

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

SARAH RENZ, :
 :
 Plaintiff-Appellee, : CASE NO. CA2010-05-034
 :
 - vs - : OPINION
 : 4/4/2011
 :
 JOHN RENZ, :
 :
 Defendant-Appellant. :

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. 2007 DRA 01538

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BRESSLER, J.

{¶1} Defendant-appellant, John Renz ("Husband"), appeals the judgment of the Clermont County Court of Common Pleas, Domestic Relations Division, granting a divorce from plaintiff-appellee, Sarah Renz ("Wife"). For the reasons that follow, the judgment is affirmed in part, reversed in part, and remanded.

{¶2} The parties were married June 11, 1988. On November 6, 2007, Wife filed a

complaint for divorce and Husband subsequently filed an answer. The matter proceeded on a contested basis to a hearing before the trial court on December 8-9, 2009, wherein it determined the termination date of the marriage was December 8, 2009, and valued and divided the marital property accordingly.

{¶3} On appeal, Husband raises two assignments of error for review.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED IN DETERMINING THAT THE TERMINATION DATE OF MARRIAGE WAS THE DATE OF THE FINAL HEARING IN THIS MATTER."

{¶6} In his first assignment of error, Husband argues the trial court erred by designating December 8, 2009, the date of the final hearing, as the termination date of the marriage. Instead, Husband argues the de facto termination date of the marriage should have been November 6, 2007, the date the parties filed for divorce. This argument lacks merit.

{¶7} Traditionally, the proper date for the termination of a marriage, for purposes of property division, is the date of the final divorce hearing. R.C. 3105.171(A)(2); *Fillis v. Fillis*, Clermont App. Nos. CA2008-10-093, CA2008-10-101, 2009-Ohio-2808, ¶8. However, when the trial court determines "the date of the final hearing would be inequitable and that a de facto termination of the marriage occurred at an earlier time, the trial court has the discretion to select dates that it considers equitable[.]" *Id.*; R.C. 3105.171(A)(2)(b). As a result, because the trial court has broad discretion to select dates it considers equitable, and because the "determination of the termination date of a marriage is largely a question of fact," this court will not disturb the trial court's finding absent an abuse of discretion. *Id.* An abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Where there is competent, credible evidence to support the trial court's decision, there is no abuse of

discretion. *Fillis* at ¶8.

{¶8} In the case at bar, we do not find the trial court abused its discretion in determining the termination date of the marriage was December 8, 2009. Although the parties testified they separated as early as November 2007, it is clear that significant portions of the parties' finances remained entangled until trial. Lastly, we cannot say the trial court abused its discretion where Husband failed to comply with numerous discovery requests and court orders regarding attorney fees and child support, thus further complicating the parties' joint affairs. See, e.g., *O'Brien v. O'Brien*, Cuyahoga App. No. 89615, 2008-Ohio-1098, ¶43.

{¶9} Accordingly, Husband's first assignment of error is overruled.

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED AS A MATTER OF LAW BY INEQUITABLY DIVIDING THE PARTIES' MARITAL ASSETS AND DEBTS."

{¶12} In his second assignment of error, Husband raises numerous issues relating to the trial court's division of the marital assets and debt. For ease of analysis, we will address Husband's arguments out of order.

{¶13} As an initial matter, property division in a divorce proceeding is a two-step process that is subject to two different standards of review. *Boyer v. Boyer*, Butler App. Nos. CA2010-04-083, CA2010-05-109, 2011-Ohio-989, ¶6. Initially, pursuant to R.C. 3105.171(B), "the court shall * * * determine what constitutes marital property and what constitutes separate property." A trial court's classification of property as marital or separate must be supported by the manifest weight of the evidence, and an appellate court will not reverse the trial court's classification if it is supported by competent and credible evidence. *Id.* at ¶8; *Zollar v. Zollar*, Butler App. No. CA2008-03-065, 2009-Ohio-1008, ¶10.

