

[Cite as *Cwik v. Cwik*, 2011-Ohio-463.]

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

PAMELA K. SOMAN CWIK,<sup>1</sup> : APPEAL NO. C-090843  
Plaintiff-Appellee, : TRIAL NO. DR-0700706  
vs. : *DECISION.*  
ANDREW S. CWIK, :  
Defendant-Appellant. :

Civil Appeal From: Hamilton County Court of Common Pleas, Domestic Relations  
Division

Judgment Appealed from Is: Affirmed

Date of Judgment Entry on Appeal: February 4, 2011

*J. Michael Kaufman*, for Plaintiff-Appellee,

*Andrew S. Cwik*, pro se.

Please note: This case has been removed from the accelerated calendar.

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<sup>1</sup> The divorce decree ordered that “Pamela K. Soman-Cwik” be restored to her former name of Pamela Kay Soman.

Per Curiam.

{¶1} Defendant-appellant Andrew S. Cwik (“Cwik”) appeals from the divorce decree entered by the Hamilton County Court of Common Pleas, Domestic Relations Division.

{¶2} In the divorce decree, the court terminated Cwik’s nearly 13-year marriage with plaintiff-appellee Pamela K. Soman Cwik (“Soman”). The court named Soman as the sole residential parent and legal custodian of the parties’ two children and limited Cwik’s parenting time after finding that conflict rendered a shared-custody arrangement inappropriate and that Cwik had been harming the children’s relationship with their mother. The court further ordered that Cwik’s parenting time be supervised because he had not demonstrated that he had been participating in psychotherapy to develop insight into the best interests of the children. The court also denied Cwik’s request for spousal support, ordered Cwik to pay child support, and divided the assets and debts of the parties, including awarding to Soman the parties’ frozen embryos. In addition, the court awarded Soman attorney fees after finding that Cwik had engaged in frivolous and egregious conduct during the litigation. Cwik now challenges the trial court’s judgment in numerous assignments of errors. For the reasons that follow, we affirm.

I. Background Information

{¶3} Cwik and Soman were married in 1996. Their daughter, Madeline, was born in February 2002, and their son, Andrew, was born in August 2003. The parties also created embryos that were frozen and stored at the Cleveland Clinic Foundation.

{¶4} The parties moved to Cincinnati from Cleveland in June 2004 after Soman was transferred by Chubb Insurance Group (“Chubb”), her employer since 1997. The parties purchased an expensive riverfront condominium at Adams Place with the expectation that both would be employed outside the home. Cwik subsequently determined that he did not want to work outside the home. The parties encountered financial difficulties, and Cwik took a part-time, temporary job. But their financial troubles continued, and their lender moved to foreclose on the condominium.

{¶5} At some point during her employment with Chubb, Soman developed a relationship with a co-worker, David Corry. In April 2007, Soman filed for divorce, and in September 2007 the court issued a Civ.R. 75(N) order that temporarily designated Soman as the legal custodian and sole residential parent of the children. Cwik was hostile towards Soman’s decision to end the marriage. In August 2007, Cwik threw a bottle at Soman, hitting her in the forehead. Cwik was charged with domestic violence, but he pleaded guilty to a reduced charge of disorderly conduct. A protection order forced Cwik to leave the marital residence at that time, but he would move back in when Soman moved out in June 2008.

{¶6} In late 2007, the court appointed Leslie Duncan, a social worker for the domestic relations court, to perform a custody investigation. Her investigation revealed problems caused by Cwik’s inability to accept the divorce, his involvement of the children in various conflicts, and the acrimonious relationship between the parties. Duncan rejected a shared-parenting arrangement and recommended that Soman be named the sole residential parent. She also recommended that Cwik participate in therapy to address his “destructive behavior” and that the court allow

Cwik only limited, supervised parenting time with the children until Cwik had begun therapy.

{¶7} Despite Duncan’s parenting recommendation, the parties attempted to settle the custody and property issues. On April 3, 2008, the parties filed an agreed entry for shared parenting that provided equal parenting time for Cwik and did not require any supervision. The April 2008 agreement did not state that it would be incorporated into the final divorce decree.

{¶8} The parties were ultimately unsuccessful in reaching an agreement on the terms of a shared-parenting plan. Around the time that negotiations came to an impasse, counsel for Cwik was permitted to withdraw from representation, and Cwik proceeded pro se.

{¶9} In late October 2008, the court ordered the parties to submit to a previously agreed-upon independent psychological evaluation with Dr. Michael Nelson. The court also set the case for a two-day custody trial beginning on January 27, 2009, at 8:30 a.m., three weeks after a scheduled pretrial conference of January 6, 2009.

{¶10} Dr. Nelson completed his 25-page comprehensive report on December 18, 2008. After noting the “high degree of conflict” between Cwik and Soman, he recommended that both children be placed in the sole custody of Soman and that Cwik’s parenting time be limited. Dr. Nelson also “strongly recommended” that Cwik participate in regularly scheduled individual psychotherapy sessions to focus on “his diminished understanding of his own anger and distress, as well as what is truly in the best interest of his children.” For the children, Dr. Nelson recommended therapy beyond in-school counseling, and that a guardian ad litem be

appointed to advocate for the children and “to report to the judge any behaviors/actions by Mr. Cwik that would not be in the best interest of the children.”

{¶11} Dr. Nelson reported that Cwik had told him that his Roman Catholic faith forbade divorce and required “perfect celibacy” unless the marriage could be annulled. Cwik blamed Soman for the situation, acting defensively when challenged and “vehemently” indicating that Soman’s relationship with Corry was not healthy for the children.

{¶12} With respect to the children, Dr. Nelson noted that both were “painfully aware” of their parents’ conflicts. Both children relayed to Dr. Nelson judgmental statements concerning their mother that they indicated they had heard from their father, including that their mother had “ ‘broke[n] the Ten Commandments and God should not let a man go in her house’ [referring to her boyfriend]” and that Corry was “ ‘breaking apart the family.’ ”

{¶13} On January 16, 2009, Cwik moved the court for an order allowing him to depose Dr. Nelson and to subpoena the information that supported Dr. Nelson’s report. The request included any notes of Dr. Nelson and his assistants, any email communications between Soman and Dr. Nelson, all questionnaires completed by Soman, and all test results for the parties and their children. Soman’s email communications were the subject of a protective order that the court had issued in December 2008 due to Cwik’s abuse of the subpoena process.

{¶14} Additionally, Cwik moved the court to appoint a guardian ad litem (“GAL”) for both minor children, based on Dr. Nelson’s recommendation. Further, to accommodate his new requests, Cwik moved the court to continue the January 27, 2009, custody hearing.

{¶15} After a hearing, the trial court granted the motion for a subpoena in part, permitting Cwik to “issue a subpoena to Dr. Nelson duces tecum for 1/27/09 at 9:00 am to bring copies of Dr. Nelson’s *testing results* on the Cwik case *and copies of any documents, emails, or other written correspondence provided by Plaintiff/Mother to Dr. Nelson* and relied upon by him in writing his report.” (Emphasis in original.) The court added that “[t]he parties may review Dr. Nelson’s notes and those of his assistants only if those notes are consulted by Dr. Nelson during his testimony and brought with him to court by his choice for that purpose,” and that “[t]he court will take a short recess in the trial on 1/27/09 following the conclusion of Dr. Nelson’s direct testimony and prior to cross-examination to allow for the review of the subpoenaed documents.”

{¶16} After disposing of the subpoena request, the court denied Cwik’s request for a continuance, citing a lack of good cause. It also denied his motion for a GAL on the ground that the motion did not comply with Loc.R. 10.3 of the Hamilton County Court of Common Pleas, Domestic Relations Division, and that the appointment of a GAL at that point would delay the trial.

{¶17} On January 23, 2009, Cwik requested that the court interview the children. He did not request a GAL in conjunction with the interview request. The court granted the motion and interviewed the children, in camera, a week later.

{¶18} The custody trial was held before a domestic relations judge on January 27 and 29. Soman requested sole custody of the minor children. Cwik requested sole custody or shared parenting.

{¶19} On the first day of the custody trial, Dr. Nelson appeared shortly after 8:30 a.m. The court delayed the proceedings until Cwik appeared at 11:20 a.m. Soman called Dr. Nelson as a witness and the report of his independent

psychological evaluation was admitted as evidence. Dr. Nelson's testimony was consistent with his report: he found that Cwik had a very limited understanding of his role in the marital difficulties and how his religious values had adversely affected the children's ability to maintain a healthy relationship with Soman. Further, Dr. Nelson testified that Cwik had placed the children in the middle of his conflicts with Soman and had shown an inability to refrain from doing so.

{¶20} After the direct examination of Dr. Nelson, the court ordered a 15-minute recess to allow Cwik to review the documents he had subpoenaed from Dr. Nelson. When Cwik complained that he did not have sufficient time to examine all the documents, the court reminded Cwik that his late arrival had limited the time for examining the documents.

{¶21} Cwik thoroughly cross-examined Dr. Nelson on his findings and on the basis for his recommendations. He also cross-examined him on the backup data he used for his evaluation. He accused Dr. Nelson of "excluding evidence" that was inconsistent with his final conclusion on the best interest of the children and of making findings that were unsupported by the information. Dr. Nelson refuted Cwik's contention by citing specific parts of the report and by explaining the basis for his findings.

{¶22} Due to time constraints, when Cwik began to cross-examine Dr. Nelson with questions that were not "focused," the court told Cwik that he would have to finish his cross-examination within half an hour. The court allowed Cwik a five-minute recess to review his remaining questions and told him that he could proffer any questions that he was unable to ask due to the time constraints.

{¶23} At the conclusion of his testimony, Dr. Nelson reiterated that his recommendations were based on his findings that Cwik was not putting the

children's best interest above his personal agenda, and that this was harming the children by bringing the children into the middle of conflicts between him and Soman, instead of supporting the children's positive relationship with their mother.

{¶24} At the end of his cross-examination of Dr. Nelson, Cwik did not proffer for the record any additional information, and he did not preserve for the record the documents that he had subpoenaed from Dr. Nelson.

{¶25} In additional support of her request for sole custody and supervised parenting time for Cwik, Soman presented the testimony of Duncan, and Duncan's report on the custody investigation was admitted as evidence. Consistent with her report, Duncan testified that she had been concerned by Cwik's inability to accept the divorce, by his involvement of the children in his conflicts with Soman, and by the acrimonious relationship between the parents. She reaffirmed her recommendation that Soman be named the sole residential parent, that Cwik participate in therapy to address his harmful conduct, and that the court allow Cwik only limited, supervised parenting time with the children until he participated in such therapy.

{¶26} Soman, Cwik, and Andrew's kindergarten teacher also testified at the custody trial. In addition, the trial court interviewed the children.

