

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

ANNETTE BUTLER,	:	O P I N I O N
Plaintiff-Appellee,	:	CASE NO. 2009-P-0002
- vs -	:	
ALAN E. BUTLER,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2006 DR 0677.

Judgment: Affirmed.

William G. Simon, Jr., Sicuro & Simon, 213 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Antonios C. Scavdis, Sr., Scavdis & Scavdis, L.L.C., 261 West Spruce Street, P.O. Box 978, Ravenna, OH 44266 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Alan E. Butler appeals from the judgment entry decree of divorce entered December 8, 2008, by the Portage County Court of Common Pleas, Domestic Relations Division, in his divorce from Annette Butler. Alan contends the trial court erred in its calculation and division of marital property. Finding no error, we affirm.

{¶2} Alan and Annette were married in November 1992. It was Alan's second marriage. There is issue: Callie (d/o/b 04/23/1993) and Casey (d/o/b 02/18/1998). Testimony from the hearing before the magistrate established that Annette became a

fulltime homemaker following the parties' marriage, while Alan was the family's sole financial support. It further appears that Alan controlled the family's finances.

{¶3} Each party owned a house prior to their marriage. Annette owned a house at 1766 4th Street, Cuyahoga Falls, Ohio; Alan's residence was at 1749 23d Street, in Cuyahoga Falls. Each house carried a mortgage at the time the couple married. During the marriage, the couple lived exclusively at the 4th Street house, while maintaining the 23d Street residence as a potential future rental property or investment.

{¶4} In October 1998, the parties refinanced the mortgage on the 23d Street house, obtaining a new mortgage for about \$32,000. At this time, the parties executed joint and survivorship deeds regarding each of the properties. Alan testified that this was required by the lender, and that he never intended to make a gift to his wife of his premarital equity in the 23d Street property. Annette testified, on the other hand, that the parties executed the joint and survivorship deeds, to make the properties "both of hours (sic)."

{¶5} In January 2003, Alan suffered a severe workplace injury. While he continues to look for employment, he has been placed on full disability by the Social Security Administration, and receives Worker's Compensation. While awaiting benefits, shortly after his accident, a home equity line for some \$31,000 was taken out on the 4th Street home. Alan testified that part of this was used to pay off a large credit card bill. Both parties otherwise agreed that the money was used to maintain the family.

{¶6} In or about November 2003, the couple separated. Annette, with the children, moved in with her mother in Portage County, Ohio; Alan returned to his parents' house in Cuyahoga Falls. Neither has lived at the 4th Street nor the 23d Street

property since shortly after the separation. Alan has continued to pay the taxes and mortgages on the two properties.

{¶7} At the beginning of September 2006, Alan received a check in excess of \$25,000 as a lump sum payment from Social Security. In mid-October 2006, he used \$20,000 from this lump sum payment to pay off a substantial portion of one of the two mortgages on the 4th Street property, which was evidently in arrearage. Similarly, in May 2007, he paid \$7,858.41 to the law firm of Lerner, Sampson & Rothfuss to dismiss a foreclosure action against the 4th Street property. According to Alan, a large portion of this check came from his Worker's Compensation, the rest being borrowed from friends and family.

{¶8} October 31, 2006, Annette filed for divorce on the grounds of incompatibility. Alan filed his answer and counterclaim for divorce, also on the grounds of incompatibility. Hearing was held before the magistrate July 31, 2007, and September 6, 2007. November 14, 2007, the magistrate filed his decision. Each party timely filed objections. Hearing on the objections was held before the trial court August 28, 2008 and October 2, 2008. December 8, 2008, the trial court filed its judgment, noting that certain modifications in the magistrate's decision regarding spousal and/or child support were required, due to changes in the parties' income. Regarding the status of the two parcels of realty in question, the trial court fundamentally adopted the magistrate's decision, finding: (a) that the parties' interests in the properties were commingled, and that each property was fully marital in nature; and (b) that Alan was not entitled to a return of the more than \$27,000 he had paid on the 4th Street

property's mortgages, even though a large part of this money came from his Social Security lump sum payment, and his Worker's Compensation.

{¶9} January 7, 2009, Alan timely noticed this appeal, assigning three errors:

{¶10} “[1.] THE TRIAL COURT ERRED IN FAILING TO CREDIT APPELLANT WITH THE \$34,000.00 EQUITY HE ACQUIRED AS PREMARITAL PROPERTY IN HIS REAL ESTATE AT 1749 23RD STREET, CUYAHOGA FALLS, OHIO.

