

[Cite as *Herndon v. Herndon*, 2009-Ohio-3261.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

RODNEY H. HERNDON	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellant	:	Hon. W. Scott Gwin, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2008-CA-00289
WENDY HERNDON	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Stark County Court of
Common Pleas, Domestic Relations
Division, Case No. 2007DR01366

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 29, 2009

APPEARANCES:

For Plaintiff-Appellant
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For Defendant-Appellee
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Gwin, J.

{¶1} Plaintiff-appellant Rodney Herndon appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, which granted a divorce to him and defendant-appellee Wendy L. Herndon, divided the marital property, and ordered appellant to pay appellee \$2,000.00 per month as spousal support, for eighty-four (84) months. Appellant assigns three errors to the trial court:

{¶2} “I. THE TRIAL COURT ERRED IN AWARDING THE APPELLEE \$2,000.00 IN SPOUSAL SUPPORT PER MONTH.

{¶3} “II. THE TRIAL COURT ERRED IN AWARDING THE NET PROFIT FROM THE SALE OF THE PARTIES’ MARITAL HOME TO APPELLEE.

{¶4} “III. THE TRIAL COURT ERRED IN NOT EQUALLY OR EQUITABLY DIVIDING THE PARTIES’ ASSETS AND DEBTS.”

{¶5} The record indicates the parties were married in 1987, and produced two children, both now emancipated.

{¶6} The court conducted a trial in the matter on or about September 23, 2008. Appellant and appellee testified, and the court reviewed various exhibits, including reports of a CPA and an accountant, which appellant offered into evidence in his case in chief. At the close of the trial, the court took the matter under advisement, and invited the attorneys to submit final argument, any proposed findings of fact and conclusions of law, and any proposed final judgment decrees they wished to submit.

{¶7} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to alimony

orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217; to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292; to custody proceedings in *Miller v. Miller* (1988), 37 Ohio St. 3d 71; and to decisions calculating child support, see *Dunbar v. Dunbar*, 68 Ohio St 3d 369, 533-534, 1994 -Ohio- 509, 627 N.E.2d 532. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore*, supra, at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Med. Board*, (1993), 66 Ohio St.3d 619, 621.

I.

{¶18} In his first assignment of error, appellant argues the trial court's award of spousal support to appellee is too high.

{¶19} Appellant states he started his own business in 2005, and made about \$19,000.00. In 2006, he lost approximately \$44,000.00. His report for 2007 showed a profit of \$139,625.00, but he argued to the trial court and on appeal that this is an aberration and unlikely to re-occur. Appellant presented documents from his accountant indicating for the current year, he was operating at a deficit.

{¶10} Appellee points out the CPA report offered by appellant calculated his income at \$69,400.00.

{¶11} The report from appellant's accountant states the balance sheets submitted do not contain all the information ordinarily used in generally accepted accounting principles. The CPA's report states appellant's business is highly leveraged with problems funding growth and cash flow. It reported the current debt exceeds the current estimated fair market value of the business assets.

{¶12} Appellant asserts the court should have ordered a token amount of spousal support, and retained continuing jurisdiction over the matter so that if appellant's business does well in the future, the spousal support could be adjusted. The court did retain continuing jurisdiction over the issues of spousal support.

{¶13} We have reviewed the record, and we find there is evidence supporting the trial court's decision to award spousal support. Both appellant and appellee have the opportunity to return to the trial court as circumstances warrant. On the record before us, we cannot find the trial court abused its discretion in computing the spousal support.

{¶14} The first assignment of error is overruled.

II.

{¶15} In his second assignment of error, appellant argues the trial court erred in awarding the net profit from the sale of the parties' marital home to the appellee. The court found appellee should receive the proceeds of the sale after payment of all mortgage and indebtedness and normal selling costs.

{¶16} The record indicates the property was listed for sale for \$349,900.00. The indebtedness on the home was approximately \$280,000.00. Appellant asserts appellee could receive as much as \$70,000.00.

{¶17} Appellee testified appellant had utilized some of the funds from the second mortgage for his business. On cross, appellant conceded the sale of the house might not cover the marital debt. Appellant expressed the hope the majority of the debt could be paid off, and stated it depends on what the house sells for. Trans. of Proceedings, Pg. 51. At the time of the hearing, the house had been on the market for approximately ninety days. Trans. of Proceedings, Pg. 15.

{¶18} The trial court made no finding as to the value of the real estate. The \$349,900 to which appellant alludes is the listing price for sale of the real estate, which is not the equivalent of an actual appraisal. The property may not necessarily sell for the asking price.

{¶19} Our review of the record leads us to conclude the trial court did not abuse its considerable discretion in awarding appellee the net proceeds of the sale.

{¶20} The second assignment of error is overruled.

III.

{¶21} In his third assignment of error, appellant argues the trial court did not allocate the debts of the marriage equally or equitably. Appellant reiterates his argument in Assignment of Error II, supra, and concludes under the court's distribution of the marital property appellee receives assets of more than \$44,000.00, while he is in debt over \$30,000.00. We find this conclusion is speculative, because the marital home is the largest asset in appellant's calculation.

{¶22} We find thus the court did not abuse its discretion in dividing the marital assets and liabilities. The third assignment of error is overruled.

{¶23} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Stark County, Ohio, is affirmed.

By Gwin, J.,

Farmer, P.J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. PATRICIA A. DELANEY

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