

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Susan L. Rash

Court of Appeals No. F-04-016

Appellee

Trial Court No. 00-DV-000176

v.

Richard S. Rash

DECISION AND JUDGMENT ENTRY

Appellant

Decided: December 3, 2004

* * * * *

Jay E. Feldstein, for appellee/cross-appellant.

Donna M. Engwert-Loyd, for appellant/cross-appellee.

* * * * *

SINGER, J.

{¶ 1} This appeal comes to us from a judgment issued by the Fulton County Court of Common Pleas, Domestic Relations Division, which determined the property division in a final divorce decree. Because we conclude that the trial court abused its discretion as to the valuation of the retirement funds and other issues, we reverse, in part, and affirm, in part.

{¶ 2} Appellant/cross-appellee, Richard S. Rash, and appellee/cross-appellant, Susan L. Rash, were married in 1981. In August 2000, Susan filed for divorce. The couple had three children, but only one was a minor at the time of trial. The court first

entered judgment in October 2003, which we determined was not a final and appealable order because it lacked certain final determinations regarding the couple's retirement accounts and Richard's visitation. On remand, the trial court addressed these issues, and then entered an amended final decree in April 2004.

{¶ 3} In that amended judgment, the court awarded Richard his \$19,000 Roth IRA as separate property. The court also found that Susan's \$55,000 inheritance and Richard's \$70,000 fund from insurance proceeds from his father's wrongful death suit were "transmuted property" since the funds had been used for various marital purposes and were impossible to segregate or trace to current assets. The marital residence had been sold during the pendency of the divorce proceedings, netting \$122,000, and each party had been advanced \$30,000 with the remainder placed in escrow. The court found that the parties had borrowed money from Richard's mother and ordered that she be repaid \$15,500 from the escrow fund, with the parties to each receive \$23,250 from the remaining balance.

{¶ 4} The court then determined that the parties' retirement accounts would be equally divided by the filing of a Qualified Domestic Relations Order ("QDRO"). The court stated that the valuations for the retirement accounts should be determined as of August 7, 2000, the date of the filing of the divorce. The court determined that Susan had a retirement account valued at \$6,912.27 and a 401K account valued at \$5,401.55. Richard's 401K account was valued by the court at \$145,114.88 and a Kroger Savings Plan (Deferred Compensation) account was valued at \$29,696.95.

{¶ 5} The court further ordered that the parties each receive one-half interest in vacation properties located on Drummond Island, Michigan, with the property to be sold and the parties to share equally in the maintenance costs pending such sale. The court also gave an alternative sale method, by “Dutch auction,” should either party wish to purchase the property.

{¶ 6} Each party was ordered to be responsible for any accounts opened or credit card debt incurred separately since the filing of the divorce. Richard was to pay \$15,113.68 and Susan was to pay \$5,241.78 toward marital credit card debt. Each party was to pay \$62.54, one-half of a dental bill for the minor child. Each party received his or her vehicles and personal property and each received one-half of the Disney Stock owned by the couple.

{¶ 7} The court showed a final “adjustment” of \$77,547.22 to be awarded to Susan by means of a QDRO, to equalize the division of all marital assets. The court also awarded Susan spousal support of \$500 per month for seven years and ordered Richard to pay \$4,000 of her \$13,600 attorney fees.

{¶ 8} Appellant/cross-appellee, Richard, now argues the following five assignments of error:

{¶ 9} “First Assignment of Error

{¶ 10} “The trial court erred in its finding and decision that the seventy thousand dollars (\$70,000.00) that defendant/appellant inherited was “transmuted property” and impossible to trace or segregate.

{¶ 11} “Second Assignment of Error

{¶ 12} “The trial court erred in not finding that defendant/appellant was entitled to fifteen thousand dollars (\$15,000.00) of inherited monies be [sic] awarded to him from marital assets prior to division of the same between the parties.

{¶ 13} “Third Assignment of Error

{¶ 14} “The trial court erred in its spousal support award as it was contrary to law.

{¶ 15} “Fourth Assignment of Error

{¶ 16} “The trial court erred in ordering plaintiff/appellee’s attorney’s fees to be paid by defendant/appellant, as such award was contrary to law.

{¶ 17} “Fifth Assignment of Error

{¶ 18} “The trial court erred in not finding that the Drummond Island Property was purchased with inherited monies, and a portion of the same should be considered as non-marital or premarital assets.”

