[Cite as *Brokaw v. Brokaw*, 2010-Ohio-1053.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92729

KARA BROKAW

PLAINTIFF-APPELLANT

vs.

KEVIN BROKAW

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-315403

BEFORE: Stewart, J., Gallagher, A.J., and Sweeney, J.
RELEASED: March 18, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiff-appellant, Kara Brokaw, appeals from a judgment of divorce that terminated her marriage to defendant-appellee, Kevin Brokaw. Prior to trial on the complaint, the parties settled all but three of their differences: (1) the amount and effective date of child support; (2) the amount and duration of spousal support; and (3) the division of debt incurred on a credit card. The court decided those issues adversely to Kara by granting a downward deviation from the child support guidelines, ordering no spousal support and making her liable for the credit card debt. Kara's eight assignments of error challenge these and other rulings by the court. We find that the court made several errors when making child support calculations, so we reverse and remand that aspect of this case; we affirm in all other respects.

I

{¶ 2} The first assignment of error complains that the court erred by granting a divorce on grounds of incompatibility. Kara alternatively pleaded adultery as a ground for divorce and maintains that the court should have granted her a divorce on that ground.

{¶ 3} R.C. 3105.01 sets forth the grounds upon which a divorce may be granted. Among those are adultery [R.C. 3105.01(C)] and incompatibility

[R.C. 3105.01 (K)]. Kara pleaded both as grounds for divorce. In his answer, Kevin admitted the parties were incompatible but denied all other allegations. Moreover, in his counterclaim for divorce, Kevin sought a divorce on grounds of incompatibility, gross neglect of duty, and extreme cruelty. See R.C. 3105.01(D) and (F).

{¶ 4} A trial court has broad discretion in determining the proper grounds for divorce and its decision will not be reversed, absent an abuse of discretion. *Buckles v. Buckles* (1988), 46 Ohio App.3d 102, 116, 546 N.E.2d 950. While Kevin denied Kara's allegation of adultery in his answer to her complaint, he admitted in that same answer that the parties were incompatible. In addition, both parties gave testimony in which they agreed they were no longer compatible. On that evidence, the court did not abuse its discretion by granting a divorce due to incompatibility.

{¶ 5} When the parties agree on a ground for divorce, the court need not determine whether any other ground for divorce exists unless there is a showing that the existence of some other ground would affect "the distribution of property, the award of sustenance alimony, the award of child custody, or otherwise to prejudicially affect the complaining party." Id. Kara makes no argument that Kevin's alleged adultery would have affected the determination of child or spousal support. And "being 'tagged' with 'fault' does not constitute prejudice of a nature justifying reversal." Id. We

find no abuse of discretion with the court's decision to grant a divorce on the ground of incompatibility.

II

{¶ 6} The second assignment of error complains that the court erred by miscalculating the child care costs when completing the child support computation worksheet. Kara claims that the court overstated Kevin's obligation for annual daycare expenses, presumably with the result that his increased expenses diminished the amount of child support he would have to pay.

{¶ 7} The court incorporated into the divorce decree a separation agreement entered into by the parties. The separation agreement contained a shared parenting plan in which the parties agreed that Kevin would assume liability for 70 percent of daycare costs for the parties' two children, and that Kara would assume liability for the remaining 30 percent cost of daycare.

{¶ 8} At trial, Kara gave uncontradicted testimony that the child care costs were $1,640.20 per month, or $19,682.40 per year. Kevin's 70 percent obligation amounted to $13,777.68 and Kara's 30 percent obligation amounted to $5,904.72. In his testimony, Kevin confirmed that he paid $1,149.14 per month, or $13,789.68 per year, and that figure constituted 70 percent of the total cost.

{¶ 9} Despite this evidence, the court's child support guidelines computation sheet listed Kara's child care expenses as $5,910 and Kevin's child care expenses as $19,700. The stated figure for Kevin is plainly in error because it constitutes the entire amount of child care expenses, not Kevin's 70 percent share. We therefore sustain this assignment of error.

