

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO**

WILLIAM DILLEY,	:	OPINION
Plaintiff-Appellant,	:	
- vs -	:	CASE NO. 2010-G-2957
TATIANA DILLEY,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 DC 000591.

Judgment: Reversed and remanded.

Joyce E. Barrett, 800 Standard Building, 1370 Ontario Street, Cleveland, OH 44113-1752 (For Plaintiff-Appellant).

Heidi M. Cisan, Thrasher, Dinsmore & Dolan Co., L.P.A., 100 Seventh Avenue, Suite 150, Chardon, OH 44024-1079 (For Defendant-Appellee).

TIMOTHY P. CANNON, P.J.

{¶1} Appellant, William Dilley, appeals the judgment of the Geauga County Court of Common Pleas adopting the magistrate’s findings of fact and conclusions of law.

{¶2} In March 2008, appellee, Tatiana Dilley, filed a motion for an ex parte civil protection order, assigned case No. 08 DV 0327. Thereafter, appellant filed for divorce in May 2008, after being married to appellee for 25 years. That case was assigned case No. 08 DC 000591 and is the case currently under appeal. During their marriage,

the parties enjoyed an upper middle-class lifestyle, lived in large homes, drove expensive cars, and traveled.

{¶3} The parties have five children together. At the time of the trial, all five children were emancipated; however, the parties agreed that two of their children were not capable of supporting themselves due to relatively long-standing mental health issues.

{¶4} Appellant was employed by Smith Barney for approximately 25 years; however, in 2009, his employment was terminated. In 2008, appellant earned \$230,000. During most of the marriage, appellee did not work. Appellee began working in 2003 as a home health care provider. At the time of the hearing in this matter, appellee's only source of income was from working odd jobs, such as weeding gardens, cleaning homes, and babysitting.

{¶5} Appellant, 65 years of age, suffers from various health problems, including diabetes, respiratory issues, cataracts, and depression. Appellant had open-heart surgery in 2007.

{¶6} The evidence demonstrated that the parties had significant debt; their home was in foreclosure at the time of the hearing and their vehicles had been repossessed. The parties further owed the Internal Revenue Service ("IRS") approximately \$80,000, due to appellant's failure to withhold money from his paycheck for the payment of taxes.

{¶7} The parties' only significant assets were the following retirement benefits: a Citigroup pension plan valued at \$202,857; a Shearson retirement plan; and a Citigroup 401(k) valued at approximately \$17,000.

{¶8} Pursuant to a March 25, 2009 agreed order, in this case, appellant was required to pay temporary child and spousal support of \$1,750 per month. Appellant was also required to provide appellee with a vehicle. Appellant made only one payment of \$1,700 under this order. In addition, appellant had previously been ordered to pay temporary support under an agreed order dated April 29, 2008, in case No. 08 DV 0327 (the civil protection case).

{¶9} The matters tried to the magistrate were appellant's complaint for divorce and his motion to modify temporary support, filed April 24, 2009, as well as appellee's motion to show cause.

{¶10} On November 24, 2009, the magistrate issued findings of fact and conclusions of law. In that entry the magistrate recommended the following: (1) appellant be granted a divorce, (2) a division of the property, (3) appellant pay appellee a distributive award, (4) appellant pay appellee spousal support, (5) appellant's motion to modify temporary support should be denied, and (6) appellant should be adjudged guilty of contempt of court.

{¶11} Both parties filed objections to the magistrate's findings of fact and conclusions of law. The trial court adopted the findings made in the magistrate's decision.

{¶12} Appellant was sentenced to 30 days in jail. Appellant could purge himself of the jail sentence if he paid appellee the balance of the temporary support he owed her. The magistrate determined that appellant owed appellee \$34,825 of temporary support. The magistrate then offset the amount of temporary support with the amount that appellee was obligated to pay for the 2005 and 2006 tax years, i.e., \$32,749.08.

Therefore, appellant was obligated to pay appellee the amount of \$2,075.92 on or before December 31, 2009. Appellant was also required to pay appellee's attorney's fees—that appellant contends were incurred in connection with the contempt proceedings in the amount of \$3,700—as a further condition of the purge.

{¶13} Appellant filed a motion to stay in the trial court. The magistrate granted appellant's motion upon the condition that appellant file a supersedeas bond in the amount of \$66,241.92. In a judgment entry dated July 14, 2010, this court granted, in part, appellant's motion to modify the stay order of the trial court magistrate. This court stated that in order for the magistrate's decision to take effect, appellant must post a bond in the amount of \$60,158.92, cash or surety.

{¶14} Appellant filed a timely notice of appeal.

{¶15} Before we address appellant's assigned errors, we recognize the following:

{¶16} "When reviewing the propriety of a trial court's determination in a domestic relations case, an appellate court generally applies an abuse of discretion standard. *** This same standard is used in reviewing orders relating to alimony and a division of marital property. ***. 'Since it is axiomatic that a trial court must have discretion to do what is equitable upon the facts and circumstances of each case, it necessarily follows that a trial court's decision in domestic relations matters should not be disturbed on appeal unless the decision involves more than an error of judgment.' ***." *Cangemi v. Cangemi*, 8th Dist. No. 86670, 2006-Ohio-2879, at ¶8. (Internal citations omitted.)

{¶17} A trial court **abuses its discretion** when its judgment neither comports with reason nor the record of the case under review. See, e.g., *Letson v. McCardle*, 11th Dist. No. 2009-T-0122, 2010-Ohio-3681, at ¶21.

{¶18} As his first assignment of error, appellant alleges:

{¶19} “The trial court erred and abused its discretion in the division of property.”

{¶20} Under this assigned error, appellant presents three issues for our review. First, appellant argues that the trial court erred in awarding the entire Shearson retirement plan to appellee without making a finding as to its value. Second, appellant maintains that the trial court erred in making a \$20,000 distributive award to appellee. And, third, appellant alleges the trial court erred in failing to award the marital home to appellant.

{¶21} Appellant first argues that the trial court erred in failing to attach a value to the Shearson plan prior to making a distribution of the property. Appellee, on the other hand, maintains that she was awarded the Shearson plan, which provided for monthly payment options, not as a division of property but as spousal support and, therefore, the trial court was not required to place a present-day value on a stream of income.

{¶22} The magistrate’s decision is internally inconsistent with respect to the Shearson plan. First, the magistrate determined that the Shearson plan was a marital asset. Thereafter, the magistrate concluded:

{¶23} “Wife should be awarded the entire Shearson Plan which will provide her with approximately \$1,656 per month in income.

{¶24} “In addition to the Shearson income, it is reasonable and appropriate that Husband pay to Wife Spousal support in the amount of \$2,000 per month for a period of 8 years and 3 month.”

{¶25} At paragraphs 111 through 128 of her decision, the magistrate addresses the division of marital property, including awarding at paragraphs 111 and 114 the Shearson plan to appellee. In the decision portion of the magistrate’s award, spousal support is referred to only in paragraph 129, wherein the magistrate decided that appellant should pay appellee the sum of \$2,000 per month for eight years and three months. We therefore are unable to determine whether the Shearson plan was awarded as spousal support or as a division of marital property. An exhibit shows that the payments under the Shearson plan were to continue for a period of 10 years, but there is no indication what the present value of this asset may be.

{¶26} Appellant next argues that the trial court erred in allocating appellee a distributive award, as there was no separate property from which to make such an award.

{¶27} A “distributive award” is defined in R.C. 3105.171(A)(1) as “any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code.”

{¶28} “It is an award from separate property made in order to achieve equity, (1) to compensate a party for the financial misconduct of the other party; (2) to provide relief where it is impractical or burdensome to reach an equitable division comprised of

marital property alone; or (3) to effectuate, facilitate, or supplement the disbursement of marital property.” *Klein v. Cruden*, 2d Dist. No. 19952, 2004-Ohio-1479, at ¶15, citing Sowald, Morganstern, Domestic Relations Law (4th Ed. 2002) 578-579, Section 12:5.

{¶29} “If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.” R.C. 3105.171(E)(4). Further, before ordering a distributive award, the trial court is required to consider the statutory mandates of R.C. 3105.171(F).

{¶30} Here, the trial court found that appellant engaged in financial misconduct. In discussing its decision to make a distributive award, the magistrate stated:

{¶31} “[Appellant’s] excessive spending after the parties separated is financial misconduct. He spent extravagant amounts on himself for clothing, jewelry, restaurants, fitness clubs and dance lessons instead of spending it for [its] intended use (mortgage, car payments). He entered into an expensive lease/option to buy when the parties could not afford it. The repossession of [appellee’s] vehicle in October, 2008 is the direct result of Husband’s failure to pay her support.

{¶32} “***

{¶33} “[Appellee] is entitled to a distributive award of at least \$20,000 so she can purchase a vehicle.”