{¶ 19} Appellee/cross-appellant, Susan, appeals, setting forth the following three assignments of error:

{¶ 20} “First Assignment of Error

{¶ 21} “The trial court committed error in using the date of the filing of the complaint for divorce for purposes of valuing defendant-appellant’s interest in his retirement plans through his employer when dividing marital property.

{¶ 22} “Second Assignment of Error

{¶ 23} “The trial court committed reversible error when it ordered defendant/appellant’s mother to be reimbursed \$15,500.00 for a loan from the parties’ escrow fund, plus any accrued interest.

{¶ 24} “Third Assignment of Error

{¶ 25} “The trial court committed reversible error by ordering that the Drummond Island Property be sold by way of a “Dutch auction.”

I.

{¶ 26} We will address Richard’s first, second, and fifth assignments of error together. He argues that the trial court erred in determining that the \$70,000 of “inherited” funds was untraceable and in not awarding him \$15,000 of those funds out of the proceeds of the sale of the Drummond Island property.

{¶ 27} Pursuant to R.C. 3105.171(B), "in divorce proceedings, the court shall * * * determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." The party to a divorce action seeking to establish that an asset or portion of an asset is separate property, rather than marital property, has the burden of proof by a preponderance of evidence. *Zeeffe v. Zeeffe* (1998), 125 Ohio App.3d 600, 614; *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. The factual findings of the trial court relating to its classification of property as marital or separate are reviewed under a manifest weight standard. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159. Thus, an appellate court may not independently weigh the evidence but should presume that the trial court's findings are correct where they are supported by some competent and credible evidence. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶ 28} R.C. 3105.171(A)(6)(b) provides:

{¶ 29} "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." Thus, traceability is the focus when determining whether separate property has lost its separate character after being commingled with marital property. *Peck*, supra. When separate funds have been used to purchase other property, a trial court may still apply the transmutation factors set forth in *Kuehn v. Kuehn* (1988), 55 Ohio App.3d 245 to determine traceability; i.e., "(1) the expressed intent of the parties, insofar as it can be reliably ascertained; (2) the source of the funds, if any, used to acquire the property; (3) the circumstances surrounding the acquisition of the property; (4) the dates of the marriage, the acquisition of the property, the claimed transmutation, and the breakup of the marriage; (5) the inducement for and/or purpose of the transaction which gave rise to the claimed transmutation; and (6) the value of the property and its significance to the parties." *Id.* at 246. See, also, *Lewis v. Lewis*, 11th Dist. No. 2002-P-011, 2003-Ohio-5006; *Hillebrand v. Hillebrand*, 5th Dist. No. CA 954, 2003-Ohio-3654. In this case, although the parties stipulated to the amounts each had received as separate property, they could not specifically demonstrate where those funds were used. No evidence was presented that any of these funds still existed as cash. Rather, each party said that the funds had been used, at times, for payments on the marital home, for maintenance, or for the children's needs. Richard deposited the \$65,000 from the wrongful death suit into his son's account and thereafter withdrew funds for various reasons, none of which were positively traceable to any current asset. Likewise, Susan

testified that the money she inherited was used for a variety of household and family needs.

{¶ 30} Further, although Richard requests that he be credited with \$15,000 from the proceeds of the sale of the Drummond Island property, nothing indicates that any of the separate funds are traceable to that property. In fact, it was purchased prior to his receipt of the insurance proceeds from the wrongful death of his father. Both parties testified that the property was purchased as a marital investment. Therefore, after reviewing the record, we cannot say that the trial court's determination that the Drummond Island property was not traceable to separate funds or the denial of an award of \$15,000 from its sale as Richard's separate property was against the manifest weight of the evidence.

{¶ 31} Accordingly, Richard's first, second, and fifth assignments of error are not well-taken.

II.

{¶ 32} In his third assignment of error, Richard argues that the trial court erred in awarding spousal support to Susan.

{¶ 33} Trial courts have broad discretion when determining an award of spousal support. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67. Appellate review of a court's decision to grant or deny requested spousal support is limited to a determination of whether the court abused its discretion. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 626. Absent an abuse of that discretion, a reviewing court may not substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131.

An abuse of discretion is more than an error of law or judgment; it implies that the trial court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable.

Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219.

{¶ 34} R.C. 3105.18 (C) (1) sets forth 14 factors the court must consider, however, in determining if spousal support is appropriate and reasonable:

{¶ 35} "(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;

{¶ 36} "(b) The relative earning abilities of the parties;

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

{¶ 38} "(d) The retirement benefits of the parties;

{¶ 39} "(e) The duration of the marriage;

{¶ 40} "(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;

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

{¶ 42} "(h) The relative extent of education of the parties;

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

{¶ 44} “(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;

{¶ 45} “(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;

{¶ 46} “(l) The tax consequences, for each party, of an award of spousal support;
(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

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

{¶ 48} Even 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. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 356.

{¶ 49} In this case, the trial court ordered in its amended decree that Richard pay Susan \$500 per month for seven years, terminable upon the death of either party or Susan's remarriage or cohabitation with an adult unrelated male. Richard's gross yearly income was \$54,000 and Susan's was \$24,367. The record shows that Richard has higher earning potential, while Susan only recently re-entered the job market after having been a homemaker while the three children were growing up. The marriage was relatively long (21 years), and Richard controlled the finances during the marriage.

Finally, the court found that Richard would have more liquid assets at his disposal, since Susan would not begin receiving much of her distribution of marital property until Richard retires. Based upon these factors we cannot say that the trial court abused its discretion in its award of spousal support.¹

{¶ 50} Accordingly, Richard's third assignment of error is not well-taken.

III.

{¶ 51} Richard, in his fourth assignment of error, contends that the trial court erred in awarding Susan attorney fees.

{¶ 52} R.C. 3105.18(H) provides that the trial court may award reasonable attorney's fees to either party at any stage of a divorce proceeding if it determines that the other party has the ability to pay the fees that the trial court awards. The statute further states that, when determining whether to award fees pursuant to this division, the trial court must determine whether either party will be prevented from fully litigating his or her rights if reasonable attorney fees are not awarded.

{¶ 53} Attorney fees are awarded as spousal support, and in awarding such fees, the court must consider the factors of R.C. 3105.18(C). See *Williams v. Williams* (1996), 116 Ohio App.3d 320. In addition, R.C. 3105.18(C)(1)(n) provides that the court may consider "any other factor that the court expressly finds to be relevant and equitable." A trial court has broad discretion in awarding attorneys fees in divorce actions. *Swanson v. Swanson* (1976), 48 Ohio App.2d 85, 90; *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39.

¹We also note that, during the pendency of this appeal, this court received notice that Susan has remarried, thus, relieving Richard of his obligation to pay such support.

A court's decision regarding the award of attorney fees as part of an award of spousal support will not be disturbed on appeal absent a showing of a clear abuse of that discretion. See *Guziak v. Guziak* (1992), 80 Ohio App.3d 805, 816; *Knowles v. Knowles* (Dec. 18, 1992), 6th Dist. No. L-92-033. As we noted previously, an abuse of discretion is more than a mere error of law; rather, it implies that the court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1993), 5 Ohio St.3d 217, 219.

{¶ 54} In this case, out of \$13,600 total in attorney fees, the court awarded Susan \$4,000, specifically in consideration of the factors in R.C. 3105.18. Since we have already noted the discrepancy in incomes between the parties and that Richard was in control of virtually all of the couple's finances during the marriage, we cannot say that the award of attorney fees was an abuse of discretion.

{¶ 55} Accordingly, Richard's fourth assignment of error is not well-taken.

IV.

{¶ 56} Susan argues, in her first cross-assignment of error, that the trial court committed error in using the date of the filing of the complaint for divorce for purposes of valuing defendant-appellant's interest in his retirement plans through his employer when dividing marital property.

{¶ 57} The date generally used to determine the value of marital property in a divorce action is the date of the final hearing. See R.C. 3105.171(A)(2), which states:

{¶ 58} “(2) ‘During the marriage’ means whichever of the following is applicable:

{¶ 59} “(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

{¶ 60} “(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, ‘during the marriage’ means the period of time between those dates selected and specified by the court.

{¶ 61} In this case, without explanation, the trial court used August 7, 2000, the date of the filing of the divorce, for the purposes of valuations of the of the pension and 401K accounts. Our review of the record, however, reveals no values in evidence which coincide with that date. Instead, the court used later valuations of the Kroger pension from January-February 2001 and the 401K account from March 2001.

{¶ 62} In this case, the evidence presented as to the valuation of Richard’s 401K account was \$154,244 as of September 30, 2002 and his Kroger pension was \$53,141.43 as of December 2, 2002. Evidence was presented that the parties lived together in the marital home until it was sold in August 2002. Thus, the more recent dates concerning the valuations of the two accounts were closer in time to the actual time the parties were still living in the marital home and pooling their incomes for marital expenses. The valuations used by the court, from more than a year before the parties actually began separate households, are not related to any specific event. In our view, the valuations closest to the sale of the house and the December 18, 2002 final hearing date are more

relevant and applicable to the facts and circumstances of this case. Thus, we conclude that the court's decision to vary from the customary final hearing date for valuation of the pension and 401K accounts was arbitrary and an abuse of its discretion.

{¶ 63} Accordingly, Susan's first cross-assignment of error is well-taken.

V.

{¶ 64} In her second assignment of error, Susan contends that the trial court erred in ordering that Richard's mother be reimbursed \$15,500.00 for a marital loan.

{¶ 65} As we noted previously, the trial court's factual findings will be presumed correct if supported by some competent and credible evidence. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. In this case, the trial court's determination that the parties owed Richard's mother \$15,500 was primarily a matter of credibility. Richard and his mother testified that the couple had borrowed money for marital expenses amounting to \$15,500. Although Susan testified that she thought the tax refunds had been used to repay some of the loans from Richard's mother, she did not present any evidence to refute the amount currently owed. Therefore, some competent, credible evidence existed from which the trial court could have made the finding that the parties still owed Richard's mother \$15,500.

{¶ 66} Accordingly, Susan's second cross-assignment of error is not well-taken.

I.

{¶ 67} Susan argues in her third assignment of error that the trial court erred in ordering the parties to utilize a "Dutch auction" if either of the parties wished to take ownership of the Drummond Island property.

{¶ 68} The trial court first ordered that the Drummond Island property be sold, with the parties to each contribute to maintenance expenses during the pendency of the sale. The court then described a method of sale, a “Dutch auction,” as an option for the parties if one of them wished to purchase the property. In this method, the trial court stated that the starting price of the property would be \$200,000 or any other price agreeable to both parties. The price would then decrease by \$200 increments until such time as one party decided to take the bid and purchase the property for that amount, giving the other party his or her share of the purchase price after paying off the land contract and any other expenses.

{¶ 69} In our view, this method of sale may be useful where the parties are on equal financial footing and both could afford to purchase the property. In this case, since Susan has a much lower income level and has less liquid assets than Richard, she would be at a great disadvantage in her ability to bid. Richard could simply wait out the bidding until the property was at a very low price, which, after payment of the land contract owed, could foreclose Susan from receiving any portion of the investment. In this case, the use of a “Dutch auction” is unfair and should not be a required option for the parties. Therefore, the trial court erred in ordering this as a method of sale for the Drummond Island property between the parties.

{¶ 70} Accordingly, Susan’s third cross-assignment of error is well-taken.

{¶ 71} In accordance with our determinations of the parties’ assignments of error, the following represents the revised distribution of the assets to be used in filing an amended QDRO:

<u>ITEM</u>	<u>TO HUSBAND</u>	<u>TO WIFE</u>
Retirement Plans/Account		
NEBA Accounts	\$ 2,468.32	6,912.27
Wife's 401(K)		5,401.55
Husband's 401(K)	154, 244.00	
Husband's Def. Comp.	53, 141.43	
Balance of Cash Proceeds (after deduction of \$15,500)	23,250.00	23,250.00
(Plus one-half accrued interest, to be divided equally)		
Drummond Island Properties	one-half value	one-half value
Credit Card Debt	<15,113.68>	<5,241.78>
Dental Bill	< 62.54>	< 62.54>
Disney Stock	one-half value	one-half value
Vehicles, household goods and personal effects	not valued	not valued
SUBTOTAL	1. _____ \$217,927.53	_____ \$ 30,259.54
Adjustment	< 93,834.00>	93,834.00
TOTAL ALLOCATION/DISTRIB.	\$124,093.53	\$124,093.54

{¶ 72} The judgment of the Fulton County Court of Common Pleas is affirmed, in part, and reversed, in part. This case is remanded for the amendment of the final decree as follows: change in the 401K and savings plan valuations as noted above, removal of the “Dutch auction” clause, and the filing of a new QDRO to reflect the amount of \$93,834.00 to Susan. Court costs of this appeal are assessed equally between the two parties. See App.R. 24.

JUDGMENT AFFIRMED, IN PART,

AND REVERSED, IN PART.

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A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

Peter M. Handwork, P.J.

JUDGE

Richard W. Knepper, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE