of the payments and had full access those records.

Dennis Lane

{¶33} Prior to the divorce, in August 2017, Wife created the Hildegard Anna Hamrick Revocable Trust ("Trust"). In September 2017, still before the divorce, Wife purchased Dennis Lane with funds from an inheritance and placed it in the Trust. The trial court found that Wife placed Dennis Lane into the Trust without Husband's knowledge or consent. Husband argues that Wife committed financial misconduct by concealing her purchase of Dennis Lane and placing it in the Trust without his knowledge and consent. We disagree.

{¶34} Wife testified that she believed Dennis Lane was her separate property because it was purchased with funds acquired from an inheritance. She further testified that the attorney who filed her complaint for divorce prepared the Trust. Wife then placed Dennis Lane into the Trust because she believed it would maintain the separate nature of the property. She testified that in so

doing, she relied in good faith on someone else's advice. Thus, while Wife may have been misguided and incorrect in her use of the Trust to protect her separate property, her ignorance about technical areas of the law does not "stem[] from an intentional act meant to defeat the other spouse's distribution of assets," *Bucalo,* 9th Dist. Medina No. 05CA0011-M, 2005-Ohio-6319, at ¶ 30. As previously noted, irresponsible financial decisions do not qualify as financial misconduct. *Id.* Furthermore, the Trust was not concealed from Husband as he alleges. Wife disclosed the Trust in response to Husband's discovery requests, evidenced by the fact that it was admitted at trial as one of Husband's exhibits.

{¶35} Moreover, Wife does not stand to profit from her actions, nor did she interfere with Husband's property interest because the trial court ordered that Dennis Lane be sold and the proceeds split equally between the parties. Therefore, no distributive award would be required to compensate Husband under R.C. 3105.171(E)(4), because he will ultimately receive his equal share of the proceeds following the sale. Accordingly, Husband did not meet his burden of proving by a preponderance of the evidence that Wife's actions regarding Dennis Lane constituted financial misconduct.

{¶36} Husband's first assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY ORDERING THAT AN UNDETERMINED AMOUNT OF ALLEGED CHILD SUPPORT ARREARAGES BE DEDUCTED FROM THE APPELLANT'S SPOUSAL SUPPORT AWARD.

{¶37} The trial court found that Husband failed to pay child support as ordered through the temporary orders and was in arrears on his obligation. The trial court ordered that the temporary orders were not merged into the decree of divorce, meaning that the terms of the temporary order were not incorporated into the decree of divorce and stood as a separate obligation.

{¶38} Based on its review of the factors set forth in R.C. 3105.18(C)(1) regarding spousal support, the trial court ordered that Wife pay Husband $872.85 per month in spousal support for 64 months, and that Wife's spousal support obligation be offset by Husband's child support arrearage. In order to accomplish that offset, the trial court ordered that the Medina County Child Support Enforcement Agency audit its records and provide to the parties the amount of arrearage Husband owed to Wife; that Wife's total spousal support obligation be reduced by Husband's total child support arrearage; and that the remaining balance after said deduction be paid by Husband at the rate of $872.85 per month until the remaining balance is paid in full. The court reserved jurisdiction to modify the amount or duration of spousal support.

{¶39} Husband argues that there was no motion before the trial court to determine temporary support arrearages. He further argues that there was no evidence before the trial court that a child support arrearage under the temporary support order existed. For those reasons, he maintains the trial court's order that any child support arrearages be deducted from the spousal support award is in error. We disagree with Husband.

{¶40} It is well settled that the trial court is vested with broad discretion over matters of spousal support. *Poitinger v. Poitinger*, 9th Dist. Summit No. 22240, 2005-Ohio-2680, ¶ 7. "This Court reviews a trial court's award of spousal support under an abuse of discretion standard." *Doubler v. Doubler*, 9th Dist. Medina No. 22CA0002-M, 2023-Ohio-393, ¶ 14. We incorporate the abuse of discretion standard as outlined above.

{¶41} At the start of trial, the court listed all the matters that were before it for determination. That list included Wife's show cause motions regarding Husband's failure to pay child support. The trial court stated specifically, "[those show cause motions are] what was

represented we would be going forward with today." Thus, the parties were on notice that the issue of Husband's child support arrearages would be addressed at trial and Husband did not object.