III

{¶ 10} The third and fourth assignments of error raise issues relating to the court's factual finding that Kevin earned income of $120,000 per year. Kara complains that amount resulted from a voluntary reduction in pay taken by Kevin and that the court should have imputed income to him in the amount of $185,000 per year. She also complains that regardless of the voluntary reduction in income, the court erred by using the $120,000 per year income amount to compute past due child support that had accrued before he took the reduction in pay.

A

{¶ 11} R.C. 3119.01(C)(5)(b) permits the court to impute income when an obligor is voluntarily unemployed or underemployed. The question whether a parent is voluntarily unemployed or voluntarily underemployed is a question that the court should determine based upon the facts and circumstances of the case, and that determination will not be disturbed on appeal absent an abuse of discretion. *Rock v. Cabral* (1993), 67 Ohio St.3d

108, 616 N.E.2d 218, syllabus. A voluntary reduction in income is not sufficient in and of itself to establish that income should be imputed. *Woloch v. Foster* (1994), 98 Ohio App.3d 806, 811, 649 N.E.2d 918.

{¶ 12} Kevin testified that he worked for a real estate company and earned a salary of $185,000 per year. He said that the company had been experiencing severe financial difficulties during the recession, leaving it on "life support." His employer had reduced a staff of 22 employees down to six employees, and the principles were no longer drawing salaries. Although under contract, his employer told him that he could accept a reduction in pay or be terminated and seek performance of the contract in the courts. Recognizing that legal fees would likely reduce any recovery on the $185,000 contract price to below what he would earn after the reduction in pay, Kevin chose to accept a reduction in pay and continue working with the hope that his employer's economic prospects would brighten.

{¶ 13} Given this evidence, we cannot say that the court abused its discretion by finding that Kevin had not voluntarily reduced his income. In poor economic times, workers are often given choices between a reduction in income or being laid-off. This is a "choice" in name only — most would rather accept a reduction in pay rather than face unemployment and the uncertain prospects associated with it. Kevin's testimony showed that he and the remaining employees at his company accepted the reduction in pay

because they thought it would enable their employer to remain in business. Kevin's choice was to remain employed or risk suing on his employment contract. He concluded that his potential recovery after legal fees would not exceed his reduced pay, and further concluded that he could hurt his chances of new employment by suing his current employer. All of these actions were "voluntary," but only in the most basic sense of the word. For her part, Kara offered no evidence to show that Kevin made the choice for the sole purpose of minimizing his support obligation. His decisions show that he acted in a manner designed to preserve an income. It follows that the court could rationally conclude that Kevin had not acted voluntarily to reduce his income. We find no error with the court's factual finding that Kevin was not voluntarily underemployed by accepting a pay cut to $120,000.

B

{¶ 14} Kara next argues that the court erred by using the $120,000 income amount to compute past-due child support that pre-dated his reduction in income.

{¶ 15} The court's findings of fact and conclusions of law state that Kevin earned an annual income of "$185,000 up until October 31, 2008." The court made the child support order retroactive to December 1, 2007. But in doing so, the court failed to use Kevin's higher income during the period from December 2007 through October 2008. The child support computation

worksheet appended to the divorce decree lists Kevin's annual gross income as $120,000, even though he earned $185,000 annually during the period from December 2007 through October 2008.

{¶ 16} We thus find that the court erred by computing Kevin's retroactive child support and sustain this assignment of error.

IV

{¶ 17} The fifth assignment of error is that the court erred by concluding that a $28,500 credit card balance accrued by Kara after Kevin had moved out of the marital residence and after the termination of their agreement to settle issues of support pendente lite had expired, was a marital debt. She maintains that these were necessary expenses incurred after separation but prior to the divorce decree and should have been shared by Kevin.