{¶27} On February 2, 2009, the trial court issued an interim decision on the allocation of parental rights and responsibilities. The court vacated the agreed entry of April 3, 2008, and designated Soman as the sole residential parent and legal custodian of both children, providing Cwik with only limited parenting time. The court ordered Cwik to participate in regularly scheduled individual psychotherapy sessions until the time of the final decree and to provide Dr. Nelson's report to his psychotherapist. Further, the court ordered Cwik to provide at the property trial and through the remainder of the proceedings "proof of his participation in the

psychotherapy,” and the court warned that if he failed to provide such proof, his parenting time would be supervised.

{¶28} The property trial was held before a magistrate in March and April 2009. The court entered the final decree of divorce on October 30, 2009, after ruling on the parties’ objections to the magistrate’s decision on Cwik’s parenting time, the allocation of property and debts, support issues, and attorney fees. The court found that Cwik had not provided proof of his participation in psychotherapy, and consistent with its February 2009 interim decision allocating parental rights and responsibilities, it ordered that Cwik’s parenting time be supervised.

II. Allocation of Parental Rights and Responsibilities

{¶29} Cwik’s first two assignments of error implicate the trial court’s allocation of parental rights and responsibilities. Although his arguments are convoluted, Cwik’s essential point is that the trial court erred by overruling his pre-trial motions and by not incorporating into the final decree the April 2008 agreement of the parties that provided for shared parenting with equal, unsupervised parenting time.

A. Pretrial Motions

{¶30} We begin by addressing Cwik’s claims related to pretrial motions that he filed on January 16, 2009. Cwik filed these motions over a week after the pretrial conference date and less than two weeks before the custody trial date.

i. Guardian ad Litem

{¶31} First, Cwik claims that the trial court erred by denying his motion for a guardian ad litem. Generally, we review the trial court’s denial of a parent’s motion

for the appointment of a GAL under an abuse-of-discretion standard, unless the motion is made in conjunction with an in camera interview of the children.<sup>2</sup>

{¶32} In this case, the trial court entertained and overruled Cwik’s motion for a GAL before he moved the court to interview the children in camera, and he did not renew his request for a GAL upon requesting the in camera interview. Thus, we apply the abuse-of-discretion standard to the trial court’s denial of Cwik’s motion for the appointment of a GAL.

{¶33} An abuse of discretion has been described as “more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.”<sup>3</sup> We find no abuse of the trial court’s discretion in denying Cwik’s motion for a GAL on the facts of this case. The court indicated that Duncan’s parenting report was becoming stale, that the case was already protracted, and that the request was untimely under Loc.R. 10.3 of the Hamilton County Court of Common Pleas, Domestic Relations Division, which requires that “[a]ll requests for the appointment of a Guardian shall be made within fourteen (14) days of the date that the parenting report is available, but in no event later than the pre-trial.”

{¶34} Cwik made his request after the scheduled pretrial conference and over a year after the completion of Duncan’s parenting report. And, importantly, Cwik did not provide a compelling reason for the appointment. He relied on Dr. Nelson’s recommendation for a GAL to be appointed after the children were placed in Soman’s custody so that the GAL could report to the court “any behaviors/actions by Mr. Cwik that would not be in the best interest of the children.” But Dr. Nelson did not recommend a GAL for the custody hearing.

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<sup>2</sup> See R.C. 3109.04(B)(2)(a).

<sup>3</sup> *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

ii. Continuance

{¶35} Cwik argues also that the trial court erred by denying his motion for a continuance so that he could depose Dr. Nelson. The grant or denial of a continuance is also within the discretion of the trial court. Before overruling Cwik's motion, the trial court noted that the custody trial had been set for January 27 and 29 since October 2008, that Cwik had known since October 2007 that Dr. Nelson would be issuing his report and had actually been in possession of the report for several weeks, that Cwik would be able to cross-examine Dr. Nelson at trial, and that the custody investigation was becoming too old. On this record, we cannot say that the trial court abused its discretion in overruling Cwik's pretrial motion for a continuance.

B. Custody and Parenting-Time Issues

{¶36} First Cwik argues that the trial court erred "when it modified custody without finding that a change in circumstances had occurred." In support of his argument, Cwik cites *Fisher v. Hasenjager*.<sup>4</sup> In *Fisher*, the Ohio Supreme Court held that a court may not modify the designation of a residential parent and legal custodian of a child in a **shared-parenting decree** without first determining that a " 'change in circumstances' " has occurred and that the modification is in the best interest of the child.<sup>5</sup> As indicated by the emphasized language, *Fisher* involved a post-decree modification of shared parenting, which is governed by R.C. 3109.04(E)(1)(a). R.C. 3109.04(E)(1)(a) mandates that "[t]he trial court shall not modify a prior decree allocating parental rights and responsibilities for the care of

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<sup>4</sup> 116 Ohio St.3d 53, 2007-Ohio-5589, 876 N.E.546.

<sup>5</sup> *Id.* at syllabus.

the children unless it finds \* \* \* that a change in circumstances has occurred \* \* \* and that the modification is necessary to serve the best interest of the child \* \* \*.”

{¶37} Unlike in *Fisher*, in this case the trial court did not modify a shared-parenting decree. Rather, the court entered an original custody decree, and in doing so, it vacated the interim agreed entry of April 2008 that provided for shared parenting. Therefore, R.C. 3109.04(E)(1)’s “change in circumstances” requirement did not apply.

{¶38} The standard set forth in R.C. 3109.04(B)(1) and defined in 3109.04(F)(1) applies when the trial court issues an original custody decree. This standard requires the trial court to determine only what is in the “best interest of a child,” after considering specified factors, and it does not require that the court first find a “change in circumstances” to modify a temporary or interim custody order such as the April 2008 agreed entry.

{¶39} In summary, Cwik’s argument that the trial court’s custody order was erroneous because the trial court failed to find a change in circumstances is incorrect as a matter of law.

{¶40} Cwik also contends that the trial court’s custody determination and its requirement that his parenting time be limited and supervised were against the “manifest weight of the evidence.”

{¶41} Although a trial court must follow the dictates of R.C. 3109.04 in deciding child-custody matters, it enjoys broad discretion when determining the appropriate allocation of parental rights and responsibilities.<sup>6</sup> We note that “[t]he knowledge a trial court gains through observing the witnesses and the parties in a

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<sup>6</sup> *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74, 523 N.E.2d 846.

custody proceeding cannot be conveyed to a reviewing court by a printed record.”<sup>7</sup> Thus we review the trial court’s determination of custody in this case under an abuse-of-discretion standard, guided by the statutory best-interest factors set forth in R.C. 3109.04(F)(1).

{¶42} When considering parenting time, a trial court must follow the dictates of R.C. 3109.051, but it enjoys broad discretion when setting parenting time and determining the conditions under which parenting time will take place. Thus, we review the trial court’s award of supervised parenting time under an abuse-of-discretion standard, as guided by the statutory best-interest factors set forth in R.C. 3109.051(D).

{¶43} In rejecting shared parenting, in awarding Soman sole custody, and in awarding Cwik limited, supervised parenting time, the trial court relied on the evidence presented at trial, including the opinions of Dr. Nelson and Duncan, the testimony of both parents, and the court’s in camera interview of the children.

{¶44} We note that the record on appeal does not include a transcript of the trial court’s in camera interview of the children. This omission limits our review. As the appellant, Cwik has a duty to provide this court with all parts of the record necessary for our resolution of the assignments of error.<sup>8</sup>

{¶45} The trial court made many findings that are supported by the record before us, and we presume that the court’s in camera interview also supports the trial court’s decision in the absence of a transcript for review.<sup>9</sup>

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<sup>7</sup> Id. at 74.

<sup>8</sup> See App.R. 9(B).

<sup>9</sup> See *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384; *Ostrander v. Parker-Fallis Insulation Co.* (1972), 29 Ohio St.2d 72, 74, 278 N.E.2d 363.

{¶46} For instance, the court found that “the children have mirrored Defendant-Father’s negative view of Plaintiff-Mother and her current boyfriend. Defendant/Father has not shielded the children from his hostility toward the divorce and Plaintiff/Mother’s decision to end the marriage. Plaintiff/Mother has seen to all the needs of the children and is more than capable of caring for them on a full time basis.”

{¶47} “The children are suffering from parental conflict. This has caused behavioral problems in the youngest child. Defendant/Father has no insight into how he has created and perpetuated this situation. He has no appreciation for the children’s need for their mother.” Further, the court found that Cwik’s mental health was a factor due to “characterological deficits that have prevented him from distinguishing his own interests from those of the children. He has no insight into how his behavior is negatively impacting the children. Some of his behavior is abusive and erratic. Plaintiff/Mother is afraid of what Defendant/Father is capable.”

{¶48} The trial court specifically rejected as unfounded Cwik’s argument that the children were at risk in the presence of Soman’s boyfriend, Corry, and that they were in danger while in Soman’s care.

{¶49} Ultimately, the court determined that, in light of the acrimony between the parties and the issues that had been exposed, a shared-parenting arrangement was not in the best interest of the children, that Cwik’s attitude towards Soman had harmed the children either consciously or unconsciously, and that Cwik needed therapy to “develop insight into the best interests of the children.” The court recognized that supervised parenting time would interfere with the children’s bond with their father, but it considered the supervision necessary unless Cwik could eliminate his negative influence with the help of psychotherapy.

{¶50} In summary, we cannot say that the trial court's decision to award sole custody to Soman and to limit and supervise Cwik's parenting time was an abuse of discretion.

{¶51} Cwik also separately challenges the trial court's requirement that his parenting time be supervised. The court ordered supervised parenting time after the magistrate determined, at the conclusion of the property trial, that Cwik had failed to demonstrate that he had been complying with the previously imposed psychotherapy requirements. In June 2009, Cwik objected to this and other findings set forth in the magistrate's May 29, 2009, decision. On August 5, 2009, Cwik filed for bankruptcy, which stayed the property issues but not the custody issues. Thus, on August 10, 2009, the trial court proceeded with its review of Cwik's objection on the issue of supervised parenting time. But at that time, Cwik had not yet filed a transcript of the property trial before the magistrate or an affidavit of the evidence to support his objection to the magistrate's factual finding, as required by Civ.R. 53(D)(3)(b)(iii). Therefore, the trial court accepted the magistrate's factual finding and overruled Cwik's objection.

{¶52} An appellate court is precluded from considering a subsequently filed transcript of a magistrate's hearing where the objecting party failed to provide the trial court with the transcript to support any factual or weight-of-the-evidence objections to the magistrate's decision.<sup>10</sup> Thus, although Cwik filed a transcript of the property trial after the trial court had ruled on his objection to the finding that he had failed to demonstrate compliance with the psychotherapy requirement, this court cannot add to the record that was before the trial court at the time of its

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<sup>10</sup> *Colbur Tech, LLC v. Zerco Sys. Internatl., Inc.*, 7th Dist. No. 09-MA-70, 2010-Ohio-4318, at ¶10.

ruling.<sup>11</sup> Accordingly, where Cwik's objection was not supported by any evidence, we presume regularity and find no error in the trial court's decision to require supervised parenting time.

{¶53} Cwik further argues that the trial court did not allow him sufficient time during the custody trial to cross-examine Dr. Nelson and to examine his notes and records from the evaluation. We note that while Cwik complained at trial that he did not have sufficient time to properly cross-examine Dr. Nelson or to review his notes and records from the evaluation, he had appeared several hours late for the custody trial, which was only scheduled to last for two days. Moreover, he did not proffer for the record any questions that he was unable to ask, despite the court's invitation to do so, and he did not preserve for the record any notes or records from Dr. Nelson's evaluation. Therefore, this court would be unable to review whether Cwik was prejudiced by the trial court's rulings on this matter even if we were to find an abuse of discretion.

{¶54} In conclusion, we overrule the first and second assignments of error. Cwik has not demonstrated any error in the trial court's resolution of his pretrial motions or in its limitation of cross-examination at the custody trial. Further, the court's decision to reject shared parenting and to award Cwik limited, supervised parenting time comported with the best-interests tests of R.C. 3109.04(A)(1) and (F)(1) and R.C. 3109.051(A) and (D), and is amply supported by the record before us.

### III. Property Issues

{¶55} Cwik raises several assignments of error pertaining to the trial court's property distribution. As we have noted previously, the property trial was held before a magistrate in March and April 2009.

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<sup>11</sup> Id., citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, 377 N.E.2d 500.

A. Frozen Embryos

{¶56} In his third assignment of error, Cwik argues that the trial court erred in its determination that Soman should have “custody” of the parties’ four embryos in cryopreservation. In its findings of fact, the court had determined that the parties had signed an informed-consent document on November 7, 2002, with the Cleveland Clinic Foundation, where the frozen embryos are stored. The contract gave sole ownership of the embryos to Soman. Cwik argues that the contract with the Cleveland Clinic was unenforceable and that it was in the best interest of the parties’ embryos that he be granted “custody” because he would hire a surrogate to give birth to the embryos.

{¶57} Cwik cites the Thirteenth Amendment to the United States Constitution, which prohibits slavery and involuntary servitude of persons, in support of his argument that the contract was unconstitutional. But Cwik has failed to cite any authority to support his claim that the Thirteenth Amendment applies to frozen embryos, and that the contract was therefore unconstitutional and void. His argument is inapposite. Courts have not afforded frozen embryos legally protected interests akin to persons, and such frozen embryos would not be considered persons under the Thirteenth Amendment.<sup>12</sup>

{¶58} Cwik argues also that the contract was unconscionable. The informed-consent/embryo-cryopreservation contract the parties signed provides in relevant part that “Wife and Husband express, as follows, their directions regarding rights to the frozen embryo(s) in the event of the death of either both the Wife or Husband or the termination of the parties’ marriage. In the event that, prior to

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<sup>12</sup> See *Doe v. Obama* (S.D.Md.2009), 670 F.Supp.2d 435, 440, affirmed on other grounds (Jan. 21, 2011), C.A.4 Nos. 10-1104 and 10-1106.

implantation of the frozen embryo(s), we terminate our marriage through divorce, dissolution, or annulment, we hereby agree that: (check one):

{¶59} “\_\_\_\_ The frozen embryos are the sole property of \_\_\_\_\_(Choose one: Wife or Husband), who may dispose of them as she/he sees fit.

{¶60} “\_\_\_\_ We relinquish all rights to the embryo(s), and the embryo(s) may be donated anonymously to another infertile person for implantation.

{¶61} “\_\_\_\_\_ The frozen embryos will be destroyed.”

{¶62} The first option was selected: “wife/Pamela Soman” was written to identify the owner, and the document was signed by both parties.

{¶63} The Fifth Appellate District addressed a similar issue *in Karmasu v. Karmasu*.<sup>13</sup> In that case, a husband contested the trial court’s decision to abide by the terms of an agreement between the parties and the reproductive program where the parties’ frozen embryos were stored.<sup>14</sup> The *Karmusa* court held that the trial court “had no authority or jurisdiction to interfere in a contract made between the parties herein and a third party, which was not a party to the divorce action sub judice.”<sup>15</sup>

{¶64} With that said, we review, under an abuse-of-discretion standard, the trial court’s treatment of the embryos in this case as part of the distribution of property. We hold that the trial court did not abuse its discretion by awarding the frozen embryos in accordance with the signed contact. Accordingly, we overrule the third assignment of error.

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<sup>13</sup> 5th Dist. No. 2008CA00231, 2009-Ohio-5252.

<sup>14</sup> Id.

<sup>15</sup> Id. at ¶38.

{¶65} Cwik challenges several other portions of the trial court's property distribution. He assigns as error (1) the award of the 2008 income-tax exemption for both children to Soman (fourth assignment of error); (2) the refusal to assign a portion of his student loans to Soman (seventh assignment of error); (3) the date chosen to value assets (eighth assignment of error); (4) the refusal to find spousal financial misconduct (ninth assignment of error); and (5) the determination that he reimburse Soman for the amount of her settlement with the Adams Place Condominium Owners' Association (tenth assignment of error). We address each of these aspects of the property distribution in turn.

B. Tax Exemption

{¶66} In this case, the trial court addressed the tax exemption for the children for the tax year 2008 because the parties had not yet filed a 2008 tax return and could not reach an agreement on how to file the return or on how to divide the exemptions.

{¶67} R.C. 3119.82 directs trial courts, in divorces, to award dependency exemptions for federal income tax to the residential parent. However, a court may award the exemptions to the nonresidential parent if it finds that doing so would serve the best interests of the children.<sup>16</sup> We review an award of tax exemptions under an abuse-of-discretion standard.

{¶68} The record reveals that in the year 2008 Soman was the sole residential parent of the children until the beginning of April, when the parties entered into the interim shared-parent arrangement that was ultimately set aside. Thus, Soman was considered the residential parent for purposes of R.C. 3119.82.

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<sup>16</sup> *Bobo v. Jewell* (1988), 38 Ohio St.3d 330, 332, 528 N.E.2d 180.

{¶69} Cwik argues that it was in the best interest of the children that he be awarded one of the exemptions because he had income to offset. At trial, on cross-examination, Cwik testified that he had earned income in the first six weeks of 2008 and had received a lump-sum payment from his former employer in the fall of 2008, for a total income of approximately \$40,000. Notwithstanding this testimony, Cwik had filed an affidavit in 2008 indicating that he had no income for the year.

{¶70} Even if we were to assume that Cwik had income of \$40,000 for the year, Cwik did not establish that awarding one exemption to him would have resulted in any net tax savings that would have benefited the children. We note that Soman's income was substantially higher than \$40,000. Under these circumstances, we cannot say that the trial court abused its discretion in awarding both 2008 exemptions to Soman. Accordingly, we overrule the fourth assignment of error.

#### C. Student Loans

{¶71} Cwik challenges the trial court's treatment of his student loans in his seventh assignment of error. With respect to these student loans, the record indicates that although Cwik obtained part of his higher education during the marriage, the student loans at issue were taken out by Cwik to obtain his bachelor's degree at DePaul University. Cwik graduated from DePaul in 1990, long before the parties married in 1996. Therefore, these student loans were not marital debt but his own separate debt that he brought to the marriage.

{¶72} Further, there was no evidence that Soman encouraged Cwik to incur these loans to benefit the marriage, or that the parties even knew each other at that time. Under these facts, the trial court's refusal to divide Cwik's separate debt between the parties was not an abuse of discretion. Accordingly, we overrule the seventh assignment of error.

D. Valuation of Assets

{¶73} In his eighth assignment of error, Cwik contends that the trial court erred when it did not use August 27, 2007, the date of separation, as the date of valuation of assets “without regard to subsequent appreciation or depreciation.” Cwik cites *Liss v. Liss*<sup>17</sup> as support for his argument, but he fails to explain its applicability to the facts of this case.

{¶74} The record reveals that the parties stipulated that the date of valuation for assets and liabilities of the marriage was August 27, 2007, the date of separation. The parties disputed whether the date of valuation should include any appreciation or depreciation in the amount of the assets.

{¶75} We assume that Cwik is complaining about the trial court’s distribution of Soman’s marital retirement benefit plans. The court ordered that the retirement benefit plans be divided by a Qualified Domestic Relations Order into “two equal portions **as of April 8, 2009**” (emphasis added). The value of the accounts had dropped due to market conditions during the 20 months after the separation date.

{¶76} The trial court has broad discretion when determining the value of a marital asset for the equitable division of property.<sup>18</sup> Cwik has not demonstrated that the trial court’s valuation was inequitable, and thus he has not demonstrated an abuse of discretion. Accordingly, we overrule the eighth assignment of error.

E. Financial Misconduct

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<sup>17</sup> 6th Dist. No. WD-08-029, 2008-Ohio-5634.

<sup>18</sup> R.C. 3105.171(A)(2).

{¶77} In his ninth assignment of error, Cwik argues that the trial court erred when it failed to find that Soman had engaged in financial misconduct through the dissipation of marital assets.

{¶78} R.C. 3105.171(E)(3) states that “[i]f 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.” The statute applies only if the allegedly offending spouse had a “wrongful scienter.”<sup>19</sup> The time frame in which the financial dealings occurred may demonstrate wrongdoing on the part of the spouse.<sup>20</sup>

{¶79} At the property trial, Cwik tried to establish that Soman had committed financial misconduct because she had spent funds obtained from the post-separation liquidation of an insurance policy and an investment fund. But Soman presented compelling evidence that she had used these liquidated marital funds to pay expenses related to the marital home, including real estate taxes and condominium association fees incurred before the parties’ separation.

{¶80} Cwik also argued that Soman engaged in financial misconduct before they separated “by withdrawing large sums of marital cash which is unaccounted for and spending large amounts of money on expensive jewelry, plastic surgery, and orthodontia when the parties could not afford it.” At best, the evidence could have supported a finding that Soman was a spendthrift during the marriage. But Cwik failed to meet his burden of demonstrating a “wrongful scienter.”<sup>21</sup>

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<sup>19</sup> *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, 884 N.E.2d 1113, at ¶40; *Hammond v. Brown* (Sept. 14, 1995), 8th Dist. No. 67268.

<sup>20</sup> *Rinehart v. Rinehart* (May 18, 1998), 4th Dist. No. 96-CA-10.