{¶42} Regarding whether Husband had child support arrearages, Wife's third motion to show cause filed on February 14, 2020, and affidavit in support alleged that Husband was in arrears $5,718.91. Attached to the motion was the payment history report from the Medina County Child Support Enforcement Agency reflecting that arrearage. No evidence was presented at trial that Husband had made payments on the arrearage or made any additional regular payments since that time, nor has Husband argued that he did so. In her post-trial brief, Wife stated that "[h]aving [Husband's] child support arrearages paid * * * would certainly help myself and the boys get on their feet and put funds toward continuing their education * * *." While her argument is not evidence of the amount of arrears, her request for back child support aligns with the evidence at trial that an arrearage still existed as of trial.

{¶43} Rather than finding Husband in contempt pursuant to Wife's motions to show cause, which could have potentially included penalties and/or jail time, the trial court, in its discretion, ordered that the Medina County Child Support Enforcement Agency prepare a calculation of Husband's child support arrearage under the temporary order, and then reduced the total amount of spousal support owed by the total amount of child support arrearages. Husband cites no authority or case law which prohibits a domestic relations court from using its broad discretion to craft an equitable order that offsets spousal support with child support. Notably, in making an oral motion to modify child support at trial, Husband's counsel stated, "[t]he Court has jurisdiction to review [child support], and it can be considered as far as any future spousal support award." Thus, Husband's own trial counsel stated on the record that the trial court is permitted to

take into consideration Husband's child support obligation when determining spousal support, which contradicts his argument on appeal.

{¶44} Based on the foregoing, Husband has failed to demonstrate that the trial court abused its discretion in ordering that his child support arrearage be deducted from his spousal support award. His third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN DETERMINING THE DURATION AND TERMINATION OF SPOUSAL SUPPORT IN THIS MATTER.

{¶45} Husband argues that the trial court's failure to award him spousal support for an indefinite term and with no explanation for the limited term of 64 months constitutes an abuse of discretion. He also argues that the trial court's termination of spousal support upon the remarriage or cohabitation of Husband is contrary to law. We disagree.

{¶46} In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, duration and terms of payment, R.C. 3105.18(C)(1) sets forth 14 factors that the trial court shall consider in making an award of spousal support. There is no set mathematical formula for determining the amount and duration of support. *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 96 (1988). The trial court must weigh all of the factors listed in R.C. 3105.18(C) and "not base its determination upon any one of those factors in isolation." *Id.* "[T]he trial court need not comment on each factor, but the record must demonstrate that the court considered each factor in making its spousal support award." *Barlow,* 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, at ¶ 22. As previously noted, we review the trial court's award of spousal support under an abuse of discretion standard. *Doubler*, 9th Dist. Medina No. 22CA0002-M, 2023-Ohio-393, at ¶ 14. Again, we incorporate the abuse of discretion standard as outlined above.

{¶47} Husband argues that other appellate courts have acknowledged that 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, and that generally, marriages lasting over 20 years have been found to be sufficient to justify indefinite support. However, Husband's argument does not address the actual question before us in the instant matter. We are not tasked with determining whether the trial court was within its discretion to award indefinite support in a long-term marriage, but rather, whether the trial court abused its discretion in awarding support for *less* than an indefinite term. The cases Husband cites in support are merely examples of cases where the trial court ordered indefinite support in a long-term marriage and do not hold that the trial court is required to do so. Simply because other courts may have ruled differently is not a basis for concluding that the trial court in this case abused its discretion.

{¶48} This Court has recognized that a marriage of long duration will *permit* a trial court to award spousal support of indefinite duration without abusing its discretion but does not require it. *See Kent v. Kent*, 9th Dist. Summit No. 26072, 2012-Ohio-2745, ¶¶ 15, 17. The salient notion is that the trial court explains its rationale and sets forth a "sufficient basis to support the award it selects." *Id*. at ¶ 17.