{¶ 18} When allocating the marital estate, the court must not only equitably divide the marital assets, but it must provide for the payment of all marital obligations and debts. See R.C. 3105.171(F)(2). "[N]o accepted definition of marital debt has arisen from Ohio case law. In most states, a marital debt is any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose." *Ketchum v. Ketchum*, 7th Dist. No. 2001 CO 60, 2003-Ohio-2559, at ¶47, citing Turner, Equitable Distribution of Property (2 Ed.1994, Supp.2002) 455, Section 6.29. In *Minges*

v. Minges (Feb. 29, 1988), 12th Dist. No. CA87-06-085, the court of appeals stated:

{¶ 19} "Because, '[a]ll debts are not necessarily marital debts * * * equity generally requires that the burden of nonmarital debts be placed upon the party responsible for them. * * * Consequently, any property acquired as a result of a nonmarital debt belongs to the party who incurred the debt and is not subject to division.'" Id. at 4.

{¶ 20} In findings of fact and conclusions of law issued after the divorce decree, the court addressed the issue of Kara's credit card debt and concluded that "of the $30,000 debt incurred on the * * * credit card $28,500 was incurred after the separation of the parties largely on her personal expenses." Based on this finding it stated that "$28,500 of aforesaid debt is Plaintiff's separate responsibility. $1,500 [sic] of the debt is marital property that is divided equally between the parties."

{¶ 21} As we previously noted, the parties settled all issues relating to Kara's motion for support pendente lite, agreeing that Kevin would pay 70 percent of the household expenses until November 30, 2007, at which time he vacated the marital residence. Kara did not file a new motion for support pendente lite, so Kevin had no legal obligation to pay support pendente lite. The expenses listed by Kara were all incurred after Kevin left the marital home, and after the parties had resolved all differences over support pendente

lite. The court did not abuse its discretion by finding that Kara's expenses were not marital assets. See *Davis v. Davis*, 7th Dist. No. 831, 2000-Ohio-2684, at ¶3.

{¶ 22} Moreover, Kara's testimony about her expenses showed that they were questionable enough to permit the court to exercise its discretion to make her responsible for them. She conceded at trial that she did not have any statements from the credit card company to verify the nature or source of the charges, and that she would rely on her testimony alone to establish these expenses. She made a general statement that she used the credit card for household expenses accrued after Kevin left the marital house, her share of daycare expenses, and between $4,000 and $5,000 on home repairs in order to prepare the old house for sale. She also testified to spending $1,300 on a trip to a theme park for her and her daughter. Her failure to detail specific charges against the credit card could allow the court to reject her testimony in the absence of documentary evidence. See *Tokar v. Tokar*, 8th Dist. No. 89522, 2008-Ohio-6467, at ¶16 (trial court properly rejected husband's testimony regarding negative value of marital property because he failed to submit independent evidence). And Kara's testimony did not conclusively show that the credit card debt had been accrued on debt that benefitted both parties. With the absence of documentary evidence proving the need for the credit card debt and the absence of evidence to show that the debt had been

incurred for a joint purpose, we are unable to conclude that the court abused its discretion by making Kara responsible for the credit card debt accrued after Kevin left the marital home.

V

{¶ 23} The sixth assignment of error is that the court erred by failing to award Kara temporary spousal support.

{¶ 24} At the time she filed her complaint, Kara also filed a motion for support pendente lite. The parties settled Kara's pretrial motion for support pendente lite by agreeing that Kevin would be responsible for 71 percent of the household bills and Kara would be responsible for 29 percent of the household bills. This arrangement stayed in effect until November 30, 2007, at which time Kevin moved into a house he purchased (he had been residing in the marital home up to that point). Kara did not file a request for additional support after November 30, 2007.

{¶ 25} By settling her motion for support pendente lite, Kara extinguished her claim to support under that motion. She did not file a new motion for support pendente lite, so she failed to invoke the court's jurisdiction, as it had no authority to sua sponte issue support pendente lite. Cf. *Glenn v. Glenn*, 10th Dist. No. 02AP-534, 2002-Ohio-6755, at ¶9. With no motion for support pendente lite before it, the court did not abuse its discretion by failing to order that which Kara had previously agreed to settle.

VI

{¶ 26} The seventh assignment of error is that the court erred by refusing to order Kevin to pay spousal support. Kara complains that the disparity in income between her and Kevin required an order of spousal support.