{¶14} After classifying the assets as separate or marital property, "the court shall disburse a spouse's separate property to that spouse" and divide the marital property equally,

unless the court finds an equal division would be inequitable. R.C. 3105.171(C)(1); R.C. 3105.171(D). The trial court is given broad discretion in determining what constitutes an equitable division of property and will not be reversed absent an abuse of that discretion. *Boyer*, 2011-Ohio-989 at ¶9. As previously discussed, a lower court may only be said to have abused its discretion when its judgment reflects an attitude that is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St.3d at 219.

{¶15} With these principles in mind, we address each of Husband's arguments in turn.

J & J Triumphant Corporation

{¶16} First, Husband argues the trial court erred in ordering the parties to sell and equally divide the net proceeds of the business known as J & J Triumphant Corporation ("J & J Corp."). Specifically, Husband argues the trial court lacked jurisdiction to order the sale when a third-party owner, James A. Smith, was never made a party to the divorce action.

{¶17} As previously discussed, when dividing property, the trial court must first determine "what constitutes marital property and what constitutes separate property." R.C. 3105.171(B). Further, pursuant to R.C. 3105.171(G), a trial court must indicate the basis for its division of marital property in sufficient detail to enable a reviewing court to determine whether the award is fair, equitable, and in accordance with the law. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97. As noted, a trial court's classification of marital or separate property will not be reversed as being against the manifest weight of the evidence if the classification is supported by competent, credible evidence. *Boyer*, 2011-Ohio-989 at ¶8.

{¶18} At trial, the parties testified that prior to the divorce, Husband founded several privately held companies, including J & J Corp. Additionally, both parties testified to co-owning J & J Corp. with a third party named James A. Smith. Husband submitted several documents proving Smith's ownership, including: (1) the 2005 certificate of business designating Smith as one of two initial directors, and (2) a 2009 tax document, naming the

corporate officers as "John R. Renz" and "James A. Smith," and indicating that Smith owned 49.8667 percent of all shares in J & J Corp.

{¶19} Under such circumstances, we agree with Husband that the trial court lacked jurisdiction to order the sale of J & J Corp. where the court's finding that "[t]he parties own the business operated as a Laundromat named J & J Companies" is not supported by competent, credible evidence. See *Keyser v. Keyser* (Apr. 9, 2001), Butler App. No. CA2000-06-127, at 2. Absent evidence that Husband rightfully acquired Smith's shares in the corporation, the trial court lacked grounds to find that Smith's ownership interest was subject to distribution as "marital property." See R.C. 3105.17; *Albaugh v. Albaugh* (July 22, 1982), Franklin App. No. 81AP-637, 1982 WL 4296 ("[a]ny consideration of [a] corporation as marital property must begin by determining who owns the stock"); *Moore v. Moore*, Ottawa App. Nos. OT-06-005, OT-06-009, OT-06-013, 2008-Ohio-255, ¶51; *Smith v. Smith*, Butler App. No. CA2005-04-091, 2006-Ohio-2136.

{¶20} To the extent the trial court adjudicated the rights of a nonparty and clearly misclassified a portion of J & J Corp. as "marital" property, the trial court abused its discretion and its finding is against the manifest weight of the evidence. Cf. *Hadley v. Hadley* (Feb. 25, 1982), Franklin App. No. 81AP-149, 1982 WL 3989, at *3. See, also, *O'Rourke v. O'Rourke*, Scioto App. No. 08CA3253, 2010-Ohio-1243, ¶24.

{¶21} Accordingly, Husband's first argument is well-taken. On remand, the trial court is instructed to reassess its distribution of J & J Corp. in light of our ruling on this argument. Moreover, on remand, the parties may submit evidence regarding any conditions for the corporation's dissolution or whether the co-owners added restrictive agreements, including rights of redemption or other special rights, privileges, or qualifications. See *Callos Professional Emp., L.L.C. v. Greco*, Mahoning App. No. 04-MA-95, 2005-Ohio-2940, ¶18.

Taxes/Tax Consequences

{¶22} Next, Husband argues the trial court failed to consider certain tax consequences of its property division as required by R.C. 3105.171(F)(6). Specifically, Husband argues the trial court failed to credit him with significant corporate taxes he paid during 2008, despite determining that those taxes were marital debt.