{¶49} Here, the trial court listed each of the 14 enumerated R.C. 3105.18(C)(1) factors and expressly stated that it reviewed all of those factors together with its findings of fact. Therefore, the trial court engaged in the required analysis and "demonstrate[d] that [it] considered each factor in making its spousal support award." *Barlow,* 9th Dist. Wayne No. 08CA0055, 2009-Ohio-3788, at ¶ 22. Of particular note, the trial court found that Husband had worked during the marriage but stopped working in 2018 due to an alleged injury, yet he failed to provide any documentation showing that he had been determined to be disabled. Based on that finding, it could

be reasonably inferred that the trial court chose to limit the duration of Husband's spousal support because it did not find it credible that he was incapable of earning income and that spousal support was necessary beyond 64 months.

{¶50} Thus, under the facts of this case and in light of the trial court's express statement that it considered all of the required statutory factors, we cannot say that its decision to limit spousal support to 64 months constitutes an abuse of discretion. Accordingly, Husband's argument on this issue is not well-taken and is overruled.

{¶51} Husband also argues here that the trial court erred by including language in the decree that spousal support would terminate upon his remarriage or cohabitation. He argues that R.C. 3105.18(B) sets forth only one event for the termination of spousal support; that is, the death of either party, and that there is no statutory requirement that remarriage or cohabitation terminates support.

{¶52} The relevant language in R.C. 3105.18 (B) states, "[a]ny award of spousal support made under this section shall terminate upon the death of either party, unless the order containing the award expressly provides otherwise." Husband argues that the fact that the legislature chose to provide a specific exception to the statute in the case of the death of either party, but not for remarriage or cohabitation, means that remarriage and cohabitation cannot automatically terminate the obligor's duty to pay spousal support. We disagree.

{¶53} First, the use of the phrase "unless the order containing the award expressly provides otherwise" clearly evinces the legislature's intent that the trial court has discretion to consider other terminating factors. The fact that the statute does not require termination of spousal support upon remarriage or cohabitation does not mean that the present language of R.C. 3105.18 prohibits the inclusion of remarriage or cohabitation as termination provisions. In other words,

nothing in the statute prohibits courts from exercising the discretion granted them under R.C. 3105.18 to order that remarriage or cohabitation terminates spousal support if the court finds that it is appropriate in a particular case.

{¶54} Next, most of the cases Husband cites in support hold only that a trial court cannot terminate spousal support for reasons other than upon the death of either party absent specific language permitting the same, not that it was error if the trial court *does,* in its discretion, include termination upon remarriage or cohabitation language. *See, e.g., Meeks v. Meeks*, 10th Dist. Franklin No. 05AP-315, 2006-Ohio-642, ¶¶ 48-49; *Sutphin v. Sutphin*, 1st Dist. Hamilton Nos. C-030747, C-030773, 2004-Ohio-6844, ¶¶ 30-35. With one narrow exception, discussed below, Husband does not cite to any cases that prohibit a court from including remarriage or cohabitation language and reserving jurisdiction to modify.

{¶55} Husband relies heavily on *Hoopes v. Hoopes,* 8th Dist. Cuyahoga No. 106855, 2018-Ohio-5232, ¶ 21, in which the Eighth District determined that it was against public policy to include a provision that remarriage or cohabitation automatically terminates support. The Eighth District ultimately concluded, however, that any error was nonprejudicial because the obligor spouse had not filed a motion to modify or terminate support on the basis of remarriage or cohabitation. *Id*. at ¶ 22. Thus, even under *Hoopes*, adding a provision that remarriage or cohabitation automatically terminates support is nonprejudicial error without a request to modify support. Here, Husband did not seek to modify support due to Wife's remarriage or cohabitation.

{¶56} That aside, we disagree with *Hoopes* on the requirements of R.C. 3105.18. We have previously acknowledged that a trial court may retain jurisdiction to consider reducing or terminating spousal support upon the recipient's remarriage. *See, e.g., Falah v. Falah*, 9th Dist. Medina No. 20CA0039-M, 2021-Ohio-4348, ¶ 23-27 (construed divorce decree containing

provision automatically terminating spousal support upon remarriage and retaining jurisdiction; husband moved to terminate support but failed to prove wife's remarriage.).

{¶57} Accordingly, based on the foregoing, Husband's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION BY FAILING TO AWARD [HUSBAND] AN AWARD OF ATTORNEY FEES AND LITIGATION EXPENSES.

