

COURT OF APPEALS  
STARK COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

NANCY M. EBNER	:	JUDGES:
	:	John W. Wise, P.J.
	:	Julie A. Edwards, J.
Plaintiff-Appellee	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 2009 CA 00060
	:	
	:	
STEPHEN P. EBNER	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas, Domestic Relations Division, Case No. 2006 DR 686
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JUDGMENT:	Affirmed In Part, and Reversed and Remanded In Part
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DATE OF JUDGMENT ENTRY:	February 8, 2010
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APPEARANCES:

For Plaintiff-Appellee

ALLYSON J. BLAKE  
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Canton, Ohio 44702

For Defendant-Appellant

DOUGLAS BOND  
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*Edwards, J.*

{¶1} Defendant-appellant, Stephen Ebner, appeals from the February 13, 2009, Judgment Entry of the Stark County Court of Common Pleas, Family Court Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant, Stephen Ebner, and appellee, Nancy Ebner, were married on June 22, 1984. On May 25, 2006, appellee filed a complaint for divorce.

{¶3} On February 15, 2007, appellee filed a motion for contempt, claiming that appellant had failed to pay temporary support in the amount of \$425.00 a month, one-half of the outstanding real estate tax bill and one-half of the business evaluation fee as ordered by the trial court pursuant to an order filed on June 30, 2006. On June 1, 2007, appellee filed an amended motion for contempt, claiming that appellant had failed to file his corporate tax returns and had failed to provide all bank records needed to complete the business evaluation. A hearing was held on June 11, 2007. As memorialized in a Judgment Entry filed same date, the trial court found appellant in contempt, fined him \$250.00 and sentenced him to thirty days in jail. The jail sentence was suspended on June 15, 2007, after appellant posted a bond.

{¶4} Final divorce hearings were held on April 18, 2007, May 14, 2007, June 11, 2007, and July 27, 2007.

{¶5} Testimony was adduced at the hearings that appellee, a college graduate, was 49 years old and is employed as a school secretary. Appellee testified that her salary contract was approximately \$27,000.00 for the 2006-2007 school year and that, although her contract was for ten months, her pay was spread out so that she was paid over the summer. Appellee testified that in 2006, she made \$25,692.00. Appellee

further testified that she paid approximately \$500.00 a year in union dues relating to her employment and paid \$48.00 a month for medical insurance. Appellee also has \$50,000.00 in term life insurance and dental insurance through the school district. At the hearing, appellee testified that she had nine years of service credit and that she had \$17,901.00 in her School Employee Retirement (“SERS”) account. According to appellee, her social security statement showed that she would receive \$539.00 a month if she retired at 62, but, because of her SERS pension, she would only actually receive a third of such sum.

{¶6} Appellee had an emergency hysterectomy in May of 2006. She testified that she had permanent damage to her right kidney as a result of the surgery and could not sit or stand for long periods of time. Appellant was in fair physical and good mental and emotional health.

{¶7} Appellant, who was 59 years old at the time of the hearing, testified that he graduated from high school in 1966 and that he had taken college courses for his business. Appellant testified that he was operating a business under the name S P Ebner Heating and Air Conditioning and had been the sole owner of the same for two and a half years. The business was previously named Ebner Enterprises and was owned by appellant and his brother, who were equal partners. The two took over the family heating and air conditioning business in 1984. Appellant testified that he bought out his brother in 2000 for \$15,000.00. Appellant testified that he had a license in HVAC and boilers and that he was currently certified.

{¶8} The corporate tax return for appellant’s business indicated that appellant, as an officer, was compensated \$15,235.00 for 2006. Appellant’s 2005 joint tax returns

with appellee showed a combined income of \$53,746.00. In 2004, the parties' joint income was \$58,567.00. Appellant testified that, at the time of the hearings, he was not taking a paycheck from Ebner, but was paying his personal expenses through the company.

{¶9} Frank Monaco, a CPA, testified at the hearing that he evaluated appellant's business and that there was over a \$200,000.00 difference between what was on the company's general ledger and what the company's bank statement was showing. Monaco testified that he believed that the company was worth \$75,000.00 as of December 31, 2006. He also testified that he believed that appellant would make approximately \$54,000.00 a year plus benefits valued at between \$16,922.00 and \$21,973.00. The following is an excerpt from his testimony:

{¶10} "Q. Okay. And what is that based on?"

