[Cite as *Riley v. Riley*, 2009-Ohio-2764.]

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

Victoria L. Riley	Court of Appeals No. H-08-019
Appellant	Trial Court No. DRB 20061131
v.	
Theodore J. Riley	**DECISION AND JUDGMENT**
Appellee	Decided: June 12, 2009

* * * * *

John F. Kirwan, for appellant.

Michael B. Jackson, for appellee.

* * * * *

SHERCK, J.

{¶ 1} This is an appeal from a judgment issued by the Huron County Court of Common Pleas, Domestic Relations Division, regarding property division and spousal support in a divorce action. Because we conclude that the trial court erred in its allocation of separate property but did not abuse its discretion in denying spousal support, we reverse in part and affirm in part.

{¶ 2} Appellant, Victoria L. Riley, and appellee, Theodore J. Riley, were married in 1989. Prior to the marriage, appellant owned a house ("Bardshar property"). The

parties both testified that this property was sold and the proceeds were applied to the construction of a home ("En Road property"). The magistrate made certain findings and awards. The trial court adopted the magistrate's finding that appellant had not adequately traced the funds from the sale of the Bardshar property because no written documents were presented to show the deposit and transfer of the proceeds from the sale. Appellant sought to supplement the record after the hearing with bank records showing the deposit of the proceeds and later withdrawal, but the trial court denied that request.

{¶ 3} In addition, appellant sought spousal support, asserting that she suffered from a medical disability which prevented her from working. The magistrate found that appellant failed to present medical documentation of her disability and also found her to be voluntarily underemployed. After the final divorce hearing before the magistrate, appellant allegedly received notice that her income claim for total disability had been approved. She requested that evidence of this disability income award be admitted to supplement the evidence presented at the hearing before the magistrate, but the trial court denied that request as well.

{¶ 4} Appellant filed objections regarding the magistrate's findings and rulings regarding the credit for her separate property and the denial of spousal support. The trial court granted the divorce, overruled the objections and adopted the magistrate's report.

{¶ 5} Appellant now appeals that judgment, arguing the following four assignments of error:

{¶ 6} "I. The trial court erred in refusing to find that plaintiff wife had a separate property interest in the En Road real estate pursuant to O.R.C. 3105.171(A)(6)(a)(ii).

{¶ 7} "II. The trial court abused its discretion in failing to find that the $46,388.05 realized from the dale of plaintiff wife's separate property was used to pay the construction loan for the En Road property.

{¶ 8} "III. The trial court abused its discretion by denying a disabled 55 year old plaintiff wife spousal support after a [sic]18 year marriage to defendant husband who earns in excess of $39,000.00 per year and plaintiff wife's income is poverty level.

{¶ 9} "IV. The trial court abused its discretion when it denied a trial de novo to redetermine plaintiff wife's need for spousal support when she was found disabled, after the final divorce hearing by the magistrate, but before adopting the magistrate's findings by the court."

I.

{¶ 10} We will address appellant's first and second assignments of error together. In her first assignment of error, appellant argues that the trial court erred in finding that she had failed to establish that the En Road property was not partially her separate property. In her second assignment of error, appellant asserts that the trial court erred in failing to find that proceeds from the sale of her separate property, $46,388.05, were used to fund the construction for the En Road property.

{¶ 11} R.C. 3105.171(A)(3)(a)(i) provides that marital property consists of “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." Separate property includes "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). A party seeking to classify property as "separate" bears "the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. See, also, Shilling v. Shilling, 6th Dist. No. OT-08-042, 2009-Ohio-1476. "The burden of showing something by a preponderance of the evidence * * * simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact's existence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.* (1993), 508 U.S. 602, 622.

{¶ 12} Nevertheless, "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property * * * except when the separate property is not traceable." R.C. 3105.171(A)(6)(b). Consequently, the court must determine whether separate property is traceable or if it has "lost its separate character after being commingled with marital property." *Rash v. Rash*, 6th Dist. No. F-04-016, 2004-Ohio-6466, ¶ 29, citing *Peck*, supra.

{¶ 13} In this case, appellee testified at the hearing before the magistrate that appellant owned the Bardshar Road property prior to the marriage. Therefore, there is no question that the Bardshar Road property was appellant's separate property. Appellee testified that there were maintenance problems with the Bardshar property. He said that

the couple refinanced the property and used the money to fix up the Bardshar Road home and to buy the En Road lot. Appellee agreed that the property was sold on July 7, 2001, and that the cash paid to appellant as the seller was $46,388.

{¶ 14} On September 28, 2001, the parties entered into an agreement for construction on the En Road lot property, which had been jointly purchased for $18,000 by the parties in 1998. The amount of the cash deposited for the new construction was $47,761.17. Although at first appellee said he was unsure of the amount, he later testified that the proceeds from the sale of the Bardshar Road property were used to secure the construction loan on the En Road lot. He also acknowledged that he had brought no real estate, property or other assets into the marriage.

{¶ 15} Appellant testified that, prior to the marriage, she owned the Bardshar property, purchased in 1983. She also stated that in 1998, the parties refinanced the Bardshar property and used $18,000 from that loan to purchase the En Road property. She further testified that the Bardshar property was then sold in 2001, and the net proceeds from the sale of that property, $46,388.05, were applied to the house construction on the En Road property. During the magistrate's hearing, appellant presented dated documents showing the sale of the Bardshar residence and the construction loan documents for the En Road home. She did not present any paperwork that showed where the Bardshar sale proceeds were deposited during the three months between the July sale and the September loan. Appellant also testified that, prior to the

marriage and as a result of her first husband's death, she had received $133,000 lump sum payment and continued to receive $250 per month from an annuity.

