

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CHRISTINE BEVARD	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2009-CA-00107
ROBERT BEVARD	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Licking County Court of Common Pleas, Domestic Relations Division, Case No. 2006DR01714

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 3, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Gwin, P.J.

{¶1} Defendant-appellant Robert Bevard appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Licking County, Ohio, which granted a divorce to appellant and plaintiff-appellee Christine Bevard, and divided the parties' assets and debts. Appellant assigns six errors to the trial court:

{¶2} "I. THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING PLAINTIFF-APPELLEE A SEPARATE PROPERTY INTEREST IN THE TENNESSEE SETTLEMENT AFTER IT HAD DETERMINED THAT THE CLAIMED SEPARATE PROPERTY INTEREST COULD NOT BE TRACED.

{¶3} "II. THE TRIAL COURT ERRED IN ITS DISTRIBUTION OF DEFENDANT-APPELLANT'S BENEFIT FROM THE STATE TEACHER'S RETIREMENT SYSTEM BY FAILING TO INCLUDE DEFENDANT'S APPELLANT'S (SIC) SURVIVORSHIP INTEREST IN THE BALANCE SHEET.

{¶4} "III. THE TRIAL COURT ERRED BY CLASSIFYING CERTAIN DEBTS AS 'MARITAL' THAT WERE INCURRED BY PLAINTIFF-APPELLEE AFTER THE DEFACTO ENDING DATE FOR THE MARRIAGE OF THE PARTIES.

{¶5} "IV. THE TRIAL COURT COMMITTED AN ERROR BY CLASSIFYING APPRECIATION ON DEFENDANT-APPELLANT'S PRE-MARITAL REAL ESTATE AS 'MARITAL PROPERTY' WHERE THERE WAS NO EVIDENCE THAT THE APPRECIATION WAS THE RESULT OF ANY LABOR OR OTHER CONTRIBUTION OF THE PARTIES DURING THE MARRIAGE.

{¶16} “V. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED AN ERROR WHEN IT FAILED TO CREDIT DEFENDANT-APPELLANT’S TRACEABLE SEPARATE PROPERTY INTEREST.

{¶17} “VI. THE TRIAL COURT ERRED BY ORDERING MARITAL PERSONAL PROPERTY TO BE DIVIDED AND ALLOCATED BY COIN FLIP WITHOUT FURTHER CLARIFICATION.”

{¶18} The record indicates the parties were married on February 10, 1999, and produced no children. The court conducted a lengthy trial and entered the original judgment on March 27, 2009. After sustaining a motion for new trial, the trial court conducted another hearing and modified some of its findings regarding the property division.

{¶19} The court found the marriage ended on October 3, 2006, when the parties physically and financially separated. The trial court found the parties are owners of several parcels of real estate. At trial, the parties testified about the separate and marital aspects of each piece of property. The trial court found despite what it characterized as counsels’ “herculean” efforts to organize and present evidence regarding separate property tracing, often neither of the parties simply could not meet the preponderance of evidence burden. The court found the parties presented conflicting, confusing and unreliable evidence, and much of the evidence regarding tracing is not credible. The parties’ real estate and real estate investments had been so merged and comingled during the marriage that the court found it was nearly impossible to clearly and equitably determine any separate property interest. Particularly with regard to a real estate investment in the state of Tennessee, the court found it was

nearly impossible to trace the parties' individual funds that were invested and withdrawn.

{¶10} The court expressed doubt that even the accounts that on their face appeared to be in the plaintiff's name were funded by non-marital assets. Both parties presented their individual theories regarding tracing their individual rights in the comingled assets, but the court found the evidence was often conflicting and/or insufficient. The court concluded that under the circumstances of the case, it was required to do what was fair and equitable.

{¶11} The trial court discussed the fair market value, the marital value, the separate property in trust, and the mortgage encumbrances of each of the seven properties. Appellant owned several of the properties prior to the marriage. Appellee testified she had contributed both money and in-kind investment into the properties appellant owned prior to the marriage.

{¶12} The court also evaluated the parties' retirement benefits. It computed the marital share of appellant's State Teachers Retirement System account and retained jurisdiction over the STRS pension. The court declined to include the Social Security benefits of the parties given the parties' ages, the relatively short duration of the marriage, and the length of time before any payout might occur. The court awarded the parties any and all financial accounts held in their own individual names free and clear of each other. The court found appellant had cashed in a \$50,000 CD for his own purpose, even though it was appellee's separate property. The court allocated this misappropriated asset in its analysis.

{¶13} The court found the case presented one of the most difficult marital/separate property determinations it had ever reviewed. The parties were mature adults who had been previously married and came into the marriage with separate property and assets. Appellee had separate property, inheritance, personal injury assets, while appellant had substantial separate property assets. The court found the parties had comingled all their property and assets and had pooled their assets for marital use. The court declined to speculate regarding the tracing issues, and found its asset and debt distribution in the case was equitable if not equal. The court totaled the asset and debt distribution, and found appellant received \$10,017.00 more than appellee. The court ordered an equalization payment of \$5,008.50 to be paid in a lump sum to appellee to equalize the property division. The court found spousal support was inappropriate, and did not order any spousal support to either party. The court ordered each party to pay the attorney fees he or she had incurred.

