

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

Bonnie S. Duffy

Court of Appeals No. WD-11-019

Appellee

Trial Court No. 2009 DR 0049

v.

Robert T. Duffy

DECISION AND JUDGMENT

Appellant

Decided: June 22, 2012

* * * * *

Rosalie N. Musachio, for appellee.

Robert E. Searfoss, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} In this divorce action, defendant-appellant, Robert Duffy, appeals the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, which divided appellant's and plaintiff-appellee Bonnie Duffy's marital assets and debts, made separate property determinations, and awarded appellee spousal support. Because we find that the court did not abuse its discretion, we affirm.

{¶ 2} On March 24, 2009, appellee filed a complaint for divorce alleging that the parties were incompatible and that appellant was guilty of gross neglect of duty and cruelty. Appellant filed an answer and counterclaim for divorce also asserting gross neglect of duty and cruelty.

{¶ 3} A final hearing on the complaint and counterclaim was held on December 7, 2009, and January 21, 2010. An overview of the evidence presented during the hearing is as follows. The parties married in 1971 and four children were born issue of the marriage. All the children were emancipated at the time the divorce was finalized. Appellant was employed with CSX Transportation. During his employment, appellant was often absent from the home for weeks at a time. Following an injury in 2005, appellant retired from the railroad and now receives 100 percent of his disability retirement benefits. Appellant also received a lump-sum settlement from CSX in conjunction with his injury. It is undisputed that during their marriage, appellant paid all expenses relating to the mortgage and utilities. He also paid for gas, vehicle insurance and maintenance, and cell-phone bills. Since about 1999, appellant provided appellee with a \$200 monthly allowance and a blank check for groceries. Appellant was also involved in various charitable organizations; his involvement included several months-long trips to build homes or mentor youth.

{¶ 4} During the marriage, appellee worked several minimal income jobs mainly from the home. She made various crafts, baked cakes, and, most recently, sold items on eBay. Appellee was the children's primary caretaker. She paid for all school-related

expenses and extracurricular fees. Appellee also purchased all the clothing and toiletries and bought birthday and Christmas gifts. Appellee claimed that she began relying on credit cards because the monetary sums provided by appellant were insufficient. She would often use the cards for cash advances which incurred high interest fees. Appellee also made several trips to various casinos, paying for the trips with credit cards. As a result, at the time of the divorce appellee had incurred approximately \$30,000 in credit card debt. In 2003, the parties took out a home equity loan to pay off nearly \$75,000 in credit card debt. At the time of the divorce, the parties owed \$43,627.25 on the home and there was approximately \$60,000 in equity in the home. The value of the home was \$105,000.

{¶ 5} Appellant and appellee received financial assistance from their parents. Around the time she filed for divorce, appellee received approximately \$16,000 from her father. Appellee's parents have consistently been "loaning" her money to pay the credit card debt. Appellant received \$10,000 from his father to help pay down the home mortgage. Appellant also received a few thousand shares of Ameren stock much of which was cashed in for approximately \$63,000 and used to pay bills following his 2005 injury.

{¶ 6} On March 2, 2010, the magistrate entered her decision. Appellant was awarded the following as separate property: Ameren stock purchased since the separation or received as a gift; the 2000 Chevrolet Malibu; various tools received by inheritance or as a gift; proceeds from his personal injury lawsuit against CSX; and plates from his

mother. Appellant was awarded the martial home and ordered to pay appellee \$30,686.22, or one-half the equity in the home. Appellee was ordered to sell her eBay inventory and apply the proceeds toward her credit card debt. Appellant was ordered to pay \$10,000 to appellee to apply to the debt.

{¶ 7} Appellee was awarded one-half of appellant's retirement benefits and spousal support of \$1,000 per month for 102 months. The court stated the amount could be modified upon appellee's receipt of the retirement benefits. Appellee was also awarded one-half of the value of appellant's Wachovia IRA account, or \$3,815.

{¶ 8} Appellant filed objections to the magistrate's decision; on February 11, 2011, they were denied. Thereafter, on March 17, 2011, the court entered its final decree of divorce. This appeal followed.

{¶ 9} Appellant raises four assignments of error for our review:

First Assignment of Error: The trial court committed prejudicial error by concluding, contrary to settled law and all competent evidence, or abused its discretion, by awarding appellee \$30,686.22 of equity in the martial home despite the fact that appellant traced his separate property to that equity and despite the fact that this is otherwise inequitable due to the gross dilution of assets caused by appellee's financial misconduct.