{¶ 27} R.C. 3105.18(B) permits the court, upon the request of either party and after the division of marital property, to award reasonable spousal support to either party. When determining whether spousal support is appropriate and reasonable, the court must consider the factors set forth in R.C. 3105.18(C). The trial court is not required to comment on each statutory factor — the record need only show that the court considered the statutory factors when making its award. *Carman v. Carman* (1996), 109 Ohio App.3d 698, 703, 672 N.E.2d 1093. We review matters of spousal support for an abuse of discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028.

{¶ 28} In its findings of fact and conclusions of law in support of its decision to deny Kara's request for child support, the court considered all the statutory factors set forth in R.C. 3109.19(C). Among those findings are two that Kara contests: the income of the parties and the relative assets and liabilities of the parties.

{¶ 29} The court found that Kevin earned $120,000 per year and that Kara earned $75,000. Kara first complains that the court abused its discretion by finding that Kevin earned $120,000 per year. We rejected this contention in Part III(A), finding that the court did not abuse its discretion by finding that Kevin's reduction in pay had been voluntary.

{¶ 30} Kara's primary contention is that she gave uncontradicted evidence that her monthly living expenses exceeded her net monthly income, while Kevin testified that after paying all of his expenses, his income exceeded his expenses. This argument, however, is based on Kevin's former income, not the reduced income established by the court. Kevin testified that he, too, had a monthly deficit after paying his expenses and offered evidence to support that contention. As the trier of fact, the court was in the superior position to assess the credibility of the parties, and we cannot say the court abused its discretion by refusing to award spousal support to Kara.

VII

{¶ 31} The eighth assignment of error is that the court erred by ordering a downward deviation in child support from that indicated by the child support guidelines. The court ordered the deviation because the shared parenting plan adopted by the parties gave Kevin a number of overnight visitations that were "substantially greater than the standard visitation order." Kara maintains that the shared parenting plan only gave Kevin six

additional nights per month during the school year, a number she believes is too insignificant to warrant a downward deviation from the child support guidelines.

{¶ 32} The amount of child support calculated using the child support schedule is "rebuttably presumed" to be the correct amount of child support due. *Marker v. Grimm* (1992), 65 Ohio St.3d 139, 601 N.E.2d 496. The party seeking to rebut the basic child support schedule calculation has the burden of presenting evidence that would demonstrate that the calculated award is unjust, inappropriate, and would not be in the best interest of the child. *Spencer v. Spencer*, 5th Dist. No. 2005-CA-00263, 2006-Ohio-1913, at ¶44; *Chittock v. Chittock* (Apr. 3, 1998), 11th Dist. No. 97-A-0042. The decision to deviate from the actual obligation is discretionary and will not be reversed absent an abuse of discretion. See *In re Custody of Harris*, 168 Ohio App.3d 1, 857 N.E.2d 1235, 2006-Ohio-3649, at ¶60-61.

{¶ 33} R.C. 3119.24 states that in cases with shared parenting plans, the court "may" deviate from the amount that is calculated according to the child support schedule, but that the court must consider "extraordinary circumstances" and other factors or criteria if it deviates and it must enter in the journal that the amount would be unjust or inappropriate and would not in the best interest of the child, and it must enter findings of fact to support its determination. R.C. 3119.24(B) sets forth a nonexclusive list of factors

that might constitute "extraordinary circumstances of the parents," including "(1) The amount of time the children spend with each parent[.]" See R.C. 3119.24(B)(1).

{¶ 34} The child support computation worksheet appended to the court's divorce decree indicated that Kevin's income constituted 61.54 percent of the parties' income. As we noted in our discussion of Kara's second assignment of error, the child support computation worksheet erroneously stated that Kevin paid $19,700 in net child care costs, when that sum actually constituted the entire child care cost and not the 70 percent allocation that he agreed to pay. This error would have caused Kevin's support obligation to be understated. We therefore sustain this assignment of error to the extent that the misstatement of Kevin's obligation for child care expenses might have affected the court's decision to grant a downward deviation from the support guidelines. On remand, the court should ensure the correctness of its support guidelines computations and then consider whether a deviation from the child support guidelines is warranted under the circumstances.

{¶ 35} This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas - Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR