

STATE OF OHIO, COLUMBIANA COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

SAM J. SICILIA,)
)
) PLAINTIFF-APPELLANT,)
)
 VS.) CASE NO. 99-CO-66
)
)
 CAROL M. SICILIA,) O P I N I O N
)
)
 DEFENDANT-APPELLEE.)

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Domestic Relations
Division, Case No. 98DR602

JUDGMENT: Remanded

APPEARANCES:

For Plaintiff-Appellant: Atty. Thomas M. Baronzzi
120 South Market Street
Lisbon, Ohio 44432

For Defendant-Appellee: Atty. Daniel A. Blasdell
139 North Market Street
East Palestine, Ohio 44413

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: September 17, 2001

DONOFRIO, J.

Plaintiff-appellant, Sam Sicilia, appeals from the decision of the Columbiana County Court of Common Pleas, Division of Domestic Relations, granting him a divorce from defendant-appellee, Carol Sicilia, ordering him to pay child support and spousal support, and dividing the marital property and debts.

The parties were married on November 8, 1980. One child was born as issue of the marriage, Jaclyn Sicilia. The court granted the parties a divorce and entered its judgment on August 31, 1999. Appellant filed his notice of appeal on September 28, 1999.

Appellant alleges four assignments of error, the first of which states:

"THE TRIAL COURT'S DIVISION OF THE APPELLANT'S PREMARITAL HOME EQUITY WAS AN ABUSE OF DISCRETION AND, THEREFORE, CONTRARY TO LAW."

Prior to the parties' marriage, appellant owned the marital residence. Appellant testified at trial that on the date of the marriage he had approximately \$80,000.00 of equity in the home. Appellee testified that on the date of marriage appellant had approximately \$30,000.00 of equity in the home. During the course of the marriage, the parties refinanced the home more than once to pay off debts. While the parties were separated

they sold the home and realized \$9,019.01 in equity from the sale, which was placed in escrow along with tax refund money.

Appellant argues that the court failed to distinguish the sale proceeds as his separate property despite evidence of his premarital equity in the home. He contends that he should have been awarded his premarital equity in the home.

"Marital property" includes real property, or any interest in real property, that is currently owned by either or both spouses and that was acquired during the marriage. R.C. 3105.171(A)(3)(a)(i) and (ii). "'Marital property' does not include any separate property." R.C. 3105.171(A)(3)(b).

"Separate property" includes real property and any interest in real 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 other property does not destroy the identity of the property as separate, unless it is not traceable. R.C. 3105.171(A)(6)(b).

A classification of the equity in the home as separate or marital is required in this case, as such a classification is required in all divorce cases. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734; *Clark v. Clark* (June 30, 2000), Carroll App. No. 720, unreported, 2000 WL 875364, at *4. R.C. 3105.171(B) provides in relevant part:

"In divorce proceedings, the court *shall* * * * determine what constitutes marital property and what constitutes separate property. * * *" (Emphasis added.)

The trial court shall divide the marital property equally unless an equal division would be inequitable or in other limited situations. R.C. 3105.171(C)(1). The trial court shall disburse a spouse's separate property to that spouse, except under limited circumstances. R.C. 3105.171(D). If the court does not distribute the spouse's separate property to that spouse, the court shall make written findings of fact explaining the factors it considered in making the determination that the spouse's separate property should not be distributed to that spouse. *Id.*

The trial court failed to determine whether the proceeds from the sale of the home were marital or separate. Without a classification of the equity in the home as either marital or separate, we are left without the proper context within which to review the trial court's allocation of the sale proceeds.

Appellant's second assignment of error states:

"THE TRIAL COURT'S DISTRIBUTION OF VIRTUALLY THE ENTIRE NET VALUE OF THE MARITAL ESTATE TO THE APPELLEE/WIFE IS NOT EQUITABLE, IN CONSIDERATION OF THE MANIFEST WEIGHT OF THE EVIDENCE AND, THEREFORE, IS AN ABUSE OF THE TRIAL COURT'S DISCRETION AND CONTRARY TO LAW."

The following assets are owned by one or both of the parties, however, the trial court failed to make a determination of whether these assets are marital or separate property:

1. Marital residence sale proceeds and balance of 1998 income tax refunds	\$11,687.10
2. 1990 Pontiac Sunbird GT	\$3,725.00
3. 1998 Pontiac Grand Am GT	\$13,650.00
4. GM Stock Savings Plan (less three SSPP loans)	\$69,659.88
5. GM Pension Plan	\$81,296.53

Appellant argues that the court divided the assets inequitably.

The court divided the pension plan, marital residence sale proceeds, and balance of the 1998 tax refunds equally between the parties. It awarded appellant \$25,281.21 from the GM Stock Savings Plan with which to pay off the SSPP loans. It then divided the remainder of the Stock Savings Plan equally between the parties. The court awarded appellant the 1998 Grand Am and appellee the 1990 Sunbird. Deducting the loan balance on the 1998 Grand Am from appellant's share of the assets, the total allocation works out to be \$67,148.69 to appellant and \$72,443.43 to appellee. Stated another way, appellant received approximately 48 percent of the total assets and appellee received approximately 52 percent of the total assets.

The court also divided the debt. Appellant must pay marital credit card debt of \$40,118.03 and the SSPP loans of \$25,281.21; however, the court allocated money from the Stock Savings Plan to pay off the SSPP loans. Appellee must pay marital credit card debt of \$19,407.12. Accordingly, the allocation of debt works out to approximately 67 percent to appellant and 33 percent to appellee.¹

Appellant argues that when the allocation of assets and debts is considered along with the court's orders of child and spousal support, which total almost \$3,000.00 per month and the court's tax treatment of those orders, the totals are inequitable. He contends that given his income for 1998, he will be unable to comply with the court's orders. Appellant states that his net income for 1998 was \$62,966.36. Given this income, he alleges that he will have a yearly deficiency of \$16,696.84.

When dividing property, the court shall divide marital property equally, unless an equal division would be inequitable. R.C. 3105.171(C)(1). If an equal property division would be inequitable, the court shall divide the property in the manner

¹ This figure does not include the SSPP loans since the court allocated money from the Stock Savings Plan to pay these off. It also does not include the loan on the Grand Am since that amount has already been subtracted from appellant's share of the assets.

it determines equitable. *Id.* The trial court must classify all property as either marital or separate property. *Peck, supra*; R.C. 3105.171(B). Such a classification is required so that a reviewing court can effectively review the property award and determine if the award is fair and equitable. *Clark, supra*, 2000 WL 875364 at *5.

Not only did the court fail to classify the proceeds from the sale of the house as separate or marital, it failed to classify any of the other assets as separate or marital property. Accordingly, we cannot determine whether the trial court's distribution of these assets was equal or equitable without such a classification.

Appellant's third assignment of error states:

"THE TRIAL COURT'S SPOUSAL SUPPORT ORDER IS SO INEQUITABLE IN THE AMOUNT AND THE COURT ORDERED TAX TREATMENT AS TO RENDER IT AN ABUSE OF DISCRETION AND CONTRARY TO LAW."

Appellant argues that the court's award of spousal support is inequitable in light of the factors set out R.C. 3105.18(C) as applied to the facts of this case and his financial situation.

When reviewing an award of spousal support, an appellate court will not reverse the trial court's award absent an abuse of discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218-219. Abuse of discretion connotes more than an error in

judgment; it implies that the trial court's judgment is arbitrary, unreasonable or unconscionable. *Id.* at 219.

The trial court should divide and distribute the marital estate and then decide whether a spousal support award is appropriate. R.C. 3105.18(B). When making a determination of spousal support, the court must consider the factors listed in R.C. 3105.18(C)(1). R.C.3105.18(C)(1). The first factor listed that the court must consider is "[t]he 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." R.C. 3105.18(C)(1)(a).

Since we cannot determine whether the property distribution was equitable, we cannot conclude whether the court's spousal support award constitutes an abuse of discretion.

Appellant's final assignment of error states:

"THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO CONSIDER THE APPELLANT'S SUBSTANTIAL INDEBTEDNESS AND OTHER COURT ORDERED OBLIGATIONS AND PROVIDE FOR A CHILD SUPPORT DEVIATION IN CALCULATING CHILD SUPPORT PURSUANT TO O.R.C. 3113.215."

At trial, the parties stipulated to basic child support calculations given appellant's income history and imputing minimum wage to appellee. They stipulated to \$871.64 per month in child support. This is the amount the court ordered appellant to pay per month.

Appellant argues that the stipulation was subject to his supplemental request for deviation due to the parties' substantial debt. Appellant asked the court for a reduction in child support for this reason. Appellant points out that appellee testified that her schedule of living expenses included Jaclyn's financial needs. He argues that the amount of money he has left for child support is greatly diminished by the sums the court ordered that he pay towards the debts and for spousal support. Appellant states that his total debt repayment, as ordered by the court, equals \$29,423.52 per year and his court ordered spousal support payments equal an additional \$24,000.00 per year. Given these large expenses, appellant argues that the court abused its discretion by failing to deviate from the child support guidelines.

When reviewing an award of child support, an appellate court will not reverse the trial court's award absent an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. Since appellant argues that the child support award is unreasonable in light of his other court ordered obligations, we are unable to review this assignment of error until the previous assignments of error are resolved.

Accordingly, the decision of the trial court is hereby remanded so that the trial court may determine whether the property at issue is marital or separate property.

Vukovich, J., concurs

Waite, J., concurs