{¶23} In dividing the marital property, the trial court credited Husband with \$446,000 for the sale of another marital business, Supreme Delivery Service, Inc. ("SDS, Inc."), to account for Husband's failure to sufficiently document the whereabouts of a majority of those funds. However, despite the fact that Husband presented evidence and testimony that he paid at least \$139,671.40 in taxes on behalf of SDS, Inc. in 2008, neither the record nor the determination by the trial court tells us how this debt was divided. Cf. *Kaechele*, 35 Ohio St.3d at 97. Absent written findings indicating whether the court gave weight to Husband's tax expenditures, this court is unable to conclude whether the division of marital property was, in fact, equal. *Smith v. Emery-Smith*, Geauga App. No. 2009-G-2941, 2010-Ohio-5302, ¶45 ("[a] trial court must take into account marital debt when dividing marital property").

{¶24} Moreover, we agree with Husband that the trial court's judgment entry does not indicate whether it considered the factors set forth in R.C. 3105.171(F), as related to the division of marital property. See, e.g., *Moser v. Moser*, Portage App. No 2006-P-0047, 2006-Ohio-4109, ¶51. Specifically, R.C. 3105.171(F) states:

{¶25} "In making a division of marital property * * *, the court shall consider the following factors:

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

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

{¶28} "(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;

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

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

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

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

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

{¶34} "(9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;

{¶35} "(10) Any other factor that the court expressly finds to be relevant and equitable."

{¶36} While an exhaustive recitation of each factor is not necessary, there must be a "clear indication that the statutory factors were considered and played a role in the ultimate division of property." *Heslep v. Heslep* (June 14, 2000), Monroe App. No. 825, 2000 WL 818909, at *4. Of particular relevance to this case is the principle that a trial court must consider the tax consequences of its property division, unless those consequences are speculative. R.C. 3105.171(F)(6); *Ferguson v. Ferguson* (Mar. 1, 1999), Clermont App. No. CA98-06-039, at 9. In the case at bar, we find the trial court either failed to consider the relevant factors set forth in R.C. 3105.171(F), or failed to provide enough detail in its order to allow this court to determine that such factors were considered. See *Foppe v. Foppe*, Warren App. Nos. CA2008-10-128, CA2009-02-022, 2009-Ohio-6926.

{¶37} Accordingly, Husband's second argument is well-taken. Upon remand, the trial

court must consider the significant tax consequences of its award to ensure it comports with its intent to equally divide the marital assets and debt.

Lake House

{¶38} Next, Husband argues the trial court erred in ordering the parties to equally divide the net proceeds from the sale of their lake house, while making Husband solely responsible for all expenses relating to the house. This argument lacks merit.

{¶39} As previously discussed, in a divorce action, the trial court shall divide marital property equally unless an equal division would be inequitable, or in other limited situations. R.C. 3105.171(C)(1). "A reviewing court may modify a property division only if it finds that the trial court abused its discretion in dividing the property [or debt] as it did." *Cherry v. Cherry* (1988), 66 Ohio St.2d 348, 355; *Emery-Smith*, 2010-Ohio-5302 at ¶45. Further, any claimed disparity in the allocation of the parties' debt must be viewed in light of the entire property division. See *Keating v. Keating*, Cuyahoga App. No. 90611, 2008-Ohio-5345, ¶66.

{¶40} In the case at bar, the parties do not dispute the fact that the lake house was marital property. Because Wife's interest in the lake house was a marital asset, the home was subject to equal division with Husband, which is precisely what the trial court ordered. In doing so, the trial court acted in accordance with its intent to equally distribute the marital property. Given the totality of the circumstances, the court's property division was not unreasonable, arbitrary, or unconscionable, particularly when the expenses allocated to Husband were temporary costs associated with maintaining the home during the pendency of the sale. Accordingly, Husband's third argument is overruled.

BMW Vehicle

{¶41} Next, Husband argues the trial court erred in crediting him with \$20,125 for the marital value of his BMW vehicle. Instead, Husband argues he provided evidence that the vehicle was worth \$22,900, and because he still owed \$7,800 on the vehicle at the time of

the hearing, he was entitled to a credit of only \$15,100. This argument lacks merit.

