[Cite as *Currey v. Currey*, 2010-Ohio-2936.]

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHEILA M. CURREY nka CLOSE Plaintiff-Appellant/Cross-Appellee -vs- JEFFREY D. CURREY Def.-Appellee/Cross-Appellant	JUDGES: Hon. W. Scott Gwin, P. J. Hon. William B. Hoffman, J. Hon. John W. Wise, J. Case No. 09 CA 13 O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 08 DR 84
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 24, 2010

APPEARANCES:

For Plaintiff-Appellant/Cross-Appellee	For Defendant-Appellee/Cross-Appellant
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Wise, J.

{¶1} Appellant Sheila M. Currey nka Close appeals the decision of the Holmes County Court of Common Pleas, Domestic Relations Division, which granted her a divorce from Appellee Jeffrey D. Currey. The relevant facts leading to this appeal are as follows.

{¶2} Appellant and appellee were married in Colorado on December 24, 1988. One child, now emancipated, was born as issue of the marriage in 1989. Both parties were employed throughout the marriage; appellant (age 45 at the time of divorce) is a bookkeeper for a trucking company, while appellee (age 59 at the time of divorce) is a self-employed carpenter.

{¶3} The parties became separated in March 2007. On September 30, 2008, appellant filed a complaint for divorce. Appellee filed an answer on October 25, 2008.

{¶4} The matter proceeded to a bench trial on June 3, 2009 and July 9, 2009. Much of the pertinent evidence at trial centered on the marital residence located on Township Road 257 in Millersburg, Ohio. The house was acquired by appellee in 1979 during a prior marriage. When appellee was divorced from his prior wife, she quitclaimed her interest in the house. This occurred in February 1983. When appellant and appellee were married in 1988, the house had a value of approximately $61,500.00 to $68,500.00, with a mortgage balance of $30,000.00. The home's value had increased substantially by the time of the parties' separation: the court found that as of November 2007, the house had a value of $228,000.00.

{¶5} On October 22, 1990, appellee's mother passed away. Appellee thereafter inherited the sum of $56,136.75 from his mother's estate. He did not produce bank

records documenting what account or accounts were used for depositing the inheritance monies. However, appellee maintained at trial that he paid down the mortgage on the marital residence in the amount of $21,304.00, using inheritance funds, at some point prior to January 4, 1993. Appellee also maintained that he used some of the inheritance proceeds to pay for remodeling expenses on the house, which took place in 1991 and 1992. Appellant testified that she assisted appellee in the physical work accomplished during the remodeling. A certified appraiser testified at trial that the value of the home increased by $45,000.00 related to the remodeling period of 1991-1992.

{¶6} In 2004, appellee contacted an attorney and executed a new warranty deed on the marital residence so as to add appellant's name to the deed. The parties stipulated that appellee executed a new deed in May 2004. At trial, appellee testified that he signed the deed because appellant threatened to leave him if he would not do so.

{¶7} On September 22, 2009, after hearing the evidence, the trial court issued a seventeen-page judgment entry, with findings of fact and conclusions of law, granting the parties a divorce.

{¶8} The court therein found, inter alia, that appellee had indeed received an inheritance and had used $21,304.00 to pay off the remaining mortgage balance in 1992. Furthermore, because the parties had jointly paid down the mortgage from $30,000.00 in 1988 to approximately $21,000.00 in 1992, appellant should receive credit therefor in the amount of $4,500.00 (one-half of $9,000.00). The court also found that appellee had used approximately $31,000.00 of non-marital funds to improve and remodel the marital residence, which had caused an increase in value of $45,000.00.

Accordingly, the court concluded appellant should be entitled credit for one-half of the $14,000.00 increase in value to the home based on the remodeling, or the sum of $7,000.00. However, the court additionally found that appellee did not have a true donative intent when he put appellant on the deed to the house in 2004; thus appellant's claim to an undivided half-interest in the house on that basis was rejected. The court found no additional "active appreciation" in the house had been established by appellant.

{¶9} The court therefore awarded the marital residence to appellee, with the proviso that he pay appellant the sum of $11,500.00, representing appellant's contribution of $4,500.00 in the 1988-1992 mortgage paydown and $7,000.00 in remodeling value, as discussed above.

{¶10} In regard to additional property division, the trial court awarded appellee his life insurance policy, the 2007 Chevrolet van, the 1995 Chevrolet Suburban, the 2006 Polaris Ranger, his Merrill Lynch account, his IRA, and various household/personal items. Appellant was awarded the 1999 Toyota RAV4 and various household/personal items. Appellant was ordered to pay via a QDRO the sum of $20,000.00 from her Merrill Lynch SEP account, with the remainder to remain in her ownership.