Second assignment of Error: The trial court committed prejudicial error by concluding, contrary to settled law and all competent evidence, or abused its discretion, by (a) awarding appellee half of appellant's Tier II

retirement benefits under the Railroad Retirement Act, (b) ordering appellant to pay \$10,000 to appellee toward her credit card balance, (c) ordering appellant to pay \$3,815 to appellee, (d) ordering appellant to pay spousal support to \$1,000 per month for 102 months, despite the fact that each is inequitable due to the gross dilution of assets caused by appellee's financial misconduct, and otherwise inequitable.

Third Assignment of Error: The trial Court committed prejudicial error by concluding, contrary to settled law and all competent evidence, or abused its discretion, by failing to identify, offset, or otherwise account for \$16,084 in marital property held in cash by appellee, disposed of or concealed by appellee during the divorce proceedings, for which appellee could not account.

Fourth Assignment of Error: The trial court committed prejudicial error by concluding, contrary to settled law and all competent evidence, or abused its discretion, by failing to identify, offset, or otherwise account for \$12,223.25 in marital property held as "E-Bay Inventory" by appellee, disposed of or concealed by appellee during the divorce proceedings, for which appellee could not account.

{¶ 10} Appellant's assignments of error relate, in large part, to the trial court's classification of marital and separate property. In a divorce proceeding, a trial court shall determine "what constitutes marital property and what constitutes separate property" and

then “shall divide the marital and separate property equitably between the spouses * * *.” R.C. 3105.171(B). Generally, this means that the court should award each spouse his or her separate property and then distribute the marital estate equally, unless an equal division would be inequitable. R.C. 3105.171(C) and (D). “Marital property” is that “real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both * * * during the marriage.” R.C. 3015.171(A)(3)(a)(i). Marital property does not include separate property. R.C. 3015.171(A)(3)(b).

{¶ 11} 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*, 119 Ohio App.3d 155, 159, 694 N.E.2d 989 (4th Dist.1997). 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*, 66 Ohio St.3d 610, 614, 614 N.E.2d 742 (1993); *Miller v. Miller*, 37 Ohio St.3d 71, 74, 523 N.E.2d 846 (1988).

{¶ 12} In appellant's first assignment of error he argues that the court abused its discretion in awarding appellee \$30,686.22, or half the equity in the marital home. Specifically, appellant contends that the court erred when it found that he did not trace the proceeds from the sale of his Ameren stock to the equity in the marital home. Appellant states that the Ameren stock proceeds, \$63,000 of separate property, were deposited into his separate checking account and used to pay \$39,709.10 on the home

equity line and mortgage. Thus, appellant contends that, at most, appellee is entitled to one-half of the difference between the amount of separate funds he used to reduce the mortgage debt and the total equity in the home.

{¶ 13} In the judgment entry of divorce, the court found:

Defendant proved that his father gifted him shares of Ameren Stock Options and then cashed these stocks and deposited them into his bank account. This account had money in the account prior to the deposit from the stock sale and there were subsequent deposits. Defendant failed to meet his burden to trace any separate interest from these stocks in the marital property.

{¶ 14} It is well-established that a party requesting that an asset be classified as separate property bears the burden of tracing that asset to his or her separate property. *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, 870 N.E.2d 168, ¶ 20 (10th Dist.). Traceability is “the focus when determining whether separate property has lost its separate character after being commingled with marital property.” *Peck v. Peck*, 96 Ohio App.3d 731, 734, 645 N.E.2d 1300 (12th Dist.1994). Such burden of proof is by a preponderance of the evidence. *Id.* at 734.

{¶ 15} Reviewing the exhibits submitted at trial relating to the Ameren stock and appellant’s separate bank account, we cannot say that the trial court erred in concluding that the proceeds from the sale of stock were not directly traceable to the mortgage

payments. Appellant's account had several deposits unrelated to the stock proceeds.

Appellant's first assignment of error is not well-taken.

{¶ 16} Appellant's second assignment of error takes issue with the trial court's award to appellee of one-half of appellant's Tier II retirement benefits under the Railroad Retirement Act and spousal support of \$1,000 per month for 102 months. Appellant also disputes the order that he pay to appellee \$10,000 to apply toward the credit card debt and one-half of his Wachovia IRA balance. Appellant argues that the award is inequitable due to appellee's "gross dilution of assets" and "financial misconduct."

