

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Tina L. Wehrle,	:	
Plaintiff-Appellee,	:	No. 12AP-386
	:	(C.P.C. No. 09DR-4999)
v.	:	
	:	(REGULAR CALENDAR)
Matthew L. Wehrle,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 15, 2013

Joseph L. Piccin Co., LLC, and Joseph L. Piccin; Law Office of Heather W. Tootle, and Heather W. Tootle, for appellee.

Randy S. Kurek, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

BRYANT, J.

{¶ 1} Defendant-appellant, Matthew L. Wehrle, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce to him and plaintiff-appellee, Tina L. Wehrle, awarding her spousal support, child support, and attorney fees, holding defendant in contempt, and overruling defendant's motion for a new trial pursuant to Civ.R. 59. Because the trial court did not abuse its discretion in awarding plaintiff spousal support, child support and attorney fees, in holding defendant in contempt, and in denying defendant's motion for a new trial, we affirm.

I. Facts and Procedural History

{¶ 2} Plaintiff and defendant were married on September 8, 1990; four children were born as issue of the marriage. Plaintiff filed a complaint for divorce on December 28,

2009, and defendant filed an answer and counterclaim for divorce on February 19, 2010. The parties' litigation of the action involved multiple filings; the particulars of only some are pertinent to defendant's appeal.

A. Temporary Support Orders

{¶ 3} The magistrate of the trial court issued a temporary support order on April 1, 2010, requiring defendant to pay within 60 days temporary spousal support in the amount of \$4,000 per month and \$2,000 for plaintiff's attorney fees and expenses. The magistrate also ordered defendant to provide health insurance for the children of the marriage. The magistrate further ordered plaintiff and defendant each to pay 50 percent of debts listed on exhibits A and B to the temporary order. Plaintiff later filed a motion for contempt because defendant failed to comply with the magistrate's temporary order.

{¶ 4} On June 29, 2010, the parties entered a memorandum of agreement stating defendant would file a financial affidavit within 14 days pursuant to Loc.R. 17 of the Franklin County Court of Common Pleas, Division of Domestic Relations, provide answers to written interrogatories and comply with discovery requests within 21 days, and pay plaintiff \$700 in attorney fees within 60 days. Plaintiff filed a motion for contempt on October 19, 2010, alleging defendant had not complied with the June 29, 2010 agreed entry, as he failed to file a financial affidavit, did not comply with requests for discovery or supply answers to interrogatories, and did not pay plaintiff's attorney fees and costs. On December 2, 2010, the magistrate entered an order modifying the temporary order by reducing defendant's spousal support obligation to the amount of \$3,500 per month.

B. Trial, Judgment Entry, and Post-Judgment Motion

{¶ 5} Following several days of trial, the trial court issued a Judgment Entry-Decree of Divorce on February 2, 2012, finding, pursuant to the parties' stipulations, that each party was entitled to a divorce. The trial court determined the termination of the marriage to be the day the trial commenced, June 28, 2011, making the duration of the marriage nearly 21 years. The court ordered defendant to pay spousal support, child support, the arrearages in the temporary orders, and a portion of plaintiff's attorney fees and expenses.

{¶ 6} Defendant filed a motion for a new trial on February 16, 2012, and the trial court filed a decision and judgment entry denying defendant's motion on March 29, 2012.

On the same date, the trial court filed an amended Judgment Entry-Decree of Divorce pursuant to Civ.R. 60(A) to correct a clerical mistake regarding the court's determination of the parties' liabilities.

II. Assignments of Error

{¶ 7} Defendant appeals, assigning six errors:

[I.] The trial court erred as a matter of law, and issued a decision against the manifest weight of the evidence, in determining child support.

[II.] The trial court abused its discretion, and issued a decision against the manifest weight of the evidence, in determining the amount and duration of spousal support.

[III.] The trial court erred as a matter of law, and issued a decision against the manifest weight of the evidence, in failing to grant a New Trial on the limited issues raised in [defendant's] Motion.

[IV.] The trial court erred as a matter of law, and issued a decision against the manifest weight of the evidence, as it relates to the division of the marital property.

[V.] The trial court abused its discretion, and issued a decision against the manifest weight of the evidence, in awarding [plaintiff] attorney's fees.

[VI.] The trial court abused its discretion, and issued a decision against the manifest weight of the evidence, in issuing its purge order on the contempt.

For ease of discussion, we address defendant's assignments of error out of order.

III. First Assignment of Error - Child Support

{¶ 8} Defendant's first assignment of error asserts the trial court erred as a matter of law in determining child support. A trial court has considerable discretion when calculating child support, and, absent an abuse of discretion, an appellate court will not disturb a child support order. *Pauly v. Pauly*, 80 Ohio St.3d 386, 390 (1997), citing *Booth v. Booth*, 44 Ohio St.3d 142, 144 (1989).

{¶ 9} When a trial court orders child support, the court must complete a child support guideline computation worksheet and include it in the trial court's record. *Marker v. Grimm*, 65 Ohio St.3d 139 (1992), paragraph one of the syllabus; R.C.

