

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

Lisa Noel

Court of Appeals No. WD-09-006

Appellee

Trial Court No. 2007DR0190

v.

Bradley Noel

DECISION AND JUDGMENT

Appellant

Decided: December 18, 2009

* * * * *

Matthew N. Fech, for appellee.

Judith A. Myers, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment issued by the Wood County Court of Common Pleas, Domestic Relations Division, determining issues in a final divorce decree. Because we conclude that the trial court did not err in the calculation of child support or determination of marital property and debt, but improperly determined the value of the parties' riverboat, we affirm, in part, and reverse, in part.

{¶ 2} Appellant, Bradley Noel, and appellee, Lisa Noel, were married in May 2001. Two children were born as issue of the marriage, Calyn, born in 1998¹ and Cameron, born in 2002. Appellee initially filed a complaint for divorce early in 2007, but dismissed that action. In August 2007, appellee again filed for divorce. After a hearing, the magistrate issued the following findings and recommendations relevant to this appeal.

{¶ 3} The parties agreed to enter into a shared parenting plan, as recommended by the guardian ad litem. The parties also agreed to certain other matters involving division of marital assets and debts. As to disputed matters, the magistrate found the value of the parties' riverboat to be \$2,600 and that a gift of \$1,700 from appellant's parents was used to pay closing costs for the refinance of or payments on the marital home. The magistrate found that appellant failed to adequately trace this "money to show [that it] resulted in any additional equity in the home or other non-marital property for [appellant]."

{¶ 4} Further, the magistrate determined that the \$926.83 medical debt to Flower Hospital was marital. The parties agreed that a credit card debt of \$916.89 was marital. The magistrate also recommended a 25 percent downward deviation from the original guideline child support amount because of the shared parenting time and expenses. The downward deviation resulted in a monthly child support payment of \$695.17, plus administrative fees.

{¶ 5} Appellant filed objections to the magistrate's decision:

¹Although born prior to the marriage, appellant recognized Calyn as his biological child.

{¶ 6} (1) the magistrate's decision failed to determine when appellee would be required to move out of the marital residence;

{¶ 7} (2) the amount borrowed from the parties to pay debts of appellee's mother's estate was allegedly incorrectly calculated based on appellee's testimony;

{¶ 8} (3) the finding that the \$1,700 gift from appellant's parents was not traceable as separate property is "contradictory;"

{¶ 9} (4) the riverboat's value at \$2,600 was not supported by the evidence presented;

{¶ 10} (5) the offset amount of \$2,867 to be paid by appellant to appellee was not supported by the evidence;

{¶ 11} (6) the debt to Flower Hospital was not found to be nonmarital;

{¶ 12} (7) because the shared parenting plan provides that the parties have equal time with the children, the deviation should have been higher than 25 percent; and

{¶ 13} (8) the child support worksheet included projected child care expenses for appellee which she was not currently paying and the magistrate failed to credit appellant for his child care costs of \$80 per week, annual union dues of \$319.25, and medical expenses for the children in a yearly amount of \$2,203.

{¶ 14} The trial court overruled most of appellant's objections. The court noted that the offset related to three marital assets: a motorcycle and the riverboat that were awarded to appellant, and debt owed to the parties by appellee's brother. The court also found that the magistrate had made a calculation error and reduced the "offset" amount to

be paid by appellant to \$1,433.50. Any objections to the calculation of child support or separate property were overruled.

{¶ 15} Appellant again moved the trial court for "reconsideration" of its ruling regarding the 25 percent reduction and its failure to consider certain child care costs, health care expense, and union dues. The trial court denied the motion, stating that, in "making the decision, the magistrate and the court took into consideration the relative sharing of expenses of raising and caring for the children that both [parties] would incur.

{¶ 16} Appellant now appeals from the trial court's judgment, arguing the following four assignments of error:

{¶ 17} "First Assignment of Error:

{¶ 18} "The magistrate and trial court erred in the calculation of child support.

{¶ 19} "Second Assignment of Error:

{¶ 20} "The trial court abused its discretion in assessing the value of the parties' riverboat which was not supported by the manifest weight of the evidence.

{¶ 21} "Third Assignment of Error:

{¶ 22} "The trial court's finding that appellee's medical bill was a marital debt was against the manifest weight of the evidence and the allocation of the debt as marital was an abuse of discretion.

{¶ 23} "Fourth Assignment of Error:

{¶ 24} "The trial court finding that appellant's monetary gift was commingled was against the manifest weight of the evidence and the failure to treat it as separate property in formulating an equitable division of property was an abuse of discretion."

I.