{¶ 16} In this case, the trial court erred in adopting the magistrate's finding that the proceeds from the Bardshar road property sale were not traceable as appellant's separate property. Appellee did not dispute and even agreed that the proceeds from the sale were applied to the financing of the En Road house construction. Moreover, nothing in the record suggests that the $47,761 deposit on the construction loan did not include the $46,388 from the sale of appellant's separate property. Appellee acknowledged that he had no other funds or assets from which the construction loan deposit could have been drawn.

{¶ 17} Contrary to the magistrate's report, the inference that the proceeds from the sale of one property were applied to the construction loan just three months later, does not require a "leap of faith" or any other speculation. Rather, it is based on logic, common sense, and the parties' own testimony which provided the necessary verification. Since the parties agreed on the ultimate use and destination of the separate property proceeds, written documentation of the temporary deposit of the Bardshar proceeds was unnecessary to trace those funds. Consequently, by a preponderance of the evidence, appellant adequately traced the Bardshar Road separate property funds to the En Road property. Therefore, we conclude that the trial court erred in failing to credit appellant with the $46,388.05 as the value of her separate property.

{¶ 18} Accordingly, appellant's first and second assignments of error are well-taken.

II.

{¶ 19} We will next address appellant's fourth assignment of error. In her fourth assignment of error, appellant claims that the trial court erred in denying her request to submit new or additional evidence regarding her ability to be employed after the final divorce hearing.

{¶ 20} Civ.R. 53(E)(4)(b) gives a trial court broad discretion when deciding whether to hear additional evidence, but "a plain reading of the second sentence of Civ.R. 53(E)(4)(b) limits this discretion and requires acceptance of the new evidence if the objecting party demonstrates with reasonable diligence that it could not have produced the new evidence for the magistrate's consideration." *Johnson-Wooldridge v. Wooldridge* (July 26, 2001), 10th Dist. No. 00AP-1073. When determining whether a party has exercised reasonable diligence under Civ.R. 53(E)(4)(b), a court must consider whether the party was put on notice that they would be reasonably expected to introduce this evidence at the hearing before the magistrate. Id. If a party had notice that they would be reasonably expected to introduce evidence on a subject, then the trial court has discretion to reject that evidence. Id.

{¶ 21} The question in this case is whether the trial court had to admit the evidence because it could not have been produced with reasonable diligence or whether the decision not to admit this evidence falls within the trial court's broad discretion.

Appellant claims that, since she did not have the disability ruling at the time of the final hearing, this meets the standard of reasonable diligence, requiring the court to admit the evidence.

{¶ 22} The record indicates, however, that the *issue* of appellant's disability was presented to the magistrate. Although the final determination of her disability claim was not available at the time of the hearing, appellant had notice but failed to present medical records or documentation of her disability income claim in order to establish a need for spousal support. Moreover, appellant could have reserved the right to file the disability determination with the court or could have asked for a continuance of the hearing until that determination was made. Therefore, we conclude that the denial of the admission into evidence of the disability claim determination was not an abuse of the trial court's discretion.

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

III.

{¶ 24} In her third assignment of error, appellant argues that the trial court erred in denying her request for spousal support.

{¶ 25} A trial court has broad discretion in determining whether to award spousal support. See *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24. The trial court also has discretion in determining the amount of a spousal support award. *Havanec v. Havanec*, 10th Dist. No. 08AP-465, 2008-Ohio-6966, ¶ 23, citing *Vanderpool v. Vanderpool* (1997), 118 Ohio App.3d 876, 879. An appellate court may not alter a support award

absent an abuse of discretion. *Havanec*, supra, ¶ 23. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 26} R.C. 3105.18(B) allows a trial court to award "reasonable spousal support to either party" in a divorce proceeding. R.C. 3105.18(C)(1) provides that, in determining whether spousal support is "appropriate and reasonable," and in determining the amount, terms, and duration of the support, the trial court must consider the following factors:

{¶ 27} "(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;

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

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

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

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

{¶ 32} "(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;

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

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

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

{¶ 36} "(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;

{¶ 37} "(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;

{¶ 38} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 39} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 40} "(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶ 41} The trial court need not comment on each factor, but the record must demonstrate that "the court considered each factor in making its spousal support award." *Kreilick v. Kreilick*, 161 Ohio App.3d 682, 2005-Ohio-3041, ¶ 24.

{¶ 42} Our review of the record reveals that although appellant requested spousal support of $400 per month based upon her disability and the disparity in incomes, she failed to submit any medical records in support of her claim. Although we agree that the parties' incomes, at the time of the hearing, appeared to be unequal, the trial court adopted

the magistrate's report that found appellant to be voluntarily underemployed. The magistrate specifically noted a lack of evidence submitted in support of the need for spousal support, including documentation of appellant's necessary living expenses, medical diagnosis or records of her disability, or the standard of living of the parties.

{¶ 43} And, although appellant alleged that she recently became disabled, the record indicates that she has been employed outside the home for most of the duration of the marriage and no evidence was offered to show that her alleged disability was permanent. Consequently, the issue of her disability becomes one of evidentiary proof and credibility, based solely on appellant's testimony. Therefore, we cannot say that the trial court abused its discretion in denying appellant's request for spousal support.

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

{¶ 45} The judgment of the Huron County Court of Common Pleas, Domestic Relations Division, is reversed as to the credit for the value of the separate property, affirmed as to the denial of spousal support, and remanded for proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED, IN PART,
AND REVERSED, IN PART.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James R. Sherck, J. _____
CONCUR.
JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.