{¶42} A trial court's decision regarding property valuation will not be disturbed on appeal absent an abuse of its discretion. *Foppe*, 2009-Ohio-6926 at ¶8; *Huelskamp v. Huelskamp*, Auglaize App. No. 2-09-21, 2009-Ohio-6864, ¶27 ("A trial court enjoys broad discretion in determining the value of a marital asset and is not required to adopt any particular method of valuation"). As previously discussed, an abuse of discretion occurs when the trial court's judgment is unreasonable, arbitrary or unconscionable. *Blakemore*, 5 Ohio St.3d at 219. Moreover, when the parties present substantially different values of an asset, the trial court may believe all, part, or none of any witness's testimony. *Huelskamp* at ¶27.

{¶43} During the hearing, Husband and Wife presented conflicting testimony regarding the value of Husband's BMW vehicle. Wife testified the fair market value of the BMW was approximately \$28,000, and further testified that the value "seems very low * * * because we purchased it two years ago for 50,000, but yes, that's probably the value of it now." Moreover, Wife presented evidence taken from "NADA" guidelines that \$28,000 was the average value for the same type of vehicle in "clean retail condition" having a minimum of 65,000 miles.

{¶44} Accordingly, contrary to Husband's assertion, the trial court had "before it sufficient evidence to justify or support the dollar figure it obtain[ed]." *Boyles v. Boyles*, Portage App. No. 2000-P-0072, 2001-Ohio-4303, at 4. The price selected by the trial court was based upon Wife's testimony and supporting evidence, which the trial court clearly found to be competent and credible. Such a finding is within the trial court's discretion. *Id.* "Our task on appeal is not to require the adoption of any particular method of valuation, but to determine whether, based on all the relevant facts and circumstances, the court abused its discretion in arriving at a value." *Id.* Because there is sufficient evidence to support the trial

court's valuation, no abuse of discretion occurred in this regard. Accordingly, Husband's fourth argument is overruled.

Misuse of Funds

{¶45} Next, Husband argues the trial court erred to his prejudice in finding that he engaged in financial misconduct. Specifically, Husband argues Wife provided insufficient evidence of "wrongdoing" to prove he engaged in financial misconduct. This argument lacks merit.

{¶46} In determining whether an equal division of marital assets would be inequitable, "a court may consider whether one party has engaged in financial misconduct." *Emery-Smith*, 2010-Ohio-5302 at ¶50. R.C. 3105.171(E)(3) provides that "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. The burden of proving financial misconduct is on the complaining party." *Id.* This court reviews a finding of financial misconduct under the manifest-weight-of-the-evidence standard. *Id.*

{¶47} In the case at bar, the trial court found Husband misused and "wasted" company funds totaling \$35,571.82, and credited that amount to Husband in dividing the marital property. A review of the record indicates the trial court calculated this amount based, at least in part, upon Husband's inconsistent testimony regarding untraced deposits into his personal bank account and markedly similar withdrawals from company accounts. For example, the trial court noted Husband failed to adequately support his testimony that "friends" made three separate deposits of \$10,000 into his personal bank account, nor could he document the whereabouts of \$30,000 withdrawn from a company checking account within months of the aforementioned deposits. Similarly, the court noted Husband's inconsistent testimony regarding the whereabouts of roughly \$202,240 acquired for the

termination and sale of the SDS, Inc. Specifically, the trial court stated:

{¶48} "THE COURT: Sir, we are here. This date has been set for months and we are here today to determine how these assets are to be divided and you're telling me, 'I can account for it.' Guess what? Today's the day we account for it. Do you have documentation today that accounts for that \$202,000?

{¶49} "[HUSBAND]: Part of it is in the business accounts.

{¶50} "THE COURT: Sir, wait a minute. You have three money orders. * * * One for \$70,780.00. Is that money order itself, this original money order that you obtained, is it still in effect in its entirety?

{¶51} "[HUSBAND]: No. * * * I deposited it into another account.

{¶52} " * * *

{¶53} "THE COURT: Sir, are you telling me that these money orders exist or are you telling me that these money orders that you obtained in the amount of \$202,240.00 have been cashed in and are sitting somewhere on deposit in another account?

{¶54} "[HUSBAND]: Yes, sir.

{¶55} "THE COURT: Which one is it?

{¶56} "[HUSBAND]: Fifth-Third Bank. It's on the books, it's on Quick Books.