{¶ 25} In his first assignment of error, appellant argues that the trial court erred in its calculation of child support. Specifically, appellant argues that the court failed to credit him with certain costs authorized by R.C. 3119.022, that the trial court did not conduct an independent review of the magistrate's decision, and that the trial court abused its discretion in failing to deviate from the child support guidelines.

{¶ 26} When calculating child support, R.C. 3119.022 provides a worksheet to be utilized by the trial court. Certain deductions are permitted, including, "mandatory work-related" expenses, "[a]nnual child care expenses for children who are the subject of this order that are work-, employment training-, or education-related, as approved by the court or agency (deduct tax credit from annual cost, whether or not claimed)," and "[m]arginal, out-of-pocket costs, necessary to provide for health insurance for the children who are the subject of this order (contributing cost of private family health insurance, minus the contributing cost of private single health insurance, divided by the total number of dependents covered by the plan, including the children subject of the support order, times the number of children subject of the support order)." See R.C. 3119.022.

{¶ 27} The amount of child support calculated using the child support guidelines and worksheet is rebuttably presumed to be the correct amount of child support. R.C. 3119.03. When a shared parenting plan is utilized, however, R.C. 3119.24(A) grants the trial court the discretion to deviate from the worksheet amount if the guideline amount would be "unjust or inappropriate to the children or either parent and would not be in the best interest of the child because of the extraordinary circumstances of the parents or because of any other factors or criteria set forth in section 3119.23 of the Revised Code * * *." See, also, *Pauly v. Pauly* (1997), 80 Ohio St.3d 386, 390.

{¶ 28} R.C. 3119.24(B), which defines "extraordinary circumstances of the parents," includes:

{¶ 29} "(1) The amount of time the children spend with each parent;

{¶ 30} "(2) The ability of each parent to maintain adequate housing for the children;

{¶ 31} "(3) Each parent's expenses, including child care expenses, school tuition, medical expenses, dental expenses, and any other expenses the court considers relevant;

{¶ 32} "(4) Any other circumstances the court considers relevant."

{¶ 33} R.C. 3119.23 sets out the following 16 factors that may be considered by the court in determining whether to grant a deviation from the child support worksheet amount:

{¶ 34} "(A) Special and unusual needs of the children;

{¶ 35} "(B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;

{¶ 36} "(C) Other court-ordered payments;

{¶ 37} "(D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;

{¶ 38} "(E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;

{¶ 39} "(F) The financial resources and the earning ability of the child;

{¶ 40} "(G) Disparity in income between parties or households;

{¶ 41} "(H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

{¶ 42} "(I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;

{¶ 43} "(J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;

{¶ 44} "(K) The relative financial resources, other assets and resources, and needs of each parent;

{¶ 45} "(L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;

{¶ 46} "(M) The physical and emotional condition and needs of the child;

{¶ 47} "(N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;

{¶ 48} "(O) The responsibility of each parent for the support of others;

{¶ 49} "(P) Any other relevant factor."

{¶ 50} In this case, appellant is correct that credits may be given for union dues, child care expenses, and the cost of health insurance, after applying the calculation formulas provided on the worksheet. The record reveals that the amount of appellant's bi-weekly union dues, \$13.15, was shown on his check stub. Unless rebutted by other evidence, the trial court should have multiplied this amount by 26 weeks to arrive at an annual deduction of \$341.90.

{¶ 51} Nevertheless, we conclude that this error is harmless. The court, in its determination of the final amount for child support, specifically stated that it had considered this expense when it deviated from the child support guidelines, reducing appellant's amount by 25 percent. Thus, the union dues amount was included as a factor

in the court's independent review of the magistrate's decision and adoption of its downward deviation from the worksheet calculation.

{¶ 52} The child care and health insurance deductions, however, are more problematic. These amounts are not deducted dollar-for-dollar from income, but, rather, any allowable amounts must be calculated in accordance with the formularies shown on the worksheet. First, appellant's mother testified that he had just begun paying his parents to care for his children. Appellant also did not indicate the after-calculation amount to be used on the worksheet. Since appellant was awarded the right to take the tax deductions for the children, the amount paid for child care expenses would be reduced by the annual tax credit, even if that deduction is not taken. Because the total annual amount of child care expense was not presented in relation to the tax credit that appellant could receive, we cannot say that the trial court erred in omitting any deduction for that expense. In addition, the trial court properly gave full credit for child care expenses to appellee, since she did not have the tax deduction benefit and no reduction would have been warranted.

{¶ 53} Likewise as to the health care insurance credit, appellant merely testified that he also pays for "medical benefits" that included himself and the children. Nothing in the record indicates the total cost appellant pays, the cost of a single policy, or the resulting reduction divided by the number of dependents covered. This information is necessary to calculate the worksheet amount. Therefore, the trial court did not err in omitting any reduction to appellant's income for health insurance costs.