{¶11} "A. And that's based on um someone working in the HVAC industry [in Akron, Ohio] that has approximately his experience level. Okay. So in this 75<sup>th</sup> percentile this is where his compensation should be. So then as a gut check to say hey is this outside information that we..that we have the ability to get does it make sense. And then what we did ah we looked at his tax return and the next page you'll see that sort of a summary if you go past that report and go all the way to the report and you'll see a spreadsheet. If you flip it to the right there's the spreadsheet. And what that spreadsheet has Your Honor is all we're doing there is you see it...is just summarizing the information. Now what I did for the compensation of the officers is I pulled off the tax returns what Mr. Ebner...what is said on Schedule E that he made okay. So fifteen thousand, thirty one, thirty six, thirty six, thirty six, and then what we did is that we

looked at whatever bank statements we had and we tried to identify some potential personal expenses. Some might have been business expenses legitimate expenses some might not have been. In regards to the meals he might have been taking a client out etc. But we didn't have the detail behind that. Okay. But what we tried to do is the summarize by year by month where these expenses were. So then what we did is we totaled those expenses. So for 2006 we looked at items that looked like home improvement, ATM withdrawals that we had no support for, meals, tobacco, ah golf, cars, miscellaneous items to in that year its \$24,902.00 add that to the \$15,000.00. He made approximately \$40,000.00. We did that for any year and each year behind it to support what we could see. For 05 and ah in 05 we're at \$74,789.00...for 2004 what we did is he made \$36,000.00 that was the year again that we were missing some bank statements so what I did is..is on the back of the 04 I just annualized ah where we were on that \$10,000.00 and I divided that by um seven months and then times it by twelve to come up with the \$17,000.00 on an annualized basis. And ah...ah and did the same for 03 and 02 continued with that same process of identifying um what the expenses were and we could see when payroll was being paid and cashed into cash sop we reduced that number by the amount that we knew that was not personal. So in summary what this sheet tells me is if I look from 02 to 06 um and just take a simple average he took approximately \$56,000.00 of compensation. Which correlate to the \$54,000.00 which we would anticipate him to make. And the purpose of these work papers are to identify what I think and I believe is a reasonable amount of compensation that he has earned and based on our market area should earn." Transcript of July 27, 2007, hearing at 16-18.

{¶12} Testimony was adduced that appellant has no retirement accounts or pensions and that he cashed in a retirement plan to put a down payment on a car.

{¶13} Pursuant to a decision filed on August 15, 2007, the magistrate recommended a divorce, allocated marital property and recommend that spousal support be set at the amount of \$1,000.00 per month for eight years. The magistrate, in his decision, noted that “[t]he major factor to be considered in this case is [sic] determining a spousal support award is the Defendant’s earning ability.” The magistrate also noted that “[t]his is a marriage of long duration wherein a lifestyle of moderate comfort has been established and maintained in large part from the income generated by the Defendant’s business.” The magistrate also recommended, with respect to the contempt, that appellant pay \$2,500.00 for partial attorney fees and \$5,625.00 for the business evaluation and Frank Monaco’s testimony. The magistrate also recommended that appellant pay \$2,000.00 in attorney fees to appellee. Appellant then filed objections.

{¶14} On October 9, 2007, the trial court imposed the remaining days of the contempt sentence for appellant's failure to file the requested bank and business records in a timely manner.

{¶15} Thereafter, pursuant to a Judgment Entry filed on November 2, 2007, the trial court approved and adopted the magistrate's decision with the following modifications: appellee was [by stipulation] to refinance the real estate, and spousal support was increased to \$2,500.00 a month effective November 1, 2007.

{¶16} Appellant then filed an appeal on the contempt action (Case No.2007CA00318), and the divorce action (Case No.2007DR00346). On appeal,

appellant argued, in his first assignment of error, that the trial court erred in valuing S P Ebner at \$75,000.00 and, in his second assignment of error, that the trial court erred in distributing marital property in a way that was not equitable and was unequal. Appellant also argued, in his third assignment of error, that the trial court erred in awarding spousal support in the amount of \$2,500.00 per month “based upon the unequal division of assets and other factors” as contained in R.C. 3105.18. Finally, appellant argued, in his fourth assignment of error, that the trial court erred in imposing the 26 days remaining on the contempt sentence without providing purge conditions and in ordering appellant to pay \$2,500.00 in attorney fees relating to the contempt, \$5,625.00 for the business evaluation and additional attorney fees in the amount of \$2,000.00.