{¶11} “[2.] THE TRIAL COURT ERRED IN FINDING THAT THE HUSBAND'S PROPERTY AT 1749 23RD STREET, CUYAHOGA FALLS, OHIO AND THE WIFE'S PROPERTY AT 1766 4TH STREET, CUYAHOGA FALLS, OHIO WERE, (sic) TRANSFORMED INTO MARITAL PROPERTY.

{¶12} “[3.] THE TRIAL COURT ERRED IN FAILING TO CREDIT APPELLANT WITH THE NON-MARITAL \$20,000.00 SOCIAL SECURITY DISABILITY PAYMENT AND THE NON-MARITAL \$7,858.00 PAYMENT MADE TO SAVE THE 4TH STREET REAL ESTATE FROM FORECLOSURE.”

{¶13} “A trial court's judgment regarding whether to adopt, reject, or modify a magistrate's decision is reviewed for abuse of discretion, *In re Gochneaur*, 11th Dist. No. 2007-A-0089, 2008-Ohio-3987, at ¶16; ***[.] “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. (***)” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Regarding this standard, we recall the term ‘abuse of discretion’ is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678, ***.”

Winkelman v. Winkelman, 11th Dist. No. 2008-G-2834, 2008-Ohio-6557, at ¶8.
(Parallel citations omitted.)

{¶14} Further, a trial court's division of marital property is reviewed for abuse of discretion. *O'Grady v. O'Grady*, 11th Dist. No. 2003-T-0001, 2004-Ohio-3504, at ¶50.

{¶15} We consider Alan's second assignment of error – that the houses brought into the marriage by each of the parties remained separate, not marital property – first. As this court stated in *O'Grady*, at ¶45-49:

{¶16} “In a divorce action, a trial court must first characterize all property as either marital or separate property. R.C. 3105.171(B).

{¶17} “Marital property is defined as any real property, personal property, or interest therein that is owned by either or both spouses, including their retirement benefits, that were acquired by either or both of the spouses during marriage. R.C. 3105.171(A)(3)(a)(i) through (ii). See, also, *Neville v. Neville*, 99 Ohio St.3d 275, ***, 2003-Ohio-3624, at ¶6. Marital property also includes all income and appreciation on separate property that occurred during the marriage due to labor, monetary, or in-kind contribution by either or both spouses. R.C. 3105.171(A)(3)(a)(iii).

{¶18} “Likewise, separate property includes any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage. R.C. 3105.171(A)(6)(a)(ii). The commingling of separate property with marital property does not destroy the identity of the separate property as long as the separate property is traceable. R.C. 3105.171(A)(6)(b).

{¶19} “It should be noted that property acquired during the marriage is presumed to be marital property. ‘The party seeking to have a particular asset classified as

separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property.’ *Smith v. Smith* (Oct. 15, 1999), 11th Dist. No. 98-A-0034, 1999 Ohio App. LEXIS 4862, at 13. See, also, R.C. 3105.171. The trial court is required to make findings as to whether a party requesting the court to classify an asset as separate property has met his burden of proof and successfully traced an asset to separate property. *Letson v. Letson* (Sept. 30, 1997), 11th Dist. No. 95-T-5356, 1997 Ohio App. LEXIS 4445, at 11.

{¶20} “A ‘trial court’s characterization of property (***) is a question of fact, thus, a reviewing court must apply a manifest weight of the evidence standard of review to the trial court’s characterization.’ *Humphrey v. Humphrey*, 11th Dist. No. 2000-A-0092, 2002-Ohio-3121, at ¶16. In determining whether a trial court’s characterization of property is against the manifest weight of the evidence, the appellate court must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence the trial court clearly ‘lost its way and created such a manifest miscarriage of justice that the (judgment) must be reversed and a new trial ordered.’ (Citations omitted.) *Boggins v. Boggins* (June 26, 2002), 9th Dist. No. 3246-M, 2002-Ohio-3183, at ¶7.” (Parallel citations omitted.)

{¶21} In support of his second assignment of error, Alan notes that the mere execution of joint and survivorship deeds does not change separate (real) property into marital (real) property. See, e.g., *O’Grady*, at ¶67. Rather, there must be a showing there was an inter vivos gift. *Id.* at ¶68.

{¶22} “The essential elements of an inter vivos gift are: ‘(1) (the) intent of the donor to make an immediate gift; (2) delivery of the property to the donee; (and) (3)

acceptance of the gift by the donee.’ *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, ***, at fn. 2, citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21, ***, paragraph one of the syllabus. The donee has the burden of showing, by clear and convincing evidence, that the donor made an inter vivos gift. *Lewis [v. Lewis* 11th Dist. No. 2002-P-0111, 2003-Ohio-5006] at ¶29.” *O’Grady* at ¶69.

{¶23} “Clear and convincing evidence” is “*** the amount of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the allegations to be proved. It is an intermediate standard *** being more than a preponderance of the evidence and less than evidence beyond a reasonable doubt.” *State v. Ingram* (1992), 82 Ohio App.3d 341, 346.

{¶24} In this case, Annette testified that the parties executed the joint and survivorship deeds in October 1998 because they intended to share their properties completely: i.e., that they made inter vivos gifts to each other. Alan testified that the execution of the deeds was solely to comply with the requirements of the lender for the new mortgage on the 23d Street property. If this was all of the record pertaining to the issue of whether the parties made inter vivos gifts of their separate real property to each other, it would be insufficient under the clear and convincing standard. However, we note the following exchange between Annette’s counsel, and Alan, on re-cross examination:

{¶25} Mr. Simon: “Mr. Butler, are you saying that 4th Street is Annette’s and 23rd Street is yours? Is that how you see this?”

{¶26} Alan: “It was our property.”

{¶27} Mr. Simon: “It was our property, wasn’t it?”

{¶28} Alan: “Yes.”

{¶29} Mr. Simon: “I mean, you pulled these properties. You borrowed money against these properties to promote the interest of the marriage, didn't you?”

{¶30} Alan: “Exactly.”

{¶31} Mr. Simon: “I mean, [you] treated her property like it was yours, and you treated your real estate like it was hers, didn't you?”

{¶32} Alan: “Yes, sir.”

{¶33} We find that this testimony was sufficient for the magistrate and trial court to conclude, by clear and convincing evidence, that the parties made inter vivos gifts of their once separate real property to each other during their marriage. Consequently, the conclusion that the two properties were marital is not against the manifest weight of the evidence, and we cannot find the trial court abused its discretion in concluding they were marital property.

{¶34} The second assignment of error lacks merit.

{¶35} By his first assignment of error, Alan contends the trial court erred in failing to credit him with the equity he possessed in the 23d Street property at the time the marriage commenced. He contends this equity remains his separate property.

{¶36} We find our analysis of the second assignment of error dispositive of the first as well. The first assignment of error lacks merit.

{¶37} By his third assignment of error, Alan contends the trial court erred in failing to credit him for the \$20,000 payment he made out of his lump sum Social Security benefit on one of the 4th Street property's mortgages in the autumn of 2006. He further contends the trial court erred in failing to credit him for the \$7,858.41

payment he made, in part out of his Worker's Compensation, to rescue the 4th Street property from foreclosure in the spring of 2007.

{¶38} Alan is correct in his contention that a lump sum Social Security Disability benefit is not marital property, subject to equitable division. *Watral v. Watral*, 9th Dist. No. 05CA0017-M, 2005-Ohio-6917, at ¶17. However, in this case, the trial court did not attempt to divide that benefit. Rather, Alan voluntarily paid off a portion of the second mortgage on the 4th Street property, using the funds he had: i.e., the lump sum benefit. This action was in the nature of a gift. Indeed, as Alan testified before the magistrate, he wished to keep both parcels of realty, himself.

{¶39} Regarding Worker's Compensation benefits, this court has held that their divisibility in divorce proceedings depends on whether the claimant was injured during the marriage, and became entitled to benefits to compensate for the loss of earnings during the marriage. Such benefits are divisible – even if the claimant has not yet received them at the time of the divorce. *Easton v. Easton*, 11th Dist. No. 2003-G-2502, 2004-Ohio-1077, at ¶15-16. But again, in this case, the trial court never ordered Alan to spend his Worker's Compensation benefits to save the 4th Street property from foreclosure. He simply chose to do so. As with his payment of the mortgage from his Social Security Disability benefit, this action was in the nature of a voluntary gift.

{¶40} The third assignment of error lacks merit.

{¶41} The judgment of the Portage County Court of Common Pleas, Domestic Relations Division, is affirmed.

{¶42} It is the further order of this court that appellant is assessed costs herein

taxed.

{¶43} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.