{¶34} Although the magistrate found that appellant engaged in financial misconduct, this court is unable to determine if a distributive award was appropriate. The magistrate’s decision indicates that the parties entered into numerous stipulations

with regard to property division. Attached to the magistrate's decision was an exhibit outlining inherited and premarital possessions of appellant, inter alia, a slate coffee table, a piano, a chandelier, a snow blower, and a gold pocket watch; however, no value was placed on any of these items. See, e.g., R.C. 3105.171(A)(6). Again, a distributive award is a payment made from "separate property or income," and, consequently, the amount of the distributive award, i.e., \$20,000, must be made from appellant's separate property. We therefore determine that based on the record, we cannot say it was an abuse of discretion to make a distributive award to appellee. However, this award must be made from appellant's separate property or income. Without a valuation of the only separate property designated in the record, we are unable to ascertain whether the amount of such award was proper.

{¶35} We note that a trial court may also consider whether one party had engaged in financial misconduct in determining whether an equal division of the marital assets would be inequitable. When a finding of financial misconduct has been made and there is no separate property, the proper remedy is not to compensate the offended spouse with a distributive award but to compensate the offended spouse with a greater award of marital property. R.C. 3105.171(E)(4).

{¶36} Appellant also contends that the trial court erred by not awarding him the marital home. Appellee agrees that the disposition of the marital home warrants clarification.

{¶37} The evidence presented reveals that as a consequence of a domestic violence civil protection order filed in April 2008, appellant agreed to make the mortgage and insurance payments on the real property while appellee continued to reside in the

home. Appellant failed to make timely payments and, consequently, a separate foreclosure action was instituted. The marital home was not expressly awarded to any party; however, appellant was ordered to pay the deficiency upon conclusion of the foreclosure proceedings.

{¶38} It is undisputed that the residence at 11720 Regents Park Drive, Chardon, Ohio, was the parties' marital home. Therefore, the trial court should have determined the disposition of the marital property. R.C. 3105.171(B).

{¶39} Appellant's first assignment of error is with merit to the extent indicated.

{¶40} Under his second assignment of error, appellant asserts:

{¶41} "The trial court erred and abused its discretion in making a spousal support award in favor of the appellee."

{¶42} The record is clear that appellee was awarded spousal support of at least \$2,000 per month beginning December 1, 2009, for eight years and three months. Appellant argues that the trial court failed to give proper weight to the following elements of R.C. 3105.18: (1) the income of the parties; (2) the ages and the physical, mental, and emotional conditions of the parties; and (3) the relative assets and liabilities of the parties, including, but not limited to, any court-ordered payments by the parties.

{¶43} R.C. 3105.18(C)(1) lists several factors for the trial court to consider when determining whether to award spousal support. R.C. 3105.18(C)(1) states:

{¶44} "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶45} “(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;

{¶46} “(b) The relative earning abilities of the parties;

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

{¶48} “(d) The retirement benefits of the parties;

{¶49} “(e) The duration of the marriage;

{¶50} “(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;

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

{¶52} “(h) The relative extent of education of the parties;

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

{¶54} “(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;

{¶55} “(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;

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

{¶57} “(m) The lost income production capacity of either party that resulted from that party’s marital responsibilities;

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

{¶59} We review a trial court’s grant of spousal support only for an abuse of discretion.

{¶60} The magistrate’s decision separately considered each of the above-mentioned facts and concluded that spousal support was warranted. Thereafter, the trial court adopted the findings of the magistrate.

{¶61} The trial court considered the income of the parties noting that appellee spent most of the marriage taking care of the parties’ five children. The trial court found appellee’s earning ability to be that of a minimum wage worker. The trial court determined that appellant earned over \$230,000 in 2008 and, before he was terminated from his employment, had a year-to-date income of \$61,328. Therefore, in addition to the bonuses he would have received, appellant would have earned approximately \$170,000 in 2009.

{¶62} The trial court noted that appellant is receiving unemployment compensation of \$372 per week; social security payments of \$2,066 per month; and disability benefits of \$1,448 per month. In his brief, appellant argues that disability benefits are not marital property subject to division. Although appellant’s assertion that disability payments are not subject to division is correct, the trial court did not attempt to divide the benefits, but merely considered appellant’s income from all sources as required by R.C. 3105.18(C)(1)(a).

{¶63} The trial court also considered the parties' health. Although the trial court enumerated appellant's health issues, it found they did not prevent him from being employed. In fact, appellant testified that had he not been terminated from his employment, he would have continued to work.

{¶64} Notably, the trial court in this case retained jurisdiction to modify or terminate the spousal support amount. Accordingly, the trial court did not abuse its discretion in awarding spousal support to appellee.

{¶65} Appellant's second assignment of error is without merit.

{¶66} Appellant's third assignment of error states:

{¶67} "The trial court erred and abused its discretion in finding that the appellant was in contempt of court for non-payment of temporary support and ordering a jail sentence."

{¶68} An exhibit of appellee indicates that an order of protection, assigned case No. 08 DV 0327, was filed on March 21, 2008. In that order, appellant was to pay appellee \$500 per week and pay all mortgage payments and utilities for the marital residence. That order remained in effect until March 21, 2009.

{¶69} A support order in this case was issued March 25, 2009. Pursuant to that agreed order, appellant was required to pay appellee temporary child support and spousal support of \$1,750 per month. After the minor daughter emancipated, the amount was reduced to \$1,250.

{¶70} Appellee filed a motion to show cause and for attorney's fees on May 14, 2009. In said motion, appellee stated that appellant had not complied with the agreed magistrate's order filed March 25, 2009.

{¶71} As we previously stated, the matters tried to the magistrate were appellant's complaint for divorce and his motion to modify temporary support, as well as appellee's motion to show cause. With respect to appellee's motion to show cause, the magistrate stated that appellant was ordered to pay temporary support in the domestic violence case of \$750 per week; that appellant's support obligation from April 17, 2008, through August 2009 is \$46,000; and that appellant has a balance of temporary support owed to appellee in the amount of \$34,825.

{¶72} Appellant was found guilty of contempt. Appellant's jail sentence was suspended provided appellant purge himself of contempt by paying appellee, after offset of taxes for 2005 and 2006, temporary support totaling \$2,075.92. Appellant was required to pay appellee's attorney's fees incurred related to the prosecution of the contempt action in the amount of \$3,700.

{¶73} Appellee's motion to show cause related solely to the temporary support order filed March 25, 2009. Further, while appellee may have introduced an exhibit of the civil protection order, the instant case and case No. 08 DV 0327 were not consolidated on appeal; thus, we do not have the record of case No. 08 DV 0327 for our review. Consequently, it was error for the trial court to issue an order in this case related to support obligations imposed upon appellant from April 17, 2008, in another case. The support order at issue in this case was not effective until March 25, 2009. If appellant was not paying the required temporary support in the domestic violence action, any judgment issued concerning the violation of *that* order should be resolved in *that* case. It appears no one has moved for consolidation of the two cases at the trial court level or on appeal. Although the record of that case is not before us, it is clear

there was a separate order and consequence that addressed appellant's conduct in that case. The magistrate found as a fact, at paragraph 73, that in that case appellant had "paid the \$750 spousal support payments sporadically and only as a result of contempt motions filed by [appellee]. Ultimately, [appellant] was sentenced to jail due to his failure to pay the household bills and the support."

{¶74} Additionally, this court is unable to ascertain whether the trial court abused its discretion when it ordered appellant to pay \$3,700 in attorney fees, at least a portion of which appears to have been incurred in case No. 08 DV 0327. Although the magistrate cites to appellee's exhibits, which are attorney fee statements, a review of the numerous invoices do not reveal what services were related to the contempt proceeding.

{¶75} Appellant's third assignment of error is with merit.

{¶76} Appellant's fourth assignment of error alleges:

{¶77} "The trial court erred and abused its discretion in its allocation of debt."

{¶78} Appellant alleges that the trial court abused its discretion in ordering appellant to pay for one-half of the marital debt, in addition to 70% of the IRS debt for tax years 2007 and 2008 and the Smith Barney debt totaling \$34,452.67.

{¶79} Trial courts have broad discretion in deciding appropriate property awards in divorce cases. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. "The equitable division of marital property necessarily implies the equitable division of marital debt. R.C. 3105.171(F)(2)." *Longo v. Longo*, 11th Dist. No. 2004-G-2556, 2005-Ohio-2069, at ¶109. As this court has observed, "equality of distribution, while a goal in many situations, must yield to concerns for equity." *Id.* at ¶111.

{¶80} The magistrate determined that the debt from Smith Barney was appellant's separate debt. At the hearing, the magistrate heard ample evidence regarding the debt from Smith Barney. The magistrate found that "[n]one of these funds [were] used to support [appellee] or the children or to pay legitimate marital bills. After depositing the money into his account, [appellant] bought an entertainment system, and he spent \$13,000 on jewelry and a Rolex watch for himself." Further, due to the fact that appellant was terminated almost immediately after payment of the advance to him by his employer, he was required to reimburse the monies. If appellant would have remained employed by Smith Barney for another five years, the advance would have been forgiven.

{¶81} The record supports the trial court's findings with respect to the Smith Barney debt. Appellant's testimony reveals that he spent \$6,842 on an entertainment system for himself; \$11,930 on a Rolex watch; \$1,000 on jewelry; \$3,300 on rent; and \$2,000 on clothing and cologne. Appellant further paid his attorney's fees with the money. Appellant did not present evidence that any of the advanced funds were used to pay marital debts or used to support appellee or their children.

{¶82} The parties owed an IRS debt of approximately \$15,000 for tax years 2007 and 2008. With respect to the 2007 and 2008 IRS debt, the magistrate ordered appellant to pay a large portion of the debt due to his failure "to withhold money from his paycheck for the payment of taxes, and [failure] to pay the taxes for those years even though he had the income to do so, (Wife had supplied him with copies of her W2s). As a result, there is additional debt due to penalties and interest."

{¶83} Although the debt may not have been divided equally, we find that the debt was divided equitably, based on the facts and circumstances of this case. Therefore, we do not find that the trial court abused its discretion. Appellant's fourth assignment of error is without merit.

{¶84} Appellant's fifth assignment of error states:

{¶85} "The trial court erred and abused its discretion in the award of attorney fees to appellee."

{¶86} Whether to award attorney fees to a party is within the trial court's sound discretion. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359.

{¶87} Pursuant to R.C. 3105.73(A), "[i]n an action for divorce *** or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate."

{¶88} In this case, the magistrate properly considered the factors outlined in R.C. 3105.73(A). The magistrate found that the only marital assets remaining were retirement assets and that appellant's conduct "unnecessarily prolonged court proceedings and protracted litigation thereby increasing [appellee's] attorney fees. *** [Appellant] was evasive with regard to certain accounts including the existence of an IRA which contained funds that had been rolled over from his Smith Barney 401(k) account." The magistrate also noted that appellant filed numerous motions to continue. And, further, appellee was required to file a contempt action and a motion to impose a

jail sentence, as appellant failed to comply with the court's temporary support order. The magistrate further determined that appellant, whose earning capacity is more than twice that of appellee's, had spent more than \$30,000 of marital money to pay his attorney's fees. Appellee's legal fees incurred in connection with the present litigation, not including the prosecution of the contempt action, exceeded \$43,000. Consequently, appellee was awarded attorney fees from appellant "in the amount of \$30,000 for legal services rendered in connection with the divorce. All other fees and expenses of the parties should be paid by the party incurring them."

{¶89} Appellant maintains that many of the services of appellee's attorney were rendered in connection with the domestic violence action and the subsequent appeal, and, therefore, the trial court erred in awarding fees for services not related to the divorce proceedings. Appellee submitted an exhibit, QQQ, outlining fees rendered by her counsel. The fees for services rendered from March 25, 2008, through September 14, 2009, totaled \$43,627.61. A review of appellee's exhibit reveals that while some of her attorney's fees incurred did not relate to the divorce proceeding at issue, the majority of appellee's attorney's fees were incurred as a result of appellant filing for divorce. Further, appellant's dissipation of a substantial portion of marital assets, which he in turn used to pay his legal fees, provides a sufficient reason to impose attorney fees. R.C. 3105.73(A). See, also, *Basham v. Basham*, 4th Dist. No. 06CA3085, 2007-Ohio-3941, at ¶29.

{¶90} Appellant's fifth assignment of error is without merit.

{¶91} Based on the opinion of this court, this matter is reversed and remanded for proceedings consistent with this opinion. On remand, the trial court should clarify

whether the Shearson plan was awarded to appellee as spousal support or as a division of marital property. If it was awarded as marital property, there must be some present value attributed to this asset. The trial court is further ordered to dispose of the marital home. With respect to the distributive award, the trial court should determine whether such an award is appropriate based on the valuation of appellant's separate property. If such an award is inappropriate, then the trial court should decide if it needs to give further consideration to a division of the marital assets. The trial court shall also revisit the issue of contempt, as any issues related to the civil domestic violence case are to be resolved under case No. 08 DV 0327, absent consolidation of the two cases at the trial court level or on appeal. Regarding the issue of contempt, the trial court shall also determine what portion of the \$3,700 awarded in attorney fees was related to the instant case and not to case No. 08 DV 0327. Since the cases were not consolidated, the attorney fee issue may have been resolved in that case. We do not have the record in that case before us, so there is no way for this court to know if the trial court abused its discretion with regard to these fees. Based on the record before us, only the portion of the \$3,700 fees that were incurred as a result of *this* case would be appropriate to include in the purge order.

DIANE V. GRENDALL, J.,

CYNTHIA WESTCOTT RICE, J.,

concur.