3119.022. The amount the worksheet yields is rebuttably presumed to be the correct amount of child support to be awarded, but the court may deviate from the guideline computation worksheet provided it supplements its decision with factual findings. *See Marker*; R.C. 3119.022, 3119.03.

{¶ 10} One of the factors to be included on the worksheet is each parent's gross income. A parent's "gross income" is "the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, * * * [and] commissions; royalties; tips; rents; dividends; * * * interest; trust income; annuities; social security benefits[;] * * * spousal support actually received; and all other sources of income." R.C. 3119.01(C)(7). "Gross income" also includes "self-generated income; and potential cash flow from any source." R.C. 3119.01(C)(7). Gross income does not include "[n]onrecurring or unsustainable income or cash flow items," meaning "an income or cash flow item the parent receives in any year or for any number of years not to exceed three years that the parent does not expect to continue to receive on a regular basis." R.C. 3119.01(C)(7)(e) and (8).

{¶ 11} Prior to this action, the parties operated an electrical business together. Defendant possessed an electrical license and was primarily responsible for securing contracts and performing electrical work for the business. Although plaintiff possessed an electrical license, the parties do not dispute that she is not a qualified electrician and instead primarily assisted the business by maintaining records and performing bookkeeping. The parties' business also employed defendant's brother, who assisted defendant in completing jobs by practicing on defendant's license.

{¶ 12} During the marriage, the parties also received income through managing 71 units in 3 apartment complexes they were attempting to buy via land contract. At the time of trial, the parties had voluntarily relinquished their interest in the land contract to the vendor in order to avoid a lawsuit, as they were unable to timely pay on the contract. Although defendant testified he had to take out loans to maintain the monthly payments on the land contract since the apartments were losing money in the downturned economy, the trial court was not persuaded. The trial court found defendant rerouted all rental income from the parties' apartment complex to his post office box instead of the parties' marital residence. The trial court further noted defendant failed to provide any

documentary evidence or third-party witnesses to demonstrate either the losses or the manner in which the money he collected from rents or loans was spent.

{¶ 13} In assessing the parties' income for purposes of child support, the trial court determined the parties' electrical business supported the family during the marriage, but defendant abandoned the business after he moved out of the marital residence. The evidence supports the court's conclusion. Plaintiff testified that despite her entreaties for his assistance, defendant no longer performed any work for the business and, as a result, she and defendant's brother attempted to manage the business without defendant. At the time of trial, both parties testified defendant's brother was no longer working for the parties' business, and plaintiff stated she no longer received any income from any electrical work. Although defendant testified he was performing electrical work following the parties' relinquishment of their apartment complexes, the trial court found he failed to state his earnings during the pendency of the parties' action with any particularity.

{¶ 14} The court also noted defendant, according to his own testimony, was an apartment manager for his paramour, Alyaa Majeed, at her apartment complex; he received free rent as compensation for his work in managing the complex that required only a few working hours per week. Pointing to defendant's relative lack of employment after the parties lost their apartment complexes and the minimal time investment required in his work for Majeed, the trial court stated the reasons for defendant's abandoning his electrical business were unclear.

{¶ 15} Given that evidence, the trial court determined defendant was voluntarily underemployed and imputed income to him in the amount of \$51,000 per year based upon defendant's testimony that he was able to earn \$45,000 as a licensed electrician and the evidence that he received \$6,000 as the value of the rent for the apartment in which Majeed allowed defendant to stay rent-free.

{¶ 16} In considering plaintiff's income for purposes of the worksheet, the trial court determined plaintiff was unemployed due to her responsibilities as caretaker of the parties' 4 children and her relative lack of employment over the prior 15 years. The court further noted that any income plaintiff could produce largely would be consumed in the costs of providing daycare for the parties' fourth child who was approximately 15 months of age at the time of the decision.

{¶ 17} Due to the absence of medical insurance provided for the children and additional costs resulting from the birth of the parties' fourth child, the trial court modified the temporary orders the magistrate issued. Using calculations from child support worksheets that it attached to the judgment entry, the trial court divided defendant's child support obligation into three separate periods as follows:

- From the period of January 1 through April 19, 2010, when health insurance was provided, defendant was ordered to pay monthly child support in the amount of \$285.87 per child, for a total of \$857.60, plus processing charge, for three children;
- From the period of April 20 through April 31, 2010, when health insurance was provided, defendant was ordered to pay monthly child support in the amount \$236.92 per child, for a total of \$947.70, plus processing charge, for four children;
- From the period of May 1, 2010 and ongoing, when health insurance is not provided, defendant was ordered to pay monthly child support in the amount \$236.92 per child, for a total of \$947.70, plus processing charge, plus cash medical in the amount of \$145.75, plus processing charge.

{¶ 18} Based on the modified child support order, the trial court calculated defendant's arrearages as of September 1, 2011 to be \$18,579.19 in child support and \$2,332.00 in cash medical support plus 2 percent processing charge. Finally, the trial court directed plaintiff to pay 25 percent and defendant to pay 75 percent of the children's extraordinary medical, dental, or psychiatric and psychological expenses.

{¶ 19} Defendant contends the trial court erred in calculating defendant's child support obligation because it failed to account for several sources of income plaintiff received. Defendant points to plaintiff's testimony that she received approximately \$12,400 of income from the parties' electrical business between January 1 and September 30, 2010. Defendant further claims the trial court failed to account for income plaintiff received from laundry machines at the apartment complexes the parties formerly controlled. Defendant's contentions are contrary to this court's authority applying the statutory provisions regarding sustainable income in R.C. 3119.01(C)(8).

{¶ 20} In *Winkler v. Winkler*, 10th Dist. No. 02AP-937, 2003-Ohio-2418, the defendant argued the trial court in determining child support obligations failed to account for the plaintiff's income received over a period of approximately two years. *Id.* at ¶ 60. During that period of time, the plaintiff attended college, and financial contributions from her parents, funds from an automobile accident settlement, child support from defendant, some financial assistance from her fiancé, and savings supported her. This court concluded nothing in the record suggested any source of income plaintiff received "existed for three years or more, or that plaintiff expect[ed] it to continue on a regular basis." *Id.* As a result, *Winkler* concluded the trial court did not act unreasonably, arbitrarily, or unconscionably in finding the plaintiff did not have income for purposes of child support calculations. *Id.*

{¶ 21} *Bruno v. Bruno*, 10th Dist. No. 04AP-1381, 2005-Ohio-3812, addressed the same issue, where the trial court utilized the defendant's income of approximately \$150,000 over the 12 months immediately prior to the child support hearing to calculate the defendant's child support obligation. *Id.* at ¶ 14. *Bruno* concluded that although the defendant earned annual sums exceeding \$150,000 in years prior to the hearing, evidence presented at trial demonstrated he would earn substantially less in the immediate future. Because there was "no evidence presented that [defendant] expected to continue to receive on a regular basis the same income he received" during the period the trial court utilized for determining child support, this court concluded the trial court improperly considered the defendant's prior income that was unsustainable pursuant to R.C. 3119.01(C)(8). *Id.*

{¶ 22} Plaintiff's income from the parties' electrical business constituted unsustainable income and could not properly be used for purposes of determining child support. Although plaintiff affirmed she received approximately \$12,400 from the electrical business between January 1 and September 30, 2010, the record reflects she no longer was receiving income from the electrical business: not only had both defendant and his brother ended their business relationship with plaintiff, but the trial court awarded ownership of the electrical business and all of its assets to defendant. No evidence demonstrated plaintiff would continue to receive on a regular basis the same income she received during the period between January 1 and September 30, 2010. *See*

Bruno at ¶ 14; *Winkler* at ¶ 60. Similarly, no evidence in the record supports defendant's contention that plaintiff would continue to receive any income from the laundry machines in the apartment complexes since the parties voluntarily relinquished their ownership interest in the properties. Plaintiff's receipt of income from the laundry machines also constitutes unsustainable income.

{¶ 23} The trial court did not abuse its discretion by declining to consider plaintiff's unsustainable income for the purposes of child support. Accordingly, defendant's first assignment of error is overruled.

IV. Second Assignment of Error - Spousal Support

{¶ 24} Defendant's second assignment of error asserts the trial court abused its discretion by requiring defendant to pay an excessive amount of spousal support given his other court-ordered obligations.

{¶ 25} " '[S]pousal support' means any payment or payments to be made to a spouse or former spouse, or to a third party for the benefit of a spouse or a former spouse, that is both for sustenance and for support of the spouse or former spouse." R.C. 3105.18(A). During the pendency of a divorce proceeding, a trial court may award "reasonable temporary spousal support to either party." R.C. 3105.18(B). Following the division of property, a trial court may award "reasonable spousal support to either party." R.C. 3105.18(B). "A trial court has broad discretion to determine the proper amount of spousal support based on the particular facts and circumstances of each case." *Heller v. Heller*, 195 Ohio App.3d 541, 2011-Ohio-5364, ¶ 19 (10th Dist.), citing *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67 (1990). Absent an abuse of discretion, a reviewing court will not substitute its judgment for that of the trial court. *Kunkle* at 67, citing *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 131 (1989).

{¶ 26} R.C. 3105.18(C)(1) "governs the trial court's discretion and requires the trial court to consider certain enumerated factors in determining not only whether spousal support is appropriate and reasonable, but also the nature, amount, terms of payment, and duration of such an award." *Heller* at ¶ 20. The trial court need not comment on each factor separately so long as the record reflects the court considered all factors in its determination of the spousal support award. *McClung v. McClung*, 10th Dist. No. 03AP-

156, 2004-Ohio-240, ¶ 21, citing *Carman v. Carman*, 109 Ohio App.3d 698, 703 (12th Dist.1996), and *Casper v. DeFrancisco*, 10th Dist. No. 01AP-604 (Feb. 19, 2002).

{¶ 27} In determining defendant's spousal support obligation, the trial court made detailed findings with regard to each of the enumerated factors contained in R.C. 3105.18(C)(1). As in determining defendant's child support obligation, the trial court found defendant to be voluntarily underemployed and imputed income to him in the amount of \$51,000 per annum, which included the value of the rent for the apartment Majeed provided to defendant free of charge. The trial court also noted that plaintiff experienced a greater reduction in her standard of living due to defendant's failure to provide any spousal support as required under the court's temporary orders.

{¶ 28} After examining the statutory factors in R.C. 3105.18(C)(1), the trial court ordered defendant to pay plaintiff spousal support in the amount of \$1,250 per month plus processing charge for a period of 156 months effective January 1, 2010. The court declared the award terminable upon the death of either party, the remarriage of plaintiff, plaintiff's cohabitation with an adult unrelated male, or the expiration of the award, whichever first occurs.

{¶ 29} Defendant asserts that his other court-ordered obligations render the trial court's award of spousal support unreasonable and inappropriate. In support, defendant states the court's decree requires him to pay child support, cash medical support, and spousal support in the amount of \$28,683.84 per year inclusive of processing charges, amounting to 56 percent of defendant's imputed gross income. Defendant also points to the court's order to pay one-half of the mortgage, taxes, and insurance costs for the marital residence until either party refinanced the home or sold it. The trial court did not make a specific finding as to the cost of such payments, but defendant notes plaintiff testified the value of the mortgage payments totaled approximately \$1,300 per month, making defendant's payment approximately \$650 per month.

{¶ 30} Defendant further notes the trial court's award to plaintiff of a total of \$20,000 in attorney fees that defendant is to pay in increments of \$500 per month for 40 months, and, to equalize the division of marital assets and debts, the \$995 the trial court ordered defendant to pay plaintiff. Finally, in order to purge his contempt, the trial court ordered defendant to pay to plaintiff within 90 days of the judgment entry the following

amounts: \$2,000 in attorney fees the magistrate awarded in temporary orders, an additional attorney fee award of \$1,900 for plaintiff's three motions for contempt, and one-half of all debts listed on the court's exhibit B to the Temporary Order under "Section A" from the period of January 1, 2010 through February 2, 2012. (R. 346, Amended Judgment Entry-Decree of Divorce, at 43-44; R. 77-79.)

{¶ 31} Plaintiff responds that defendant's alleged inability to pay the spousal support award results from his own actions in failing to pay spousal and child support as the court's temporary orders required. Plaintiff also notes the trial court's finding that defendant "indulged in discretionary expenses" while he was under an obligation to pay spousal and child support pursuant to the court's temporary orders. (R. 346, at 43.) The record supports the trial court's finding. According to the evidence, much of which plaintiff discovered by virtue of subpoena since defendant failed to comply with discovery requests, defendant spent \$380.00 on lodging for a trip to Jamaica, New York to meet Majeed, \$97.99 for two charges at a tanning salon, \$1,388.00 for two charges for telephone use, and \$497.38 for Prolixus, which defendant testified was an over-the-counter male enhancement drug. Based on these and other charges found in the exhibits and defendant's admissions, defendant incurred at least \$2,418.03 in discretionary expenditures from January to June 2010.

{¶ 32} "R.C. 3105.18 does not require a court, in awarding spousal support, to provide the parties with an equal standard of living." *Heller* at ¶ 23, citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 95 (1988). "Nor does any statute 'prevent[] a court from ordering a spousal support in an amount that is in excess of 50 percent of a person's earnings.' " *Heller* at ¶ 23, quoting *Zollar v. Zollar*, 12th Dist. No. CA2008-03-065, 2009-Ohio-1008, ¶ 40, citing *Cramblett v. Cramblett*, 7th Dist. No. 05 HA 581, 2006-Ohio-4615, ¶ 23. Nevertheless, in determining whether the trial court abused its discretion, a reviewing court must consider whether the obligor spouse is reasonably able to pay the award of spousal support. *Hesseling v. Hesseling*, 4th Dist. No. 08CA3034, 2009-Ohio-3116, ¶ 22; *Heller* at ¶ 23 (stating the issue for review "reduces to whether defendant's * * * income reasonably supports the trial court's order").

{¶ 33} In *Heller*, this court found the trial court's award of indefinite spousal support and the cost of health insurance coverage totaling 75 percent of the defendant's

yearly income to the plaintiff, who was readily employable and received income-producing assets through the distribution of marital property, constituted an abuse of discretion. *Id.* at ¶ 23-26. *See also Farnsworth v. Farnsworth*, 9th Dist. No. 02CA0074-M, 2003-Ohio-2341, ¶ 8, 13; *Stone v. Stone*, 2d Dist. No. 2003-CA-34, 2004-Ohio-671, ¶ 32-34. In *Hesseling*, the court found an abuse of discretion in awarding spousal support where the defendant's court-ordered payments, including child support, spousal support, and his mortgage obligation, totaled 76 percent of his gross income.

{¶ 34} The noted cases, however, are distinguishable. Unlike the obligees in *Heller* and *Farnsworth* who were determined to be capable of developing meaningful employment outside the home, the trial court found outside employment for plaintiff would be prohibitively expensive: not only was she the primary caretaker for the parties' youngest child, but the cost of daycare would outweigh her earnings due to her limited education and lack of work history. Further, unlike the obligors in *Hesseling* and *Stone* who were awarded the marital residence and were required to pay the attendant mortgage, defendant's court-ordered mortgage payments are not indefinite; defendant was not awarded sole possession of the mortgaged property and his obligation will terminate upon a successful refinancing or sale of the marital residence. *Hesseling* at ¶ 8, 26; *Stone* at ¶ 6-7, 33.

{¶ 35} Defendant's contentions surrounding the trial court's award of attorney fees, defendant's arrearages pursuant to the court's temporary orders, and the conditions imposed to purge defendant of contempt also lack merit. Although these court-ordered payments constitute a substantial portion of defendant's imputed income, they directly result from defendant's failure to comply with the court's temporary orders and his conduct during litigation, which the trial court found substantially increased plaintiff's litigation costs and expenses.

{¶ 36} To withhold justice from a wronged party due to the voluntary conduct of another is contrary to the principles of equity. *See Shanley v. Shanley*, 46 Ohio App.3d 100, 101-02 (8th Dist.1989) (concluding trial court did not abuse its discretion in denying obligor spouse's motion to reduce alimony since the obligor's alleged inability to pay arrearages resulted from his voluntary decision to incur additional debt); *Haynie v. Haynie*, 19 Ohio App.3d 288 (8th Dist.1984) (deciding trial court did not abuse its

discretion in denying obligor spouse's motion to reduce alimony and child support payments since obligor voluntarily reduced his income); *Adams v. Adams*, 6th Dist. No. WD-09-022, 2009-Ohio-6257, ¶ 28 (concluding trial court did not abuse its discretion in ordering spousal support payments, even though obligor had tax liabilities and support arrearages, and obligee had returned to employment, where obligor made withdrawals from an IRA account without obligee's knowledge); *Getter v. Getter*, 90 Ohio App.3d 1, 9 (2d Dist.1993). Cf. *Hesseling* at ¶ 28 (determining the award of spousal support constituted an abuse of discretion since it would "result in significant economic hardship to one party only while the record does not indicate that party was the sole cause of the overwhelming debt incurred during the marriage"); *Farrell v. Farrell*, 5th Dist. No. 2008-CA-0080, 2009-Ohio-1341, ¶ 22 (concluding court abused its discretion in denying obligor's motion to reduce his child support obligation where trial court expressly found obligor could not possibly make the payments and did not find obligor had intentionally reduced his income).

{¶ 37} Moreover, although the trial court cited defendant's failure to pay any spousal support under the temporary orders as a relevant factor in its analysis pursuant to R.C. 3105.18(C)(1)(n), the trial court's extensive examination of all other enumerated factors makes clear that the trial court did not base its award of spousal support solely on defendant's failure to comply with the court's temporary orders and the resulting reduction in plaintiff's standard of living. See *Gilson v. Gilson*, 7th Dist. No. 10 HA 3, 2011-Ohio-6640, ¶ 19 (determining spousal support award was not intended to punish, but to account for financial realities that obligor's arrearage in temporary orders in part caused).

{¶ 38} Given the trial court's thorough consideration of the evidence and the statutory factors, the trial court did not act unreasonably, arbitrarily, or unconscionably in awarding spousal support to plaintiff in the amount of \$1,250 per month for 156 months. Accordingly, we overrule defendant's second assignment of error.

V. Fourth Assignment of Error - Distribution of Property

{¶ 39} Defendant's fourth assignment of error asserts the trial court's division of property is against the manifest weight of the evidence.

{¶ 40} "In any divorce action, the starting point for a trial court's analysis is an equal division of marital assets." *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5, citing R.C. 3105.171(C), and *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981). R.C. 3105.171(C)(1), however, provides that if an equal division would be inequitable, the court must divide the property equitably between the spouses. To ensure an equitable division of marital property, a trial court must consider the factors set forth in R.C. 3105.171(F). *Neville* at ¶ 5. The trial court must evaluate all relevant facts in determining an equitable division. *Cherry* at 355 (stating "[e]quitable need not mean equal").

{¶ 41} "An appellate court's job is not to reweigh the evidence but to determine whether competent, credible evidence in the record supports the trial court's findings." *Hood v. Hood*, 10th Dist. No. 10AP-999, 2011-Ohio-3704, ¶ 14, citing *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, ¶ 27 (10th Dist.), and *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶ 15. A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401 (1998), citing *Berish v. Berish*, 69 Ohio St.2d 318 (1982). We review a trial court's division of property for an abuse of discretion. *Neville* at ¶ 5; *Hood* at ¶ 14.

{¶ 42} Here, the trial court determined, considering the relevant statutory factors in R.C. 3105.171(F)(1) through (10), that an equal division of marital property would be inequitable due to a lack of evidence. Therefore, the trial court divided the property equitably. Defendant contends the trial court erred in so concluding based on its determination that certain debts defendant incurred were gifts as opposed to marital debt.

{¶ 43} To support his contention, defendant points to his testimony that he borrowed \$3,700 from his brother to pay for the children's school tuition, \$12,000 from Majeed to maintain the parties' apartment complexes, \$24,000 from his father to maintain the apartment complexes, and \$1,200 from his mother to pay for utilities at the marital residence. Defendant further contends the trial court erred by not considering his attorney fees as debts on the marital balance sheet and points to his and Majeed's testimony that he borrowed \$3,000 from Majeed to pay for attorney fees.

{¶ 44} The trial court noted defendant's testimony regarding the above debts and determined neither defendant's nor Majeed's testimony was credible. The trial court specifically noted defendant failed to supply any evidence or supporting documentation

regarding the specific use of the monies received from the alleged loans. Further, the trial court found Majeed's testimony to be inconsistent, unreliable, and "conveniently aligned" with defendant's testimony. (R. 346, at 18.) Due to the lack of credible testimony and supporting documentary evidence, the trial court designated the alleged debts as gifts to defendant and declined to include them as marital debt.

{¶ 45} Competent, credible evidence supports the trial court's findings. Defendant did not produce documentary evidence to support the existence of the loans or their terms. *See Sun v. Chen*, 10th Dist. No. 09AP-404, 2009-Ohio-6197, ¶ 30; *Dunn v. Dunn*, 12th Dist. No. CA2004-08-020, 2005-Ohio-5477, ¶ 7; *Hancock v. Hancock*, 6th Dist. No. WM-02-011, 2002-Ohio-7106, ¶ 23. Moreover, the trial court was in the best position to assess the credibility of the testimony defendant and Majeed offered. *Heyman v. Heyman*, 10th Dist. No. 05AP-475, 2006-Ohio-1345, ¶ 18, citing *Rogers v. Rogers*, 10th Dist. No. 96APF10-1333 (Sept. 2, 1997). Given the absence of credible testimony and the lack of supporting evidence in the record, the trial court's division of marital property is not an abuse of discretion. Defendant's fourth assignment of error is overruled.

VI. Fifth Assignment of Error - Attorney Fees

{¶ 46} Defendant's fifth assignment of error asserts the trial court's award of attorney fees to plaintiff was overly punitive and therefore an abuse of discretion. Although defendant concedes he failed to comply with the court's temporary orders, he argues his lack of income and alleged debts render the award inequitable.

{¶ 47} In divorce proceedings, a trial court may award "all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable." R.C. 3105.73(A). A trial 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" to determine whether an award is equitable. R.C. 3105.73(A). An award of attorney fees under R.C. 3105.73 lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Huffer v. Huffer*, 10th Dist. No. 09AP-574, 2010-Ohio-1223, ¶ 19, citing *Parker v. Parker*, 10th Dist. No. 05AP-1171, 2006-Ohio-4110, ¶ 36.

{¶ 48} In determining the attorney fees award, the trial court noted defendant's conduct had "significant impact on [plaintiff's] financial means and standard of living"

because defendant's actions "eliminated assets and business opportunities that provided the couple historical income and financial resources." (R. 346, at 37.) The court further noted defendant failed to fulfill any support obligations contained within the court's temporary orders, forcing plaintiff to rely on state benefits and her parents in order to provide for the parties' four children. The trial court also found defendant failed to exercise his parenting time with his children and his actions indicated "he was not concerned about any responsibility for his children, and that his focus was almost solely upon his needs and wants." (R. 346, at 37.)

{¶ 49} Finally, the trial court found defendant's actions throughout the pendency of the litigation and the trial indicated "an effort to thwart the legal process" and cause additional hardship for plaintiff. (R. 346, at 38.) According to the guardian ad litem, defendant stated that plaintiff would "run around crazy filing motions, getting upset, sending out correspondence. She is going to run herself into a tizzy, spending a lot of money. Eventually she will not be able to afford to continue up with that pace and then she will calm down and * * * we will be able to reach a settlement easier, at that time she is out of money." (Tr. 89-90.) The trial court found defendant's conduct was "egregious" and resulted in substantially increased litigation costs and expenses for plaintiff. (R. 346, at 38.) Considering the record and the factors included in R.C. 3105.73(A), the trial court ordered defendant to pay plaintiff a total of \$20,000 in attorney fees in addition to the \$2,000 the magistrate awarded in temporary orders.

{¶ 50} "Because a court addresses an award of attorney fees through equitable considerations, a trial court properly can consider the entire spectrum of a party's actions, so long as those actions impinge upon the course of the litigation." *Padgett v. Padgett*, 10th Dist. No. 08AP-269, 2008-Ohio-6815, ¶ 17; *see also Wolf-Sabatino v. Sabatino*, 10th Dist. No. 10AP-1161, 2011-Ohio-6819, ¶ 105; *Farley v. Farley*, 10th Dist. No. 99AP-1103 (Aug. 31, 2000) (stating the trial court was in a better position to determine the extent to which one party's conduct was responsible for increasing litigation expenses). Although defendant argues he will be unable to pay the fees due to his alleged debts, spousal and child support arrearages, and continuing support obligations, the trial court considered those arguments, determined defendant would be unable to pay the fees in a lump sum, and so allowed defendant to make monthly payments.

{¶ 51} Given that the net value of defendant's assets and liabilities was \$49,466 following the trial court's division of the marital property and debt, the record does not support defendant's claim that he is unable to pay the attorney fees award. Where, as here, one party's improper actions force the other to turn to the court in an effort to protect her rights, principles of equity allow the trial court to exercise its discretion in determining the appropriate awards based on the parties' respective behavior. *Padgett* at ¶ 17; *Grosz v. Grosz*, 10th Dist. No. 04AP-716, 2005-Ohio-985, ¶ 27, citing *Trott v. Trott*, 10th Dist. No. 01AP-852, 2002-Ohio-1077.

{¶ 52} Because the trial court did not abuse its discretion by considering the totality of defendant's conduct during the divorce proceedings, we overrule defendant's fifth assignment of error.

VII. Sixth Assignment of Error - Contempt Order

{¶ 53} In his sixth assignment of error, defendant asserts the trial court abused its discretion by issuing a purge order where the manifest weight of the evidence demonstrates defendant cannot possibly comply with the underlying order.

{¶ 54} "Contempt results when a party before a court disregards or disobeys an order or command of judicial authority." *Byron v. Byron*, 10th Dist. No. 03AP-819, 2004-Ohio-2143, ¶ 11, citing *First Bank of Marietta v. Mascrete, Inc.*, 125 Ohio App.3d 257, 263 (4th Dist.1998). Contempt of court may also involve an act or omission substantially disrupting the judicial process in a particular case. *Byron* at ¶ 11, citing *In re Davis*, 77 Ohio App.3d 257, 273 (2d Dist.1991). Absent an abuse of discretion, a reviewing court will not overturn a finding of contempt. *Rife v. Rife*, 10th Dist. No. 11AP-427, 2012-Ohio-949, ¶ 9, citing *Hopson v. Hopson*, 10th Dist. No. 04AP-1349, 2005-Ohio-6468, ¶ 9.

{¶ 55} Generally, contempt proceedings in domestic relations matters are civil in nature as their purpose is to encourage compliance with the court's orders. *Byron* at ¶ 12. A sanction for civil contempt must allow the contemnor the opportunity to purge himself or herself of contempt since "[t]he purpose of sanctions, including punishment, is not for the purpose of punishment, but rather for the purpose of encouraging or coercing a party in violation of the decree to comply with the violated provision of the decree for the benefit of the other party." *Williamson v. Cooke*, 10th Dist. No. 05AP-936, 2007-Ohio-493, ¶ 11, citing *Pugh v. Pugh*, 15 Ohio St.3d 136, 139 (1984).

{¶ 56} "[I]n a civil contempt proceeding, the movant bears the initial burden of demonstrating by clear and convincing evidence that the other party has violated an order of the court." *Hopson* at ¶ 19, citing *Allen v. Allen*, 10th Dist. No. 02AP-768, 2003-Ohio-954, at ¶ 16. Once the movant has met his or her burden, the burden shifts to the other party to either rebut the showing of contempt or demonstrate an affirmative defense by a preponderance of the evidence. *Hopson* at ¶ 19, citing *Allen* at ¶ 16, citing *Pugh* at 140.

{¶ 57} Impossibility of complying with a contempt order is an affirmative defense for which the alleged contemnor bears the burden of proof. *Fidler v. Fidler*, 10th Dist. No. 08AP-284, 2008-Ohio-4688, ¶ 11, citing *Olmsted Twp. v. Riolo*, 49 Ohio App.3d 114, 117 (8th Dist.1988), citing *Smedley v. State*, 95 Ohio St. 141, 142-43 (1916). " 'The trial court abuses its discretion in ordering purge conditions that are unreasonable or where compliance is impossible.' " *Rife* at ¶ 20, quoting *McEnergy v. McEnergy*, 10th Dist. No. 00AP-69 (Dec. 21, 2000). The trial court's purge order required defendant to comply with the following:

- (1) defendant to pay to plaintiff \$2,000, as and for attorney fees;
- (2) defendant to pay plaintiff one-half of all debts listed on the court's exhibit B to the Temporary Order as section "A" for the period of January 1, 2010 through the journalization of the Judgment Entry-Decree of Divorce;
- (3) defendant to pay plaintiff attorney fees for the contempt findings in the amount of \$1,900; and
- (4) defendant to pay all amounts within 90 days of the filing of this Judgment Entry-Decree of Divorce.

{¶ 58} Defendant does not contend that contempt is an unreasonable sanction, as he admits he failed to comply with the trial court's orders. Rather, defendant contends he cannot possibly comply with the court orders. To support his contention, defendant states, without pointing to supporting evidence in the trial court's record, he is unable to comply due to lack of assets and income.

{¶ 59} The trial court expressly rejected defendant's affirmative defense of impossibility for three reasons. Initially, the court noted defendant "failed to provide a verifiable budget to the Court or any legitimate documentary evidence as to a computation of income as well as expenses." (R. 346, at 43.) The court further stated

defendant's failure to supply documentation of expenses was designed to be "an effort to thwart a just, equitable result in the divorce." (R. 346, at 43.) The court lastly considered documentary evidence plaintiff submitted showing defendant's discretionary expenses as evidence of defendant's ability to comply with the contempt order.

{¶ 60} Defendant admitted he knew of the court's temporary orders and paid nothing. According to the guardian ad litem, defendant stated he was not going to comply with the temporary orders so "[e]ventually [plaintiff] will not be able to afford to continue [litigation] * * * and I believe we will be able to reach a settlement easier * * * [when] she is out of money." (Tr. 89-90.) Although defendant testified to his limited earning capacity and difficulties with debt and other expenses, the trial court found plaintiff's evidence and testimony to be more credible than that of defendant's. Because competent, credible evidence supports the trial court's determination that defendant did not demonstrate his affirmative defense of impossibility, defendant's contentions to the contrary are unpersuasive. Defendant's sixth assignment of error is overruled.

VIII. Third Assignment of Error - Motion for a New Trial

{¶ 61} Defendant's third assignment of error asserts the trial court erred as a matter of law in denying defendant's motion for a new trial pursuant to Civ.R. 59.

{¶ 62} Civ.R. 59 provides in pertinent part: "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: * * * (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial; * * * In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown." "The decision to grant or deny a motion for a new trial pursuant to Civ.R. 59 generally lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion." *Byrd v. Byrd*, 10th Dist. No. 01AP-946, 2002-Ohio-2579, ¶ 20, citing *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 312 (1995).

{¶ 63} Although defendant's motion for a new trial asserted seven reasons why a new trial should be granted, he asserts only two of those on appeal, both of which assert a new trial should be granted due to evidence discovered subsequent to trial but prior to the issuance of the judgment entry. Defendant initially contends he is entitled to a new trial on the issue of child support, contending his obligations were incorrectly calculated

because he alleges he has de facto custody of the parties' oldest child following the conclusion of trial; he notes the trial court's child support order was based upon plaintiff's having custody of all four of the minor children. Defendant secondly contends the trial court's imputation of \$6,000 of income to defendant arising from the value of the apartment Majeed provided to defendant was in error since such arrangement allegedly was terminated shortly after the trial concluded.

{¶ 64} In *Sheen v. Kubiak*, 131 Ohio St. 52 (1936), the court held that "[t]o warrant the granting of a motion for a new trial based on the ground of newly discovered evidence," the new evidence (1) "must be such as will probably change the result if a new trial is granted," (2) "must have been discovered since the trial," (3) "must be such as could not in the exercise of due diligence have been discovered before the trial," (4) "must be material to the issues," (5) "must not be merely cumulative to former evidence," and (6) "must not merely impeach or contradict the former evidence." *Id.* at paragraph three of the syllabus. *See also Brooks v. Brooks*, 10th Dist. No. 95APF03-381 (Dec. 14, 1995); *Wozniak v. Wozniak*, 90 Ohio App.3d 400, 411 (9th Dist.1993).

{¶ 65} The trial court analyzed the factors underlying a motion for a new trial based on newly discovered evidence as established in *Sheen* and determined defendant's claims of newly discovered evidence with regard to the custody arrangement were "merely an alleged and unsubstantiated change in the facts after the trial was concluded." (R. 340, Decision and Entry, at 2.) The court found defendant failed to present any evidence regarding the criteria in *Sheen* and therefore concluded he did not meet the requirements for a motion for a new trial based on newly discovered evidence.

{¶ 66} The trial court correctly so concluded because the evidence defendant used to support his motion is not newly discovered evidence. "In general, evidence qualifies as 'newly discovered evidence' if it was in existence at the time of trial, but the moving party was excusably ignorant of it." *Alderman v. Alderman*, 10th Dist. No. 10AP-1037, 2011-Ohio-3928, ¶ 17, citing *In re C.C.*, 10th Dist. No. 04AP-883, 2005-Ohio-5163, ¶ 75. Defendant's noted change regarding the apartment Majeed provided to him occurred, according to defendant's motion, after the trial was completed. Similarly, the alleged change in living arrangements with the oldest child, according to defendant's motion, occurred after the trial concluded. Moreover, as the trial court noted, the parties were

bound by the terms of their prior agreed parenting plan that recognized plaintiff as sole legal custodian and resident parent, so that any attempt to modify the agreement was properly addressed through a post-decree motion for modification of the parenting plan.

{¶ 67} In both instances, the trial court properly determined defendant failed to demonstrate newly discovered evidence. The trial court thus correctly concluded defendant failed to meet the factors in *Sheen* and properly denied defendant's motion for a new trial. Defendant's third assignment of error is overruled.

IX. Disposition

{¶ 68} Having overruled defendant's six assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

KLATT, P.J., and BROWN, J., concur.