{¶57} "THE COURT: That's not what you told me * * * you told me you took it out in money orders and you told me you had the money order. Having a money order and having the money on deposit are not the same thing. And you're not fooling me, you're not going to fool this Court. I want to know where the money's at. You're being deceptive and I want to know where the money's at.

{¶58} "[HUSBAND]: I told you.

{¶59} "THE COURT: All \$202,000.00 is on deposit at Fifth-Third? Yes or no?

{¶60} "[HUSBAND]: No.

{¶61} "THE COURT: Okay, where else?

{¶62} "[HUSBAND]: Nowhere."

{¶63} As a result of Husband's inconsistent testimony, it is clear he made it impossible for the trial court to believe his assertion that he could "account for every penny" associated with the termination and sale of SDS, Inc.

{¶64} Additionally, Wife presented evidence and testimony that following their separation, Husband frequently used company funds to pay personal debts, including casino expenses, home repairs, and numerous restaurant bills. However, as Husband correctly indicates, the parties also paid personal expenses using company accounts *during* the marriage – an equally improper deed. This is a classic example of why two wrongs do not make a right. However, contrary to Husband's apparent assertion, a wrong committed by the parties as espoused does not negate a wrong committed by Husband alone. Thus, Husband's continued commingling of business and personal finances following the parties' separation and paucity of independent documentation in this case made the trial court and this reviewing court's task extremely difficult. In light of the totality of the circumstances, it is clear the trial court, as the trier of fact, was entitled to believe Wife's testimony that Husband engaged in evasive behavior and converted funds flowing from marital asset(s) for personal, or otherwise undetermined, use.

{¶65} Because the trial court's finding is supported by competent, credible evidence, we cannot say the court's finding that Husband committed financial misconduct was against the manifest weight of the evidence. Moreover, we cannot say the trial court erred in declining to credit Husband for \$23,500 he claims to have repaid to SDS, Inc. between August 2008 and February 2009, where the origin of such funds was not sufficiently determinable from the evidence Husband presented.

{¶66} Accordingly, Husband's fifth argument is overruled.

Distributive Award

{¶67} Lastly, Husband argues the trial court erred by ordering him to pay Wife a "distributive award" of approximately \$45,000 within six months from the date of the divorce decree. Specifically, Husband claims the court "basically set [him] up for failure and contempt with this [o]rder," given the fact that Wife was awarded the "only liquid property," i.e., the parties' Fifth Third Bank Account containing \$140,000.

{¶68} A "distributive award" is defined as "any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from *separate* property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code." R.C. 3105.171(A)(1). (Emphasis added.)

{¶69} In the case at bar, the trial court ordered Husband to pay Wife \$44,954.52 under a division entitled "Equalization of Property Division," explaining the purpose of the award was "to *equalize* the division of property * * * within 180 days from the journalization of the Decree of Divorce[.]" (Emphasis added.) In issuing this order, the trial court made no mention of a "distributive" award or discussed the requisite findings associated therewith, namely, findings that a "division of the marital property in kind or in money would be impractical or burdensome" under R.C. 3105.171(E)(2), or that the court considered the nine factors under R.C. 3105.171(F) in issuing the award. Furthermore, the record does not contain anything from which this court could infer that the trial court intended to order a distributive award pursuant to R.C. 3105.171(E).

{¶70} In light of these considerations, we find Husband has simply mischaracterized the trial court's use of an offset to equalize the division of marital property. In such a case, this court would review the trial court's decision to offset the parties' awards under the deferential abuse-of-discretion standard. See *Cherry*, 66 Ohio St.2d at 355. In reviewing the

trial court's disposition as a whole, we cannot say the trial court abused its discretion in utilizing an offset to achieve an equal distribution of marital property.¹ See *id.*

{¶71} Accordingly, Husband's sixth and final argument is overruled.

{¶72} Judgment affirmed in part, reversed in part, and remanded.

POWELL, P.J., and HENDRICKSON, J., concur.

1. Upon remand, we would not require the trial court to reassess the offset unless the court divides the remaining marital assets and debt on an equitable, rather than equal, basis.

[Cite as *Renz v. Renz*, 2011-Ohio-1634.]