{¶ 17} An appellate court reviews a trial court judgment awarding spousal support under an abuse of discretion standard. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990); *Bowen v. Bowen*, 132 Ohio App.3d 616, 626, 725 N.E.2d 1165 (9th Dist.1999). "Even though a trial court has broad discretion in awarding spousal support, its determination of whether spousal support is 'appropriate and reasonable' the nature, amount, duration and terms of payment of spousal support is controlled by the factors in R.C. 3105.18(C)(1)." *Crites v. Crites*, 6th Dist. Nos. WD-04-034, WD-04-042, 2004-Ohio-6162, ¶ 26-27, citing *Schultz v. Schultz*, 110 Ohio App.3d 715, 724, 675 N.E.2d 55 (10th Dist.1996). Although a trial court need not enumerate each R.C. 3105.18(C)(1) factor, it must demonstrate that it considered all the "relevant factors." *Stockman v. Stockman*, 6th Dist. No. L-00-1053, 2000 WL 1838937 (Dec. 15, 2000).

{¶ 18} Additionally, when awarding spousal support, "the trial court's judgment must contain sufficient detail to enable a reviewing court to determine that the spousal

support award is “fair, equitable and in accordance with the law.” *Crites, supra*, at ¶ 27, quoting *Kaechele v. Kaechele*, 35 Ohio St.3d 97, 518 N.E.2d 1197 (1988).

{¶ 19} R.C. 3105.18(C)(1) provides:

In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

(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;

(b) The relative earning abilities of the parties;

(c) The ages and the physical, mental, and emotional conditions of the parties;

(d) The retirement benefits of the parties;

(e) The duration of the marriage;

(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;

(g) The standard of living of the parties established during the marriage;

(h) The relative extent of education of the parties;

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

(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;

(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;

(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;

(n) Any other factor that the court expressly finds to be relevant and equitable.

{¶ 20} As to appellant's retirement benefits, the court noted that appellee does not have any retirement benefits and, due to her limited and sporadic employment record, she does not qualify for social security benefits. The court further noted that appellee would not be eligible for her divorced spouse's retirement benefits until November 1, 2014, when she would receive a reduced benefit of \$762. If she waited until 2018, she would collect her full benefit of \$1,083. The court then stated:

It is reasonable and appropriate that Husband shall pay to Wife the sum of \$1,000 per month as spousal support effective the 1st of the month following the Judgment Entry for a period of 102 months. The amount is subject to the continuing jurisdiction of the court as to amount and duration. Spousal support shall terminate upon the death of either party, and upon Plaintiff's cohabitation or remarriage.

Wife's receipt of her divorced spouse railroad retirement benefit shall be considered a change of circumstances to consider a possible modification of the spousal support award. Wife shall notify Husband of receipt of said benefit within 10 days of receipt.

{¶ 21} Reviewing the record below and the court's judgment entry, we find that the court considered the factors in R.C. 3105.18(C)(1) in making the spousal support award. Because appellee was 57 at the time of the divorce, from a 40-year marriage with no job experience, the amount was appropriate and reasonable. Thus, we cannot say the court abused its discretion in awarding retirement benefits and expressly stating that upon receipt of the benefits the spousal support may be modified. Further, we cannot say that the \$10,000 award was in error because there was evidence presented that a large amount of the credit card debt was due to household and child related expenses. Appellant's second assignment of error is not well-taken.

{¶ 22} In his third assignment of error, appellant challenges the trial court's failure to identify and offset \$16,084 in cash that he argues appellee concealed or disposed of

during the divorce proceedings. During the hearing, appellee testified that her father gave her the money in February or March 2009, and that she used the money to pay credit card bills. Accordingly, because there is evidence to support the court's failure to include the amount in the division of marital property, appellant's third assignment of error is not well-taken.

{¶ 23} Appellant's fourth and final assignment of error argues that the court erred in failing to identify or offset \$12,223.25 in marital property held by appellee as "eBay inventory." Appellant argues that the amount was improperly "disposed of or concealed" during the divorce proceedings.

{¶ 24} In its decision, the court valued the eBay property at approximately \$5,000 and ordered it be sold and that appellee use the proceeds toward the credit card debt attributed to her. During the final hearing, appellant submitted a composite exhibit of transfers from appellee's Paypal account to her bank account from January through July 2009. The amount totaled just over \$12,000. Appellee was questioned about the transactions and the difference between the value of the property she provided to the court, \$5,500, and the amount of the transfers. Appellee explained that the \$5,500 was what she paid for the items and that out of the remaining \$7,000 she paid for postage and shipping expenses. It is unclear from the record how much profit, if any, appellee made from selling the items

{¶ 25} Upon review, we find that there is competent evidence in the record to support the trial court's findings. Further, we note that, as the trier of fact, the trial court

was in the best position to assess appellee’s credibility and the weight to be given her testimony and we will not substitute our judgment for that of the trial court. *See Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 81, 461 N.E.2d 1273 (1984).

Accordingly, appellant’s fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio’s Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court’s web site at:
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