

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

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| DIANE G. SENSKE, | : | APPEAL NO. C-080328 |
| | : | TRIAL NO. DR-0400560 |
| Plaintiff-Appellee, | : | |
| vs. | : | JUDGMENT ENTRY. |
| DAVID P. SENSKE, | : | |
| Defendant-Appellant. | : | |

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant David Senske appeals from the judgment of the Domestic Relations Division of the Hamilton County Common Pleas Court awarding plaintiff-appellee Diane Senske spousal support and child support, contesting not only the support awards but also the court's finding that a portion of a Franklin Savings bank account was separate property. We affirm in part.

I. The Dissolution

David and Diane (we use first names because the parties have the same last name) were married in 1979, and Diane filed for divorce in March 2004. About four months later, Diane and David agreed on certain parental rights and responsibilities relating to their son Sean. David and Diane followed the agreement during the divorce and that agreement was eventually incorporated into a shared-parenting plan in April 2008. Under the agreement, the parties were to alternate parenting time with Sean on a weekly basis during the school year and to equally divide their parenting duties during the summer months.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Diane testified that, because Sean had been adopted at an older age, she had received subsidies from the county and the state of over \$5,300 per year; and she also testified that Sean would receive Medicare benefits until he reached 18.

In October 11, 2005, a magistrate entered a temporary order² designating Diane the residential parent and legal custodian of Sean and awarding her \$1,800 per month in spousal support and \$234.58 per month in child support. David then moved to set aside the order, requesting that the magistrate be removed and that another hearing be held. The magistrate later withdrew, the case was assigned to another magistrate, who held another property hearing.

In March 2006, the new magistrate likewise designated Diane the residential parent and legal custodian of Sean and awarded her \$1,000 per month in spousal support and \$124.39 in child support. Again the parties objected.

In a July 2007 decision, the trial court sustained some objections, overruled others, and remanded the case to the magistrate for a reassessment. After the magistrate award, both parties objected again, and this time the court awarded Diane custody of Sean and increased her spousal support to \$2,000 per month and her child support to \$216.44 per month.

David then retained new counsel and filed this appeal, alleging the following assignments of error: (1) the trial court abused its discretion by calculating child support without using a R.C. 3119.022 worksheet and by failing to deviate from that worksheet under R.C. 3119.23; (2) that the court erred in calculating the spousal-support award; and (3) the court erred in determining that a portion of a Franklin Savings account was Diane's separate property. We dispose of David's assignments of error in reverse order, and

² See Civ.R. 75(N).

because we conclude that only one has some merit, we reverse only with respect to the award of child support.

II. The Franklin Savings Account and Traceability

In this assignment of error, David argues that the trial court improperly found that a portion of the couple's Franklin Savings account was Diane's separate property because it contained traceable proceeds from her inheritance. David asserts that the Franklin Savings account included commingled separate property that Diane had failed to trace, and that because Diane failed to trace her separate property, her inheritance lost its identity as separate property and became marital property.

"While a trial court's actual award and distribution of marital property is reviewed under an abuse-of-discretion standard in light of the totality of the circumstances, a specific determination of whether an asset is marital or separate property is made by reviewing whether the trial court's determination was supported by the manifest weight of the evidence."³ Generally, personal property that has been inherited is separate property.⁴ And under the Ohio Revised Code, the commingling of separate property with other property of any type does not destroy the identity of the separate property, except when the separate property is not traceable.⁵ As the party seeking to have the asset classified as separate in this case, the burden to trace the separate property was on Diane, and she had to prove that the property was separate by a preponderance of the evidence.⁶

The trial court determined that \$59,744.44 of the Franklin Savings account was traceable as Diane's separate property inherited from her grandmother. Diane testified that she had inherited money and bonds from her grandmother, and that the Franklin

³ *Comella v. Comella*, 8th Dist No. 90969, 2008-Ohio-6673, ¶39, citing *James v. James* (1995), 101 Ohio App.3d 668, 656 N.E.2d 399.

⁴ R.C. 3105.171(A)(6)(a)(i).

⁵ R.C. 3105.171(A)(6)(b).

⁶ See *Peck*, *supra*.

Savings account had resulted from numerous transfers of her inheritance through different accounts, including ones with Fifth Third, AG Edwards, Paine Webber, and Hilliard Lyons. Some of these accounts had been opened in Diane's name, and some had been opened as joint savings accounts. The argument David makes on appeal is that Diane's separate property lost its identity when it was placed into an existing joint account.

The act of placing traceable funds into an existing joint account, standing alone, does not transform what would otherwise be separate property into marital property. In this case, after awarding Diane the first \$59,744.44 of the Franklin Savings account, the trial court divided the remainder between David and Diane. Diane testified that neither she nor David had ever contributed to any of the accounts that contained her inheritance and bonds. And no other money had been added to the accounts except for dividends and interest earned. David failed to rebut Diane's testimony, and we cannot say that the trial court erred in finding that the first \$59,744.44 of the Franklin Savings account was traceable and was Diane's separate property.

III. Spousal Support

David next argues that the trial court improperly awarded Diane \$2,000 per month in spousal support. Two different magistrates had ordered David to pay less per month in spousal support, but both parties had objected, and in the final decree of divorce, the trial court increased the amount of spousal support to \$2,000 per month. David asserts that the court failed to consider the R.C. 3105.18 factors in doubling the amount of spousal support.

R.C. 3105.18 enumerates several factors that the court should consider in determining a reasonable and appropriate amount of spousal support. David's brief notes that two magistrates had determined that he should owe considerably less in spousal support—one magistrate awarded spousal support of \$1,000 per month, while the other

awarded \$1,800 per month—and he alleges that the trial court erred in focusing on the relative disparity of the parties’ incomes rather than on all the R.C. 3105.18 factors.

Trial courts enjoy broad discretion in determining spousal-support awards,⁷ but that discretion is not unlimited.⁸ A trial court has discretion to do what is equitable based on the facts and circumstances of each case,⁹ and it may award an amount that is “appropriate and reasonable.”¹⁰ A spousal-support award will not be reversed absent an abuse of discretion.¹¹

After reviewing the transcript of the hearings before the second magistrate, the trial court concluded that spousal support should be increased to \$2,000 a month. In so doing, the court noted that the magistrate had not given enough weight to the disparity of the parties’ incomes, especially given the magistrate’s finding that David had the potential to earn considerably more than had been indicated on the child-support worksheet.

We are not convinced that the trial court disregarded the R.C. 3105.18 factors in making its spousal-support award; nor are we convinced that the determination to give more weight to the disparity in earning potential between David and Diane in increasing the spousal-support award was unreasonable, arbitrary, or unconscionable. David’s second assignment of error is overruled.

IV. Child Support

A decision concerning child support is within the discretion of the trial court, and that decision will not be reversed on appeal absent an abuse discretion.¹² An abuse of

⁷ *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83.

⁸ *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293.

⁹ *Id.*

¹⁰ See *Zerbe v. Zerbe*, 1st Dist. Nos. C-040035 and C-040036, 2005-Ohio-1180, ¶26, citing *Sutphin v. Sutphin* 1st Dist. Nos. C-030747 and C-030773, 2004-Ohio-6844, ¶12.

¹¹ See, e.g., *Macko v. Macko* (Feb. 26, 1998), 8th Dist. No. 72339, citing *Babka v. Babka* (1992), 83 Ohio App.3d 428, 432, 615 N.E.2d 247, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 450 N.E.2d 1140; *Cherry*, *supra*, paragraph two of the syllabus.

¹² *Sapinsley v. Sapinsley*, 171 Ohio App.3d 74, 2007-Ohio-1320, 869 N.E.2d 702, at ¶8, citing *Pauly v. Pauly*, 80 Ohio St.3d 386, 390, 1997-Ohio-105, 686 N.E.2d 1108.

discretion implies that the decision was arbitrary, unreasonable, or unconscionable—more than an error of law or judgment.¹³ In this case, the trial court failed to adjust the child-support worksheet to account for court-ordered spousal support that had been paid.¹⁴ We conclude that the trial court unreasonably denied David a deduction on the child-support worksheet for spousal support payments made.¹⁵ We therefore reverse that part of the trial court’s judgment awarding child support and remand the case for a recalculation of child support that includes a deduction for the spousal support paid by David. In all other respects, the judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App. R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN AND DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on January 21, 2009

per order of the Court _____
Presiding Judge

¹³ *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

¹⁴ See *State ex rel. Athens Child Support Enforcement Agency v. Tritipo*, 4th Dist. No. 05CA20, 2006-Ohio-2951, ¶¶ 18-20; see, also, *Zimon v. Zimon*, 9th Dist. No. 04CA0034-M, 2005-Ohio-271; *Posadny v. Posadny*, 2nd Dist No. 18906, 2002-Ohio-935.

¹⁵ *Tritipo*, supra.