{¶ 54} Finally, appellant argues that the trial court erred in not awarding him a greater deviation than 25 percent from the worksheet child support calculations because he has the children 50 percent of the time. The time spent with each parent, however, is just one of 16 factors to be considered. Since few of the other factors favor appellant, we cannot say that the trial court's deviation of 25 percent was an abuse of discretion.

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

II.

{¶ 56} In his second assignment of error, appellant asserts that the trial court erred in its valuation of the riverboat. We agree.

{¶ 57} In making an equitable division of property, a trial court must first determine the value of marital assets. *Kestner v. Kestner*, 173 Ohio App.3d 632, 2007-Ohio-6222, ¶ 11; *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10, 15. An appellate court must affirm a trial court's determination of an asset's value if it is supported by competent, credible evidence and is not otherwise an abuse of discretion. *James v. James* (1995), 101 Ohio App.3d 668, 681; *Moro v. Moro* (1990), 68 Ohio App.3d 630, 637.

{¶ 58} In this case, appellee presented her evidence, in the form of a computer printout from the NADA website, showing that the boat was currently worth between \$1,260 and \$1,380. Appellant agreed with that valuation. Nothing in the record supports the trial court's finding that the boat was still worth \$2,600, the purchase price. Therefore, the trial court abused its discretion in failing to value the boat within the range agreed to by the parties.

{¶ 59} Accordingly, appellant's second assignment of error is well-taken.

III.

{¶ 60} In his third assignment of error, appellant contends that the trial court erred in finding that debt resulting from appellee's surgical procedure to prevent future pregnancies was marital.

{¶ 61} The trial court's division of marital debts will be affirmed absent an abuse of discretion. *Fields v. Fields* (Apr. 8, 1992), 9th Dist. No. 15235. Marital debts are those which occur during the marriage. Unless the court determines that such time period would be inequitable, "during the marriage" means "the period of time from the date of the marriage through the date of the final hearing in an action for divorce * * *." R.C. 3105.17(A)(2)(a).

{¶ 62} In this case, the parties were married in May 2001. The record indicates that appellee's first complaint for divorce was dismissed in April or May 2007 because the parties allegedly were attempting to reconcile. According to appellee, she underwent surgery to "have her tubes tied" in May 2007, as a primary method of birth control because allegedly appellant would not get a vasectomy. Because efforts to work things out between the parties ultimately failed, appellee then refiled for divorce on August 14, 2007. Appellant testified that he was opposed to appellee's medical procedure.

{¶ 63} Although technically appellee's surgery may be considered a "voluntary" medical procedure, we decline to classify such an expense as non-marital when obtained during a time when no divorce proceedings were pending. Therefore, we conclude that

appellee's surgery was a medical procedure performed "during the marriage," and the trial court did not err in determining it to be a marital debt.

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

IV.

{¶ 65} In his fourth assignment of error, appellant claims that the trial court erred in finding that certain funds given to him by his parents were not traceable as separate property.

{¶ 66} 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, ¶ 10. 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.

{¶ 67} The "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 trial 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.

{¶ 68} In this case, appellant presented a copy of a check for \$1,700 from his mother written to him on February 7, 2001. There are no notations on the check to indicate how the money was to be used. The closing for the refinance took place nine days later on February 16, 2001. Although the home refinance documents presented into evidence showed closing costs of \$3,205.67, nothing on those documents indicates the source of those funds. Further, appellant himself was unsure whether the \$1,700 was applied to closing costs on the refinance or was used to pay down the initial mortgage. At first appellant stated that he thought he had signed the check over to the bank for the closing costs, but later he stated the money was "put down on the loan."

{¶ 69} Appellant also acknowledged and his mother testified that when she gave him the check, he was told that the money was a gift to be used for anything he wanted for the house. His mother also testified that, although the check was made out to appellant, the money was intended for both parties to be used for their home together. Therefore, other than his own statement, appellant provided no other documentation, i.e., a deposit into the parties' joint checking account or other records to directly show how the

check was used or that it should remain as separate property. Therefore, without some documentation that would show the parties' intent that it was a separate contribution, we cannot say that the trial court erred in its determination that appellant failed to adequately trace the \$1,700 check funds.

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

{¶ 71} The judgment of the Wood County Court of Common Pleas is affirmed, in part, and reversed, in part. This case is remanded for the sole purpose of the court's re-determination of the value of the riverboat, based on the value range presented by the parties. Appellant and appellee are each ordered to pay one-half of the cost 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.

Peter M. Handwork, P.J.

JUDGE

Arlene Singer, 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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