{¶17} Pursuant to an Opinion filed in *Ebner v. Ebner*, Stark App. Nos. 2007CA00318 and 2007CA00346, 2008-Ohio-5335, this Court affirmed the judgment of the trial court in part and reversed and remanded the same in part. We denied appellant’s first and fourth assignments of error while sustaining his second and third assignments of error. With respect to the second and third assignments of error, this Court stated, in relevant part, as follows: “The trial court awarded to appellee the marital residence along with the debt (market value of \$141,500 minus 32,602.68 of debt equals \$108,897.32), three vehicles, two of which are used by the parties two children (\$3,353.63, \$3,310.00, and \$2,920.00), her pension (\$17,901.50), and her credit card debt (\$443.73). Appellant was awarded the business along with the debt (\$75,000.00), a truck (\$6,725.00), credit card debt (\$693.54), and one-half of the delinquent real estate property tax bill (\$1,892.33)...

{¶18} “The trial court's November 2, 2007 judgment entry did not specifically address the apparent disparity in the distribution of marital property. However, in its October 23, 2007 judgment entry on objections, the trial court attributed financial misconduct to appellant in its decision on spousal support:

{¶19} “The court finds that more than \$210,000 ‘disappeared’ from the corporation during the pendency of this case. This financial misconduct of the defendant has prejudiced the plaintiff to an incalculable extent. The defendant has continued his obstreperous course of conduct during this case including delay, obfuscation and outright defiance of court orders. The court finds that the magistrate erred in his calculation of spousal support by failing to completely account for this financial misconduct.’

{¶20} “The trial court assigned financial misconduct to appellant via an increase in spousal support (from \$1,000 per month to \$2,500 per month). See, e.g., *Tyree v. Tyree*, Licking App. No. 03 CA 89, 2004-Ohio-3967. While this court agrees there is ample evidence peppered throughout the record of financial misconduct that could properly be assigned to appellant, such a determination of financial misconduct should have been addressed and/or assigned when determining the issue of unequal distribution of marital assets, not spousal support as the trial court did sub judice.

{¶21} “According, we remand the matter to the trial court to review the unequal distribution of marital assets and the companion issue of spousal support. It was error to assign financial misconduct to spousal support.” *Id* at paragraphs 45, 47-50.

{¶22} On remand, the trial court granted the parties time to submit any additional briefs and/or arguments “on their position how this court should finalize this case

consistent with the Court of Appeals Mandate.” Both parties filed briefs. Pursuant to a Judgment Entry filed on January 21, 2009, the trial court modified the spousal support order to \$1,750.00 a month commencing on February 1, 2009 and also made a distributive award to be paid by appellant to appellee commencing February 1, 2009 and continuing for a period of 80 months. Thereafter, the trial court, as memorialized in a separate Judgment Entry filed on February 13, 2009 indicated that the amount of the distributive award was \$1,500.00 per month. The trial court also suspended the remaining 26 days of appellant’s jail sentence “upon compliance with this Court’s orders”. Finally, the trial court, in such entry, stated, in relevant part, as follows:

{¶23} “This order shall continue subject to the same conditions as previously ordered. For clarification and enforcement purposes, the Court reaffirms that the spousal support amount from the date of the August 15, 2007 Magistrate’s Decision until November 1, 2007 is \$1,000.00 per month; and the spousal support amount from November 1, 2007 until February 1, 2009 is \$2,500.00 per month as previously ordered in the October 23, 2007 and November 2, 2007, Entries.

{¶24} Appellant now raises the following assignments of error of appeal:

{¶25} “I. IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO DISREGARD THE REMAND OF THE COURT OF APPEALS AND REAFFIRM THE PREVIOUS ORDER OF SPOUSAL SUPPORT FROM NOVEMBER 1, 2007 UNTIL FEBRUARY 1, 2009.

{¶26} “II. IT WAS AN ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO PROSPECTIVELY ORDER SPOUSAL SUPPORT IN THE AMOUNT OF \$1,750.00 PER MONTH COMMENCING FEBRUARY 1, 2009.

{¶27} “III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED A DISTRIBUTIVE AWARD IN THE AMOUNT OF \$1,500.00 PER MONTH COMMENCING FEBRUARY 1, 2009 AND CONTINUING FOR EIGHTY (80) MONTHS.

{¶28} “IV. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN THE OVERALL AWARD GIVEN IN THIS CASE HAS MADE COMPLIANCE BY THE APPELLANT IMPOSSIBLE.

{¶29} “V. IT WAS ERROR AND ABUSE OF DISCRETION FOR THE TRIAL COURT TO SET PURGE TERMS THAT REQUIRES COMPLIANCE WITH AN ESTABLISHED ORDER.”

I

{¶30} Appellant, in his first assignment of error, argues that the trial court erred by disregarding the remand order from this Court and reaffirming the previous order of spousal support from Nov. 1, 2007 until Feb. 1, 2009. We agree.

{¶31} Pursuant to a decision filed on August 15, 2007, the Magistrate recommended that appellant pay spousal support to appellee in the amount of \$1,000.00 a month for eight years. Appellant filed objections to the Magistrate’s Decision and the trial court, on November 2, 2007, approved and adopted the Magistrate’s Decision in part, but the trial court increased the amount of spousal support to \$2,500.00 a month.

{¶32} Appellant then filed an appeal with this Court arguing, in part, that the trial court had erred in increasing spousal support from \$1,000.00 a month to \$2,500.00 a month. As is stated above, after the matter was remanded by this Court which found

that the trial court had erred in assigning financial misconduct to spousal support, the trial court modified spousal support to \$1,750.00 per month effective February 1, 2009 and ordered that “the spousal support amount from November 1, 2007 until February 1, 2009 is \$2,500.00 a month as previously ordered...”

{¶33} “Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred.’ *State ex rel. Stevenson v. Murray* (1982), 69 Ohio St.2d 112, 113, 431 N.E.2d 324. The rule is long-standing: “[W]hen the cause was remanded to the common pleas it stood \* \* \* precisely as when first at issue, and before any error had occurred.” *Sutcliffe v. State* (1849), 18 Ohio 469, 480, 1849 WL 130.

{¶34} We find that the trial court, by ordering the spousal support award from November 1, 2007, until February 1, 2009, would remain \$2,500.00 a month as previously ordered, failed to proceed from the point where the error occurred. The error clearly occurred in November of 2007 when the trial court increased spousal support from \$1,000.00 a month to \$2,500.00 a month based on appellant’s financial misconduct.

{¶35} Appellant’s first assignment of error is, therefore, sustained.

## II

{¶36} Appellant, in his second assignment of error, argues that the trial court abused its discretion when it ordered appellant to pay spousal support in the amount of \$1,750.00 amount commencing on February 1, 2009.

{¶37} A review of a trial court’s decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421

N.E.2d 1293. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶38} R.C. 3105.18(C)(1)(a) through (n) sets forth the factors a trial court must consider in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms of payment and duration of spousal support. These factors are:

{¶39} “(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

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

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

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

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

{¶44} “(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

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

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

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

{¶48} “(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶49} “(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

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

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

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

{¶53} R.C. 3105.18 does not require the lower court to make specific findings of fact regarding spousal support awards. While R.C. 3105.18(C)(1) does set forth fourteen factors the trial court must consider, if the court does not specifically address each factor in its order, a reviewing court will presume each factor was considered, absent evidence to the contrary. *Carroll v. Carroll*, Delaware App.No.2004-CAF-05035, 2004-Ohio-6710 at paragraph 28, citing *Watkins v. Watkins*, Muskingum App. No. CT 2001-0066, 2002-Ohio-4237 (additional citations omitted).

{¶54} The parties in the case sub judice, were married for over twenty (20) years. Appellee, who obtained a college degree prior to the marriage and who was 49 years old, earned approximately \$27,000.00 for the 2006-2007 school year not including health insurance and benefits. She has a pension through the State Employees' Retirement System worth \$17,901.50 as of February of 2007.

{¶55} Appellant, who was 59 years of age as of the time of the hearing, is the owner of a heating and air conditioning business with an appraised value of \$75,000.00. Appellant's 2006 federal income tax return shows an income of \$15,235.00. Appellant testified that the parties' income tax returns indicated that the parties jointly earned \$53,746.00 in 2005 and \$58,567.00 in 2004. Testimony was adduced at the hearing that appellant, with his years of experience, could earn \$54,000.00 a year plus benefits. Appellant has a high school education and has completed college level courses relating to his business and has no retirement benefits.

{¶56} In view of the above, we find that the trial court abused its discretion when it ordered appellant to pay spousal support in the amount of \$1,750.00 a month amount commencing on February 1, 2009. We further note that appellee, in her proposed findings of fact and conclusions of law that were filed on August 10, 2007, requested that she be awarded \$1,250.00 month in spousal support. While the trial court, in its January 21, 2009, stated that it was basing the award of spousal support "in light of the evidence in the record especially the plaintiff's exhibit 40 attached to her brief filed December 16, 2008,..." there is no evidence that such exhibit was part of the original record. Nor is it clear how appellee arrived at the \$100,000.00 income figure for appellant that she uses in such exhibit. As is stated above, testimony was adduced at

the hearing that appellant could earn \$54,000.00 a year plus benefits if he worked for a competitor.

{¶57} Appellant's second assignment of error is, therefore, sustained.

### III

{¶58} Appellant, in his third assignment of error, argues that the trial court abused its discretion in ordering a distributive award in the amount of \$1,500.00 a month commencing on February 1, 2009 and continuing for 80 months after the trial court already awarded appellee a greater award of marital property. Appellant specifically contends that the trial court could either compensate appellee with a distributive award or with a greater than 50% division of marital property, but not both. We disagree.

{¶59} R.C. 3105.171 governs division of marital property. Subsection (F) states the following:

{¶60} "(F) In making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors:

{¶61} "(1) The duration of the marriage;

{¶62} "(2) The assets and liabilities of the spouses;

{¶63} "(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

{¶64} "(4) The liquidity of the property to be distributed;

{¶65} “(5) The economic desirability of retaining intact an asset or an interest in an asset;

{¶66} “(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

{¶67} “(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

{¶68} “(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

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

{¶70} R.C. 3105.171(E)(3) states as follows: “If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.”

{¶71} As is stated above, the trial court awarded appellee the marital residence along with the debt (market value of \$141,500 minus 32,602.68 of debt equals \$108,897.32), three vehicles, two of which are used by the parties two children (\$3,353.63, \$3,310.00, and \$2,920.00), her pension (\$17,901.50), and her credit card debt (\$443.73). In turn, appellant was awarded the business along with the debt (\$75,000.00), a truck (\$6,725.00), credit card debt (\$693.54), and one-half of the delinquent real estate property tax bill (\$1,892.33).

{¶72} The trial court's November 2, 2007, Judgment Entry did not specifically address the apparent disparity in the distribution of marital property. However, in its

October 23, 2007, Judgment Entry, the trial court attributed financial misconduct to appellant in its decision on spousal support, noting, in part, that “more than \$210,000 ‘disappeared’ from the corporation during the pendency of this case. This financial misconduct of the defendant has prejudiced the plaintiff to an incalculable extent. The defendant has continued his obstreperous course of conduct during this case including delay, obfuscation and outright defiance of court orders.”

{¶73} After this matter was remanded by this Court, which found that the trial court had erred in compensating financial misconduct by means of spousal support, the trial court awarded appellee a distributive award of \$1,500.00 a month for 80 months. Appellant now contends that because appellee received the greater award of marital property, the trial court erred in also awarding her a distributive award. Appellant notes that 3105.171(E)(3) states, in relevant part, as follows: the court may compensate the offended spouse with a distributive award or with a greater award of marital property. (Emphasis added).

{¶74} However, we find that the trial court did not err because there was insufficient property to compensate appellee for appellant’s misconduct. As noted by appellant in her December 16, 2008, brief before the trial court, “[t]his additional award is required since there are no other assets to divide due to [appellant’s] financial misconduct and dissipation of the marital assets.” We find that nothing in such section prohibits the trial court from ordering a distributive award and an unequal distribution of marital property when equity so requires.

{¶75} Appellant’s third assignment of error is, therefore, overruled.

## IV

{¶76} Appellant, in his fourth assignment of error, argues that the trial court erred and abused its discretion when the overall award to appellee, which included spousal support of \$1,750.00 a month and the distributive award of \$1,500.00 a month has made compliance by appellant impossible.

{¶77} Based on our disposition of appellant's second assignment of error, appellant's fourth assignment of error is moot.

## V

{¶78} Appellant, in his fifth assignment of error, argues that the trial court erred in suspending the remaining 26 days of appellant's jail sentence "upon compliance with this Court's orders."

{¶79} As is stated above, appellant was found guilty of willful contempt and was sentenced to 30 days in jail. Appellant's sentence was suspended on June 15, 2007, after appellant posted a bond. However, on October 9, 2007, the trial court re-imposed the remaining 26 days of appellant's contempt sentence because of appellant's failure to file requested bank and business records in a timely manner.

{¶80} Appellant then appealed, arguing that the trial court had erred in imposing the 26 days remaining on the contempt sentence without providing purge terms. This Court, in our decision in *Ebner v. Ebner*, Stark App. Nos. 2007CA00318 and 2007CA00346, 2008-Ohio-5335, held that the trial court had not abused its discretion in reimposing the jail time.

{¶81} Thereafter, on remand, the trial court, pursuant to a Judgment Entry filed on February 13, 2009, ordered that “the remaining 26 days are suspended upon compliance with this Court’s orders.”

{¶82} This Court has held that a purge condition which requires future compliance with an established order is an abuse of discretion. *Brett v. Brett*, Knox App. No. 01 CA000018, 2002-Ohio-1841. *Sexton v. Sexton*, Richland App. No.2006CA0083, 2007-Ohio-4751; *Ryder v. Ryder*, Stark App. No. 2001 CA00190, 2002-Ohio-765. See also, *Tucker v. Tucker*, (1983), 10 Ohio App.3d 251, 461 N.E.2d 1337. Orders that purport to regulate future conduct do not provide the party with a true opportunity to purge. *Tucker*, supra. A contempt order which regulates future conduct “simply amounts to the court’s reaffirmation of its previous support order and can have no effect since any effort to punish a future violation of the support order would require new notice, hearing and determination.” *Tucker*, supra., at 252, citing *Matter of Grohoske* (June 16, 1983), Franklin App. No. 82AP-948, 1983 WL 3573, unreported (holding a purge order may provide for suspension of a jail sentence on condition that the contemnor pays an arrearage; however, it may not regulate future conduct by conditioning suspension of a jail sentence on making payments on current support obligations.)

{¶83} We find that the trial court’s purge condition constituted an abuse of discretion because this purge condition required future compliance with established orders.

{¶84} Appellant’s fifth assignment of error is, therefore, sustained.

{¶85} Accordingly, the judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed in part and reversed and remanded in part.

By: Edwards, J.

Delaney, J. concur

Wise, P.J. concurs in part and

dissents in part

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

JAE/d1118

*Wise, J., Concurring in part and dissenting in part.*

{¶86} I concur with the majority's decision to sustain appellant's first assigned error and to overrule the third assigned error. I note that although *Ebner I* at ¶ 49 appears to contradict this Court's earlier holding in *Tyree v. Tyree*, Licking App.No. 03 CA 89, 2004-Ohio-3967, that a trial court has discretion to consider financial misconduct as a factor in determining spousal support, *Ebner I* must be recognized as the law of the case in this matter.

{¶87} However, I dissent from the result reached as to the second, fourth, and fifth assigned errors. In *Ebner I* at ¶50, we "remand[ed] the matter to the trial court to review the unequal distribution of marital assets and the companion issue of spousal support." I would apply a presumption of regularity to the trial court's review process pursuant to our mandate, including its review of appellee's Exhibit 40, and affirm the revised award of \$1,750.00 per month in spousal support. Cf. *Tsai v. Tien*, Stark App.No. 2007 CA 00024, 2008-Ohio-878, ¶ 15. Accordingly, I would not find the fourth assigned error moot, and would also find that the property division award was within the trial court's discretion.

{¶88} Finally, I would not sustain the fifth assigned error regarding the contempt sentence. Although I concede there appears to be no purge provision ordered by the trial court, appellant is challenging what the trial court established to be terms of a suspended sentence, which is distinct from the purge concept. I find his appellate argument is incorrectly postured pursuant to App.R. 16.

{¶89} In a nutshell, I would overrule all assigned errors in this matter except the first, in response to which I would remand solely for the purpose of adjusting, forthwith, the amount of spousal support ordered between November 1, 2007 and February 1, 2009 to \$1,750.00 per month.

s/John W. Wise  
JUDGE JOHN W. WISE

