[Cite as *Tyler v. Tyler*, 2010-Ohio-1428.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93124

KENNETH F. TYLER, III

PLAINTIFF-APPELLANT

vs.

DIANA A. TYLER

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Domestic Relations Division
Case No. D-322410

BEFORE: Boyle, J., Dyke, P.J., and Jones, J.

RELEASED: April 1, 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).
MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Kenneth Tyler, appeals the portion of his divorce decree dividing property and awarding spousal support to defendant-appellee, Diana Tyler. He assigns two errors to the trial court:

{¶ 2} "[1.] The trial court erred when it ordered lifetime spousal support for a marriage lasting 6.5 years.

{¶ 3} "[2.] The trial court erred and abused its discretion in dividing the parties [sic] assets and liabilities."

{¶ 4} Finding no merit to the appeal, we affirm.

Procedural History and Factual Background

{¶ 5} Kenneth and Diana were first married in February 1989 and divorced in 1993. They reunited, began living together again in 1996, and were remarried in July 2002. They separated again in July 2008. They had one child who was emancipated at the time of the divorce hearing.

{¶ 6} Kenneth and Diana purchased a home in 2006 in Oakwood, Ohio. At the time of the divorce hearing, the home was encumbered with two mortgages, one at approximately $226,677 and one at $60,067. And it was also in foreclosure.

{¶ 7} The Social Security Administration ("SSA") found Diana to be permanently disabled. She stipulated to receiving $753 per month from Social Security. In October 2007, she received a lump sum payment retroactive to December 2000 of $39,800.

{¶ 8} Kenneth was employed at Pantek Incorporated as a project engineer. He stipulated to making $56,120 through October 31, 2008. The trial court found that based on his testimony his salary was $74,000 per year.

{¶ 9} Kenneth filed for divorce in August 2008. The trial court held an evidentiary hearing in February 2009 and entered the final divorce decree in March 2009.

Spousal Support

{¶ 10} In his first assignment of error, Kenneth maintains that the trial court erred when it ordered him to pay "lifetime spousal support for a marriage lasting 6.5 years." We disagree.

{¶ 11} A trial court enjoys broad discretion in awarding spousal support. *Gordon v. Gordon*, 11th Dist. No. 2004-T-0153, 2006-Ohio-51, ¶13. The trial court must consider the factors enumerated under R.C. 3105.18(C)(1) in making the award. *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 784, 689 N.E.2d 112. It then must set forth the basis for its award in sufficient detail for adequate appellate review. Id. The trial court's award is reviewed for abuse of discretion. *Gordon* at ¶13. An abuse of discretion connotes more than a mere error in judgment; it signifies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 12} To determine "whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and

duration of spousal support," the trial court must consider the fourteen factors provided in R.C. 3105.18(C)(1), including, but not limited to: (1) the relative earning abilities of the parties, (2) the ages and physical, mental, and emotional conditions of the parties, (3) the retirement benefits of the parties, (4) the duration of the marriage, (5) the standard of living of the parties established during the marriage, (6) the relative education of the parties, (7) the relative assets and debts of the parties, including but not limited to any court-ordered payments by the parties, (8) the time and expense necessary of the spouse seeking support to acquire education, training, or job experience, (9) the tax consequences for each party of an award of spousal support, or (10) any other factor that the court expressly finds to be relevant and equitable. Id.

{¶ 13} Specifically, Kenneth argues that the trial court's decision — making the spousal support indefinite — was not consistent with the Ohio Supreme Court's holding in *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83.

In *Kunkle*, the Ohio Supreme Court held, at paragraph one of the syllabus: "Except in cases involving a marriage of long duration, parties of advanced age or a homemaker-spouse with little opportunity to develop meaningful employment outside the home, where a payee spouse has the resources, ability and potential to be self-supporting, an award of sustenance alimony should provide for the termination of the award, within a reasonable time and upon a date certain, in order to place a definitive limit upon the parties' rights and responsibilities."

{¶ 14} Notably, however, the *Kunkle* court also recognized that "providing a termination date is not legally mandated and, in some situations, it could work a hardship on either the payor or payee. " Id. at 68, quoting *Koepke v. Koepke* (1983), 12 Ohio App.3d 80, 81, 466 N.E.2d 570. The high court further pointed out that "if under reasonable circumstances a divorced spouse does not have the resources, ability or *potential* to become self-supporting, then an award of sustenance alimony for life would be proper." (Emphasis sic.) Id. at 69.

{¶ 15} In the present case, the trial court found that Diana suffered from obsessive compulsive disorder with depression and "has been deemed by the Social Security Administration to be permanently disabled." The court further found that Diana's disability prevents her from seeking gainful employment and that she "cannot complete her daily activities of life." And based on a report from the SSA, the court also determined that Diana "cannot maintain employment," and that her income from Social Security disability was $9,036 per year.

{¶ 16} The trial court considered that Kenneth's income was $74,000 per year and that he was "gainfully employed in an area that is highly specialized."

{¶ 17} The trial court then determined that Diana was entitled to lifetime spousal support of $1,100 per month, subject to modification by the court.

{¶ 18} We cannot say the trial court abused its discretion for not establishing a termination date for Kenneth's support obligation. Given Diana's inability to work due to her permanent disability, we find Kenneth's assertion to

be unpersuasive. We certainly cannot say the trial court abused its discretion by failing to accept Kenneth's arguments.

{¶ 19} Although the trial court in this case found the duration of the marriage to be 6.5 years, it also heard evidence that the parties were previously married and that they lived together all but three years since they were first married in 1989 (thus, all but three out of 20 years). Under similar circumstances, the Ninth District upheld an indefinite spousal support. See *Moore v. Moore* (1992), 83 Ohio App.3d 75, 613 N.E.2d 1097. In *Moore*, the parties were married twice, with the second marriage lasting only four years. The court found that "the previous legal, marital relationship [was] relevant to the trial court's decision to award spousal support" under R.C. 3105.18(C)(1)(n) ("any other factor that the court *** finds to be relevant and equitable"). See, also, *Jernigan v. Jernigan* (July 2, 1998), 8th Dist. No. 72899 (recognizing the principle set forth in *Moore* that the parties' first marriage may be considered in determining spousal support for the second marriage); *Swartz v. Swartz* (Feb. 24, 1997), 12th Dist. No. CA96-07-063 (parties' first marriage may be relevant to a spousal support determination).

{¶ 20} Moreover, the trial court (unlike the trial court in *Kunkle*) reserved jurisdiction to modify the amount and the term of the spousal support award pursuant to R.C. 3105.18(E). The failure to assign a termination date is not a lifetime award where the court retains continuing jurisdiction to decrease or terminate the spousal support based on a change in either party's

circumstances. *Donese v. Donese* (Apr. 10, 1998), 2d Dist. No. 97CA70. And at a modification hearing, the court can once again determine if it is appropriate to set a termination date. See *Vanke v. Vanke* (1992), 80 Ohio App.3d 576, 581, 609 N.E.2d 1328. Accordingly, appellant is not without a remedy should future facts demonstrate a modification is warranted.

{¶ 21} Kenneth's first assignment of error is overruled.

Division of Marital Property

{¶ 22} In his second assignment of error, Kenneth maintains that the trial court erred when it divided the marital property because "it did not place values on any of the property or debt." He further argues that the property division was not equitable because the trial court awarded Diana "the far more expensive vehicle," and ordered him "to pay almost all of the marital debt."

{¶ 23} Trial courts also have broad discretion in deciding appropriate property awards in divorce cases. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319, 432 N.E.2d 183. Thus, a trial court's determination in such cases will be upheld absent an abuse of discretion. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, 696 N.E.2d 575.

{¶ 24} R.C. 3105.171(C)(1) explains a trial court's obligation when dividing marital property in divorce proceedings as follows: "Except as provided in this division or division (E)(1) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the

spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section." On appellate review, the trial court's property division should be viewed as a whole in determining whether it has achieved an equitable and fair division of marital assets. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222, 459 N.E.2d 896.

{¶ 25} Regarding Kenneth's argument that the trial court erred by not placing a value on the assets or liabilities, we find no error on the part of the trial court. In doing so, we rely on a Tenth District decision that aptly addressed an argument identical to the one presented here. In *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, the court explained:

{¶ 26} "Although the trial court has broad discretion to determine the value of marital property, some courts adhere to the concept that the court is not privileged to omit valuation altogether. *Willis v. Willis* (1984), 19 Ohio App.3d 45, 48, 482 N.E.2d 1274. It has also been held that a party's failure to put on any evidence does not permit assigning an unknown as value. [Id.] Under such circumstances, the court itself should instruct the parties to submit evidence on the matter. Id.

{¶ 27} "However, courts, including this court, have found some limitations to the general declaration that a trial court must value all marital property. For example, this holding has typically been limited to only 'major' assets. See, e.g., *Beagle v. Beagle*, 10th Dist. No. 07AP-494, 2008-Ohio-764, ¶41, citing *McCloud*

v. McCloud, 6th Dist. No. F-05-006, 2005-Ohio-6841, citing *Zona v. Zona*, 9th Dist. No. 05CA0007-M, 2005-Ohio-5194, ¶5, citing *Kohler v. Kohler* (Aug. 14, 1996), 9th Dist. No. 96CA006313. We have also acknowledged that 'the trial court cannot be expected to place a value on each individual item of personal property owned by the parties.' Id. Thus, the trial court need not 'value every piece of furniture, lawn equipment, and other personal property accumulated during a marriage,' where evidence of the value has not been presented. *Kohler*, supra.

{¶ 28} "In *Ortiz v. Ortiz*, 7th Dist. No. 05 JE 6, 2006-Ohio-3488, the court analyzed this issue, as well as the holding in *Willis*, at length. In *Ortiz*, there were two vehicles as part of the marital assets, and no valuation of the vehicles was given by either party. The appellant in *Ortiz* argued that the trial court must put some type of monetary value on the assets of the parties, regardless of the evidence actually presented at trial. The court rejected this contention, finding '[t]his is a misstatement of the law in this area.' Id. at ¶44. In addressing the appellant's argument that *Willis* prohibits a trial court from omitting the valuation of any marital asset, the court noted that *Willis* is sometimes incorrectly cited for this sweeping principle. Instead, the court in *Ortiz* explained that

> What is nearly always left out of these general observations from the *Willis* case is the fact that *Willis* is referring specifically to the valuation of a pension fund, and not necessarily to the valuation of every last individual item of marital property, whether it be a family photo, a broken toy, a pile of old magazines, or any of thousands of similar items. ***

{¶ 29} Id. at ¶46. The court went on to indicate that, in *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 180, 559 N.E.2d 1292, '[t]he Ohio Supreme Court adopted the analysis and holding of *Willis*, but only in the context of pension and retirement funds.' Id. 'Few marital assets present the range and intricacy of problems associated with pension and retirement funds.' Id., citing *Hoyt*. The court in *Ortiz* then noted that:

> There has never been any general rule that the trial court must put a monetary value on every conceivable marital asset before a final and appealable divorce decree can be granted, particularly if the parties refuse to provide or are completely unable to provide any factual basis to value their personal effects. ***

{¶ 30} Id. at ¶46. Instead, the *Ortiz* court stated, 'trial courts normally deal with personal effects and sentimental items in a divorce by simply allowing the parties to divide the items amongst themselves, and the trial court's order in this case seems to be a more elaborate version of the usual provision.' Id." *Roberts* at ¶18-20.

{¶ 31} The *Roberts* court went on to explain that "[o]ther courts have agreed, finding that, when a party fails to present evidence as to the value of an item, it is akin to an invited error and that party has waived the right to appeal in regard to that asset. See *Hruby v. Hruby* (June 11, 1997), 7th Dist. No. 93-C-9; see, also, *Davis v. Davis*, 8th Dist. No. 82343, 2003-Ohio-4657, at ¶18, citing *Hruby* (husband waived any argument regarding the valuation of marital property when he failed to submit any evidence of valuation at trial)." Id. at ¶21.

{¶ 32} "In *Hruby*, the court found that, if a party fails to present sufficient evidence of valuation, that party has presumptively waived the right to appeal the distribution of those assets because the trial court can only make decisions based on the evidence presented and is not required to order submission of additional evidence. The court agreed with the finding in *Walls v. Walls* (May 4, 1995), 4th Dist. No. 94-CA-849, in which the court concluded that, if a trial court required parties to submit further evidence on the issue of valuation, the court would be interfering with the parties' right to try their own case. The court in *Walls* reasoned that, if a party elects to be less than forthcoming in the presentation of evidence, he has a right to do so, and any error resulting therefrom must be 'invited.' Thus, the court in *Hruby* rejected the holding in *Willis* that a trial court should instruct the parties to submit evidence on the matter of valuation, finding that, although such instruction would be more efficient for all concerned, a trial court is under no duty to do so. The court in *Hruby* stated that the parties are under a duty to provide values for the property, and when they fail to submit such evidence at trial, the waiver principle from *Walls* makes more sense." *Roberts* at ¶22.

{¶ 33} In the present case, neither party testified to knowing the value of any of the marital assets. Diana did give a "guesstimate" that the household furniture "maybe" had a value of $6,000. Both Kenneth and Diana testified to the purchase price of certain items and what they owed on those items, including

their home, their vehicles, and household goods and furniture, but purchase price and remaining debt say nothing about the present value.

{¶ 34} Nonetheless, this case was not complicated, and the record is sufficient to determine that the trial court did not abuse its discretion. The identification of marital property and debt was straightforward. The parties' only substantial asset — their home — was in foreclosure. There were no retirement benefits to divide. They were rewarded their respective vehicles, as well as furniture that had a lien in their name attached, and they were made solely responsible for those respective liens. Under the facts of this case — especially since Kenneth failed to present specific evidence on the value of the assets and therefore waived any argument as to the trial court's division of them, we cannot say the trial court's decision was inequitable.

{¶ 35} Kenneth's second assignment of error is overruled.

{¶ 36} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

MARY J. BOYLE, JUDGE

LARRY A. JONES, J., CONCURS;
ANN DYKE, P.J., CONCURS IN JUDGMENT ONLY