{¶58} The trial court found that the parties both failed to present credible evidence that the actions of one party caused the other to incur additional attorney fees because they both violated the temporary orders, resulting in certain instances of a depletion of assets for division. Based on that finding, the trial court found it fair and equitable that the parties each pay their own attorney fees.

{¶59} Husband argues that the trial court erred and abused its discretion in failing to grant him attorney fees. He alleges that his attorney fees were necessitated by delays in the litigation due to Wife's bankruptcy filing, her refusal to obtain new counsel after the withdrawal of her counsel, and her repeated non-compliance with discovery.

{¶60} As explained below, the record does not support Husband's argument. In addition, Husband's merit brief completely ignores and fails to address the trial court's rationale in ordering both parties to be responsible for their own attorney's fees; namely, his own misconduct.

{¶61} R.C. 3105.73(A), which gives the trial court the authority to determine an equitable award of attorney fees, states as follows:

> 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.*

(Emphasis added.) "A trial court has broad discretion in considering an award of attorney fees, and an award will only be reversed upon an abuse of the trial court's discretion." *Young v. Young*, 9th Dist. Lorain No. 19CA011573, 2022-Ohio-2535, ¶ 30. Once again we incorporate the abuse of discretion standard as outlined above.

{¶62} The history of this case reveals that the delays were the result of multiple factors unrelated to Wife's alleged delay tactics. Wife availed herself of her right to file for bankruptcy in 2019, resulting in a stay of the litigation. Both parties' attorneys withdrew at different points in the litigation, Husband's prior to the first scheduled trial in November 2018, and Wife's in March 2021, necessitating continuances. Husband filed a motion to have Wife's attorney removed and later requested a continuance of the settlement conference for a family emergency, both of which further delayed the proceedings. Certain factors were beyond the control of either party or the court, i.e., the global pandemic and the death of two of the judges assigned to the case, including the elected Judge of the Medina County Domestic Relations Court. After a new visiting judge was assigned to the case in April 2022, she continued the trial date to permit the completion of discovery which included outstanding items from *both* parties, not just Wife. Almost seven months elapsed from the time of the new trial judge's April 27, 2022, scheduling order and the November 2, 2022, trial date due to the new judge's limited availability and the outstanding discovery.

{¶63} Husband also alleges Wife improperly delayed the matter by filing motions throughout the case. The record shows that Wife filed three motions to show cause regarding Husband's failure to pay child support, and two motions to compel the production of documents. Ultimately, the trial court concluded that Wife's show cause motions were meritorious. Thus, by delegating sole responsibility to Wife's discovery delays as support for his argument that Wife

single-handedly hindered the proceedings, Husband ignores his own responsibility in the matter. His own conduct in failing to pay support precipitated Wife's motions to show cause, and he was ultimately ordered to pay the arrearages. Along the same line, the record reflects that Husband filed several motions to compel Wife's production of documents and her appearance for deposition. However, both parties, not just Wife, were ordered by the trial court to exchange a substantial number of outstanding documents prior to final hearing.

{¶64} Husband also argues here that the trial court failed to award him attorney fees as sanctions under Civ.R. 37(D) pursuant to his motion to compel Wife's deposition. However, according to the express language of the trial court's July 6, 2022, order, which Husband has not disputed, Husband's motion to compel was withdrawn and no sanctions were issued. Because Husband waived this issue, it will not be addressed.

{¶65} Finally, Husband failed to address whatsoever the trial court's reasoning in ordering that the parties each pay their own attorney fees; that is, that the parties were equally guilty of violating the temporary orders. Husband does not allege that the trial court erred in arriving at this conclusion regarding his own conduct. The record also shows that Husband was in arrears on his child support and that the marital residence was in foreclosure due to Husband's failure to pay the property taxes. Under R.C. 3105.73(A), the court was permitted to "consider the * * * conduct of the parties" as a factor in determining whether an award of attorney fees was equitable, which it did here.

{¶66} In sum, this case is not analogous to *Young*, 9th Dist. Lorain No. 19CA011573, 2022-Ohio-2535, which Husband relied upon in his merit brief, wherein Wife was single-handedly responsible for inhibiting the adjudication of the proceedings. Here, both parties, not just Wife, as well as various unrelated outside factors, were responsible for the delays in the proceedings.