{¶11} The court also addressed the issue of marital debt as follows:

{¶12} "With respect to the distribution of debt, the Court has considered the testimony, Stipulations, exhibits and argument of counsel. The Court specifically finds that although wife had debt at the time the parties separated, she voluntarily elected to continue to spend money and incur additional debt as opposed to liquidating the debt at

hand, which she could have done, had she applied her resources accordingly. The Court further finds that the remaining debts she has accumulated has (sic) been accumulated by her during the parties' separation, at a time when neither side were contributing to the living expenses of the other. The Court finds it would be most equitable for wife to assume all debts in her name and husband to assume all debts in his name under these particular facts and circumstances, recognizing this will leave wife in a position where she has a greater debt to satisfy upon the termination of the marriage than does husband. The Court finds again that the largest single debt, the $30,000 owed on account of the daughter's college expenses, represents wife's obligation which she charged, and for which husband paid an identical amount and incurred no debt." Divorce Decree at 16.

{¶13} Finally, no spousal support was awarded to either party.

{¶14} On October 22, 2009, appellant filed a notice of appeal. She herein raises the following five Assignments of Error:

{¶15} "I. THE TRIAL COURT'S (SIC) ABUSED ITS DISCRETION WHEN IT FOUND, CONVERSE TO THE MANIFEST WEIGHT OF THE EVIDENCE, THAT APPELLEE REDUCED THE MORTGAGE ON THE RESIDENCE LOCATED AT 4800 TOWNSHIP ROAD 257 IN MILLERSBURG, OHIO BY APPROXIMATELY $21,000.00 FROM HIS SEPARATE, NON-MARITAL INHERITANCE.

{¶16} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DETERMINED AGAINST THE MANIFEST WEIGHT OF [THE] EVIDENCE THAT APPELLEE DID NOT GIFT THE RESIDENCE LOCATED AT 4800 TOWNSHIP ROAD 257 IN MILLERSBURG, OHIO TO APPELLANT.

{¶17} "III. THE TRIAL COURT'S DECISION THAT IMPROVEMENTS, WHICH INCREASED THE VALUE OF THE HOME LOCATED AT 4800 TOWNSHIP ROAD 257 IN MILLERSBURG, WERE PAID FOR BY APPELLEE'S SEPARATE, NON-MARITAL FUNDS, WAS AGAINST THE MANIFEST WEIGHT OF [THE] EVIDENCE AND AN ABUSE OF THE COURT'S DISCRETION.

{¶18} "IV. THE TRIAL COURT'S DECISION THAT APPELLANT WAS ENTITLED TO $11,500 AS HER ACTIVE APPRECIATION IN THE HOME LOCATED AT 4800 TOWNSHIP ROAD 257 IN MILLERSBURG, OHIO WAS AGAINST THE MANIFEST WEIGHT OF [THE] EVIDENCE AND AN ABUSE OF THE COURT'S DISCRETION.

{¶19} "V. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ALLOCATING CERTAIN CREDIT CARD DEBT, ALTHOUGH INCURRED DURING THER (SIC) TERM OF THE MARRIAGE, IN AN INEQUITABLE AND UNEQUAL MANNER."

{¶20} Appellee has filed a cross-appeal, and herein raises the following sole Assignment of Error for said purpose:

{¶21} "I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO AWARD DEFENDANT/HUSBAND SPOUSAL SUPPORT UPON THE PARTIES[']DIVORCE."

Appellant-Wife Appeal

I., II., III., IV.

{¶22} In her First, Second, Third, and Fourth Assignments of Error, appellant argues on various bases that the trial court's orders regarding the marital residence constituted an abuse of discretion. We disagree.

{¶23} An appellate court generally reviews the overall appropriateness of the trial court's property division in divorce proceedings under an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. Generally, a judgment supported by competent and credible evidence going to all the elements of the case must not be reversed by a reviewing court as being against the manifest weight of the evidence. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63. We further note the trier of fact is in a far better position to observe the witnesses' demeanor and weigh their credibility. See, e.g., *Taralla v. Taralla,* Tuscarawas App.No. 2005 AP 02 0018, 2005-Ohio-6767, ¶ 31, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶24} In sum, appellant challenges the trial court's conclusions that appellee paid down the approximately $21,000.00 remaining mortgage and added remodeling of approximately $31,000.00 with separate inheritance monies after his mother's death, that appellee did not intend to gift to appellant an interest in the marital home, and that appellant is entitled to just $11,500.00 for "active appreciation" to the home.

{¶25} We particularly note "[t]he commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." *Gerber v. Gerber,* Stark App.No. 2005CA00116, 2006-Ohio-1384, ¶ 9 f.n. 1, quoting R.C. 3105.171(A)(6)(b). Likewise, "[e]xcept as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." R.C. 3105.171(H).

{¶26} This Court has clearly expressed its reluctance to engage in piecemeal review of individual aspects of a property division taken out of the context of the entire award. See *Harper v. Harper* (Oct. 11, 1996), Fairfield App.No. 95 CA 56, citing *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 459 N.E.2d 896. Upon full review of the trial record, and viewing the award in its entirety, we do not find the trial court abused its discretion in assessing the testimony of the witnesses and in dividing the parties' marital residence. See *Koegel v. Koegel* (1982), 69 Ohio St.2d 355, 432 N.E.2d 206 (emphasizing that a trial court should be given wide latitude in dividing property between the parties).

{¶27} Accordingly, appellant's First, Second, Third, and Fourth Assignments of Error are overruled.

V.

{¶28} In her Fifth Assignment of Error, appellant maintains the trial court abused its discretion in allocating certain credit card debt. We disagree.

{¶29} Pursuant to R.C. 3105.171(B), "[i]n divorce proceedings, the court shall ... determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section."

{¶30} The gist of appellant's argument is that it was improper for the trial court to divide the debt so as to make appellant responsible for her credit card balances after the date of the parties' separation; appellant contends this effectively creates an alternative termination date of the marriage, to her prejudice. However, we note the record reveals the parties lived physically and financially separate and apart for more than two years prior to the decree of divorce, not contributing to each other's support during that time. Upon review, we find no abuse of discretion in the court's equitable finding, as set forth previously in our statement of the facts and case, that the credit card debts were the assumable liability of appellant, even if this resulted in an unequal property/debt division. Accordingly, appellant's Fifth Assignment of Error is overruled.

Appellee-Husband Cross-Appeal

I.

{¶31} In his sole Assignment of Error on cross-appeal, appellee/cross-appellant contends the trial court abused its discretion in declining to award him spousal support. We disagree.

{¶32} A trial court's decision concerning spousal support may only be altered if it constitutes an abuse of discretion. See *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83. An abuse of discretion connotes more than an error of law or judgment;

it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore, supra.*

{¶33} R.C. 3105.18(C)(1)(a) through (n) provides the factors that a trial court is to review in determining spousal support:

{¶34} "(C)(1) 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:

{¶35} "(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; (b) The relative earning abilities of the parties; (c) The ages and the physical, mental, and emotional conditions of the parties; (d) The retirement benefits of the parties; (e) The duration of the marriage; (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; (g) The standard of living of the parties established during the marriage; (h) The relative extent of education of the parties; (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties; (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; (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; (l) The tax consequences, for each party, of an award of spousal support; (m) The lost income production capacity of either party that resulted from that party's marital responsibilities; (n) Any other factor that the court expressly finds to be relevant and equitable."

{¶36} Appellee/cross-appellant points out that the marriage in this case lasted approximately twenty-one years, and that appellee is approximately fifteen years older than appellant. Appellee submitted that he expected to earn about $20,000.00 in net income as a self-employed carpenter, while appellant testified that her annual income is approximately $52,000.00. Appellee maintains that he will lose his health insurance, even as he moves into his sixties and has to deal with a purported knee problem, but appellant will keep her plan via her employer. Appellee also directs us to the trial court's conclusion that the parties enjoyed a comfortable lifestyle during the marriage, owning recreational items like a boat and snowmobiles, as well as taking numerous vacations to western States. Appellant responds, in part, that appellee's financial affidavit listed monthly expenses which were $600.00 to $700.00 more than his asserted monthly income, and that appellee signed a loan application in 2007 stating his income was $60,000.00. See Tr. at 91.

{¶37} We note that while R.C. 3105.18(C)(1) does set forth fourteen factors the trial court must consider in reviewing spousal support, if the court does not specifically address each factor in its order, a reviewing court will presume each factor was considered, absent evidence to the contrary. *Carroll v. Carroll,* Delaware App.No. 2004-CAF-05035, 2004-Ohio-6710, ¶ 28, citing *Watkins v. Watkins,* Muskingum App. No. CT 2001-0066, 2002-Ohio-4237, (additional citations omitted). In this instance, the court

heard the evidence and determined, inter alia, that neither party has an inability to seek employment, and, upon review of the record, we are unpersuaded that the court abused its discretion in declining to award spousal support to appellee under the facts and circumstances of this case.

{¶38} Accordingly, appellee's sole Assignment of Error on cross-appeal is overruled.

{¶39} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Holmes County, Ohio, is affirmed.

By: Wise, J.

Gwin, P. J., and

Hoffman, J., concur.

/S/ JOHN W. WISE_____

/S/ W. SCOTT GWIN_____

/S/ WILLIAM B. HOFFMAN_____

JUDGES

JWW/d 525

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SHEILA M. CURREY NKA CLOSE	:	
Plaintiff-Appellant/Cross-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JEFFREY D. CURREY	:	
Defendant-Appellee/Cross-Appellant	:	Case No. 09 CA 13

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, Holmes County, Ohio, is affirmed.

Costs to be split evenly between appellant and appellee.

/S/ JOHN W. WISE

/S/ W. SCOTT GWIN

/S/ WILLIAM B. HOFFMAN

JUDGES