<sup>21</sup> *Moore*, supra; *Hammond*, supra.

{¶81} The trial court's finding that Cwik's allegations of financial misconduct were unfounded is supported by the record. Accordingly, we overrule the ninth assignment of error.

F. Condominium Fees Settlement

{¶82} In his tenth assignment of error, Cwik contends that the trial court erred by ordering him to reimburse Soman for the amount of her settlement with the Adams Place Condominium Owners' Association. The condominium association had sued the parties for condominium fees that had accrued but were not paid while Cwik had resided in the condominium after the date of separation. Soman paid a settlement to the condominium association for the dismissal of the lawsuit.

{¶83} Soman had requested reimbursement for this debt at the property trial, and the parties had stipulated that Cwik would receive the marital condominium and "be solely responsible, indemnify and hold [Soman] harmless for any and all expenses associated with the property, including but not limited to \* \* \* the home owners association fees." But the magistrate did not specifically address the issue in the findings of fact and conclusions of law. Soman objected to the magistrate's decision on this basis, but her objections were filed not long after the time allotted by Civ.R. 53 had expired. Cwik did not move to strike the objections as untimely, and the trial court sustained Soman's objection when, after the bankruptcy stay was lifted and the transcripts were filed, it considered both parties' objections to the magistrate's property distribution.

{¶84} Soman argues that Civ.R. 53 provides the trial court with some discretion to entertain untimely filed objections. We agree that the court does have some discretion in this regard, as the time limits of Civ.R. 53(C)(b)(i) are not jurisdictional. Moreover, Civ.R. 53(D)(5) expressly allows the court to extend the

time to file objections for “good cause shown,” and Civ.R. 6(B) provides additional authority for the extension of a deadline that has expired where the court finds excusable neglect.<sup>22</sup>

{¶85} In this case, Cwik did not bring the timeliness issue to the attention of the trial court. Further, Soman did not object to any factual findings or conclusions of law. Rather, she objected to an omission by the magistrate. Under these circumstances, we presume that the trial court found “good cause” to entertain the untimely filed objections, and we find no abuse of discretion.

{¶86} To the extent that Cwik is also arguing the merits of the claim under this assignment of error—that Soman “was equally responsible for the condo fees”—we note that his argument is refuted by the record, including Cwik’s stipulation. Thus, we find no abuse of discretion in the trial court’s modification of the magistrate’s decision to include a disposition of the debt to the condominium association that Soman had incurred and that Cwik had agreed by stipulation to indemnify her for.

{¶87} Accordingly, we overrule the tenth assignment of error.

#### IV. Child and Spousal Support

{¶88} In his fifth assignment of error, Cwik argues that the trial court miscalculated his child-support obligation and erroneously denied him spousal support.

##### A. Child Support

{¶89} Cwik challenges the trial court’s calculation of his child-support obligation on the basis that the court underreported Soman’s income and overreported his income. In calculating and awarding child support in accordance

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<sup>22</sup> See *Sipes v. Martini*, 1st Dist. No. C-100025, 2010-Ohio-4598, at ¶4.

with the statutory child-support worksheet,<sup>23</sup> the trial court must first determine the income of each of the child’s parents. Income for a parent who is employed to full capacity means that parent’s gross income<sup>24</sup> as defined in R.C. 3119.01. Income for a parent who is unemployed or underemployed means the sum of any gross income and any potential income for that parent.<sup>25</sup> Potential income includes imputed income that the court determines the parent would have earned based on specified criteria and imputed income from nonincome-producing assets of the parent, but only if the court first determines that the parent is voluntarily unemployed or underemployed.<sup>26</sup>

i. Stock Awards

{¶90} First, Cwik contends that the trial court did not include Soman’s “stock awards” as “earnings” on the child-support worksheet. But Cwik has not identified which “stock awards” the trial court erroneously excluded or how their exclusion from the worksheet was erroneous, thus hampering our review.

{¶91} The record reflects that Soman’s employer, Chubb, had awarded to Soman certain Restricted Stock Units (“RSU”) in 2005, 2006, 2007, and 2008. Although Chubb had granted her the stock units, the RSUs could not be exercised for several years and were valued based on the stock price on the date exercised. The trial court treated as marital property and divided equally the 2005 RSUs that Soman had exercised in May 2008. With respect to the 496 RSUs awarded in 2006 but not exercisable until March 2009, and the 564 RSUs awarded in 2007 but not exercisable until March 2010, the court ruled that those, too, would be divided

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<sup>23</sup> R.C. 3119.02; R.C. 3119.022.

<sup>24</sup> R.C. 3119.01(C)(5)(a).

<sup>25</sup> R.C. 3119.01(C)(5)(b).

<sup>26</sup> R.C. 3119.01(C)(11).

equally as marital property, but it ordered that Cwik's proceeds be held in a constructive trust and be first applied to the attorney fees awarded to Soman in the case. Further, the court gave Soman the discretion to determine when to exercise these RSUs, and the court specifically retained jurisdiction over the issue. The 2008 RSUs<sup>27</sup> were nonmarital property and the court did not divide them.

{¶92} We find no prejudicial error in the trial court's failure to include the RSUs on the child-support worksheet. With respect to the marital RSUs, the court had already divided them equally as property. And even if we accept Cwik's argument that these RSUs should have been included as income on the child-support worksheet, the court would have been required to include the RSUs as income for both parties. Because the additional amount of income would have been the same for both parties, we conclude that any error was harmless.

{¶93} Further, Soman's nonmarital 2008 RSUs were not exercisable in 2009, and Cwik has not cited any authority to support a conclusion that the unascertainable value of these units should have been included as income several years before Soman could have actually realized any income. Thus, we conclude that the trial court did not miscalculate Cwik's child-support obligation based on the exclusion of the RSUs.

ii. Voluntarily Unemployed

{¶94} Cwik also argues that his income was overreported by the trial court when it calculated his child-support obligation. Specifically, he challenges the trial court findings that he was voluntarily unemployed and had imputed income in the amount of \$66,560. Whether Cwik was voluntarily unemployed and the appropriate

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<sup>27</sup> The parties' stipulated that Soman was awarded 396 units on March 12, 2008, but Soman testified at the property trial that she had actually been awarded 496 units.

amount of imputed income posed questions of fact for the trial court, and its determinations will not be disturbed on appeal absent an abuse of discretion.<sup>28</sup> As we have previously noted, an abuse of discretion implies an attitude that is unreasonable, arbitrary, or unconscionable.<sup>29</sup>

{¶95} The trial court found that Cwik had a bachelor’s degree in computer science as well as an associate’s degree in music composition, and that his unemployment since mid-February 2008 was due to his “virtually nonexistent efforts to secure employment.” This finding was based in part on Cwik’s failure at trial to support his testimony about his job searches with any admissible documents. Cwik had attempted at trial to admit some exhibits that, he alleges, documented his job searches, but the trial court sustained Soman’s objection to their admission. Soman had objected to the admission of these documents because Cwik had failed to mark them and to provide them to her before trial, in violation of Loc.R. 20, and because he had failed to properly identify and authenticate these unmarked documents at trial, as required by Evid.R. 901.

{¶96} We find no abuse of discretion by the court in excluding these documents, where Cwik failed to properly identify and authenticate them under Evid.R. 901. Furthermore, Cwik did not proffer these documents as exhibits for appellate review, and, therefore, he cannot demonstrate any prejudice from their exclusion. As a result, we hold that the trial court’s determination that Cwik was voluntarily unemployed was supported by the evidence.

{¶97} We next review whether the trial court abused its discretion by imputing income to Cwik in the amount of \$66,560. The court based this amount on

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<sup>28</sup> See *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112, 616 N.E.2d 218.

<sup>29</sup> *Blakemore*, 5 Ohio St.3d at 219.

the projected yearly amount of Cwik's compensation from MySQL, his most recent employer. At MySQL, Cwik had worked as an independent contractor, providing consulting assistance in the area of software quality assurance. The court also found that Cwik was not unemployed due to his emotional health. Under these facts, we cannot say that the trial court abused its discretion by imputing \$66,560 of income to Cwik.

B. Spousal Support

{¶98} Cwik also challenges the trial court's denial of spousal support. He sought spousal support to allow him to reestablish his career. In determining whether spousal support is appropriate, the trial court must consider the factors set forth in R.C. 3105.18(C)(1)(a) through (n). We review the grant or denial of spousal support under an abuse-of-discretion standard.<sup>30</sup>

{¶99} On this issue, the trial court adopted the magistrate's factual findings concerning the statutory factors. Of importance, the court noted Cwik's education and earning capabilities, and that Cwik had not demonstrated a loss of income-production capability due to his performance of marital responsibilities.

{¶100} The court's findings are supported by some evidence in the record, and, therefore, we are unable to find an abuse of discretion.

{¶101} Accordingly, we overrule the fifth assignment of error.

V. Attorney Fees

{¶102} In his sixth assignment of error, Cwik contends that the trial court erred by ordering him to pay Soman a portion of her attorney fees. R.C. 3105.73(A) authorizes the trial court in a divorce action to award reasonable attorney fees to a party if the court finds the award "equitable" after considering the relevant factors,

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<sup>30</sup> *Ghai v. Ghai*, 182 Ohio App.3d 479, 2009-Ohio-2449, 913 N.E.2d 508, at ¶77.

including conduct of the parties. We review the trial court's award of fees under an abuse-of-discretion standard.<sup>31</sup>

{¶103} The trial court adopted the magistrate's findings on the issue of fees and ordered Cwik to pay \$15,000 toward Soman's attorney fees. The magistrate had determined that a major portion of Soman's fees were made necessary by the "frivolous and egregious conduct exhibited by [Cwik] throughout the course of this litigation." This conduct included threats made by Cwik to litigate the divorce "for ten years" if Soman would not agree to his demands that he be awarded the frozen embryos. Cwik had also declared his intention to "ruin" Soman financially through extensive litigation. At the conclusion of the property trial, the magistrate found that "[Cwik] has done everything in his power to carry out those threats."

{¶104} Although Cwik contends that these findings are not supported by the record, we find ample supporting evidence in the record. Thus, we conclude that the trial court's award of \$15,000 in attorney fees to Soman was not an abuse of discretion. Accordingly, we overrule the sixth assignment of error.

#### VI. Conclusion

{¶105} Cwik's assignments of error are meritless. We affirm the decree of divorce entered by the domestic relations court.

Judgment affirmed.

**CUNNINGHAM. P.J., SUNDERMANN and DINKELACKER, JJ.**

Please Note:

The court has recorded its own entry on the date of the release of this decision.

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<sup>31</sup> *Moore*, 2008-Ohio-255, at ¶80.