{¶67} Accordingly, based on the record before us, we cannot say that the trial court abused its discretion in declining to award Husband attorney fees in this matter as Wife was not solely responsible for the delays in the litigation. Husband's fifth assignment of error is overruled.

III

{¶68} Based on the foregoing, Husband's assignments of error are overruled and the judgment of the Medina County Court of Common Pleas, Domestic Relations Division, is affirmed

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

SCOT STEVENSON
FOR THE COURT

SUTTON, J.
CONCURS IN JUDGMENT ONLY.

FLAGG LANZINGER, J.
DISSENTING.

{¶69} I respectfully dissent with the lead opinion. I believe the trial court's failure to find Wife engaged in financial misconduct was against the manifest weight of the evidence.

{¶70} R.C. 3105.171(E)(4) permits a court to compensate one spouse with a distributive award if it finds the other spouse has engaged in financial misconduct, including but not limited to dissipation, destruction, concealment, or fraudulent disposition of assets. Financial misconduct inherently involves some element of wrongful intent or scienter. *Kim*, 2020-Ohio-22, at ¶ 25. For the trial court to find the requisite "financial misconduct," it must find (1) a wrongdoing by one spouse that interferes with the other spouse's property rights and (2) that the wrongdoing results in profit to the wrongdoer "or stems from an intentional act meant to defeat the other spouse's distribution of assets." *Bucalo*, 2005-Ohio-6319, at ¶ 30. Violation of a mutual restraining order may constitute financial misconduct. *See Okoye v. Okoye*, 9th Dist. Summit No. 28183, 2018-Ohio-74, ¶ 63, 67 (affirming trial court's determination that husband's violation of mutual restraining order was financial misconduct); *Marshall v. Marshall*, 11th Dist. Portage No. 2015-P-0073, 2016-Ohio-3405, ¶ 36 (holding that husband's direct violation of mutual restraining order permitted trial court to award a distributive award for financial misconduct.); *King v. King*, 4th Dist. Jackson No. 12CA2, 2013-Ohio-3426, ¶ 40 (remanding matter for trial court to revisit issue of financial misconduct when husband violated mutual restraining order).

{¶71} Here, Wife's act of borrowing from her 401(k) plan clearly violated the mutual restraining order and interfered with Husband's property rights. The trial court acknowledged this violation and attempted to address the impact of Wife's 401(k) loan on Husband's share of marital

assets by ordering that the 401(k) account be split equally between the parties and that Wife's share be reduced by the balance of the loan. However, the trial court's order fails to account for (1) the growth that the loan amount would have accrued had it remained in the 401(k), (2) any tax penalty suffered for early withdraw of the funds, and (3) the dissipation of the 401(k) account's reduced balance.

{¶72} Further, when reviewing the record, Wife's borrowing from her 401(k) appears to stem from an intentional act meant to defeat Husband's distribution of assets. The lead opinion's analysis concludes that while Wife may have withdrawn the funds from the 401(k) "to defeat Husband's interests she also may have done so because she was having financial difficulties * * * ." The lead opinion conflates intent with motive. A person who steals because they are having financial difficulties is not excused for theft, regardless of their motivations. Wife clearly intended to usurp the mutual restraining orders. Wife's action resulted in the reduction of the 401(k)'s value, and ultimately resulted in Huband receiving a lesser distribution of assets. Reviewing the record as a whole, the record supports a conclusion that wife intended to defeat husband's distribution of assets. The loan from the 401(k) was part of a pattern of financial actions made by Wife, the removal of large sums from Husband's business, and the secretive handling of the Dennis Lane property. These actions collectively are demonstrative of intent to conceal and deplete marital assets. The evidence weighs in favor of finding that Wife engaged in financial misconduct.

{¶73} For these reasons, I would reverse the trial court's judgment regarding the first assignment of error and remand the case for further proceedings. The trial court should make a finding of financial misconduct and reassess the distribution of assets accordingly, including a distributive award to compensate Husband for the lost growth potential of the 401(k) funds and the overall depletion of the marital estate due to Wife's actions.

APPEARANCES:

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