{¶14} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142, 541 N.E.2d 1028. The Supreme Court made the abuse of discretion standard applicable to property divisions in *Martin v. Martin* (1985), 18 Ohio St. 3d 292, 480 N.E.2d 1112, wherein the court affirmed a distribution of approximately 64% of the property to the husband. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for

that of the trial court, *Pons v. Ohio State Med. Board*, 66 Ohio St.3d 619, 621, 1993 - Ohio- 122, 614 N.E.2d 748.

{¶15} A trial court must first establish the value of the individual marital assets, but has broad discretion to develop some measure of value. *Berish v. Berish* (1982), 69 Ohio St. 2d 318, 432 N.E. 2d 183. The trial court is not required to use any particular evaluation method, but must make its own determination as to the value of the property based on the evidence presented. *James v. James* (1995), 101 Ohio App. 3d 668, 656 N.E. 2d 399. However, our review of a property division must be based upon the totality of the circumstances. *Briganti v. Briganti* (1984), 9 Ohio St. 3d 222, 459 N.E. 2d 896. Unless the trial court has abused its discretion, this court must defer to the court's findings.

{¶16} The determination whether a witness is credible, and the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact, and this court may not substitute its judgment for that of the finder of fact. *State v. Awan* (1986), 22 Ohio St. 3d 120, 489 N.E. 2d 277, citing *Season Coal Company v. Cleveland* (1984), 10 Ohio St. 3d 77, 461 N.E. 2d 1273 and *Henkle v. Salem Manufacturing Company* (1883), 39 Ohio St. 547. If there are inconsistencies in the testimony offered at trial, the trier of fact is free to believe or disbelieve any or all of the evidence presented. *State v. Pilgrim*, 184 Ohio App. 3d 675, 2009-Ohio-5357, 922 N.E. 2d 248, at paragraph 34.

{¶17} The trial court found the parties' financial dealings were so comingled and convoluted it was difficult to trace separate property with any accuracy, and the parties' testimony was so conflicting, and so dubious, that the court determined it was

appropriate to divide the property equitably. The court made findings regarding separate property where it could, and included the findings in its calculations.

{¶18} This court may not conduct a piece meal appeal regarding particular real estate parcels or funds. Nor can we find here that the trial court's evaluation of the credibility and weight of the evidence is misplaced. The trial court divided the assets equally, and this court cannot say the court abused its discretion.

{¶19} The first assignment of error is overruled.

II.

{¶20} In his second assignment of error, appellant argues the court failed to include appellant's survivorship interest in the STRS account in the balance sheet dividing the property. The trial court determined only 22% of the STRS account was a marital asset. The pension was in pay-out status.

{¶21} We have reviewed the record in light of the Supreme Court's mandate to restrict ourselves to the totality of the facts and circumstances, and to apply the abuse of discretion standard. We find the trial court did not err in its computation and division of the parties' retirement benefits. The value of the asset was not clearly established by the evidence at trial, and the trial court did not err in awarding appellee one-half of what it determined to be the marital portion. The trial court also awarded appellee the survivorship benefit, which appellant argues should be included in appellee's total award rather than awarded separately. We find, however, on the record before us, the property division of the trial court is equitable, and does not constitute abuse of discretion.

{¶22} The second assignment of error is overruled.

III.

{¶23} In his third assignment of error, appellant argues the court classified certain debts as marital, but they were actually incurred by the appellee after the defacto ending date of the marriage. The trial court gave appellee credit for \$13,000.00 worth of debt she incurred after filing for divorce, a portion of which appellant states went toward appellee's attorney fees and legal expenses. Appellant argues this is tantamount to requiring him to pay half of appellee's legal fees, even though the court directed the parties should each pay their own.

{¶24} Appellee concedes the trial court did use different dates to determine debts and the value of assets, but urges the court can do so in the exercise of its discretion. She also argues at least some of the debt at issue was incurred for repairs to one of the parties' parcels of real estate.

{¶25} We find the trial court did not abuse its discretion in its evaluation of the parties' assets and debts.

{¶26} The third assignment of error is overruled.

IV.

{¶27} In his fourth assignment of error, appellant argues the court classified some appreciation on his pre-marital real estate as marital property, but there was no evidence the appreciation was a result of any labor or other contribution of the parties during the marriage. As stated in I, supra, the trial court allocated certain items as separate property, but found that much of the evidence was not credible or did not rise to the level of proof necessary. The court chose instead to divide the property equitably, and we find no error therein.

{¶28} The fourth assignment of error is overruled.

V.

{¶29} In his fifth assignment of error, appellant argues the court abused its discretion when it did not credit him with his traceable separate property interest. Again, the trial court is the finder of fact, and is free to believe all, some, or none of the testimony regarding any particular asset. The trial court found in general neither party was able to credibly trace their property from its separate to its comingled state. We find the trial court did not err in its conclusions, and did not abuse its discretion in not crediting appellant with more separate property.

{¶30} The fifth assignment of error is overruled.

VI.

{¶31} In his sixth assignment of error, appellant argues the trial court erred in ordering the personal property be divided by a coin flip.

{¶32} The trial court directed the parties to divide any personal property, and if they cannot agree, they should flip a coin in the presence of witnesses to determine ownership. Appellant argues this order does not address the parties' separate property dispute with respect to the personal property and household goods. Appellant also argues there is no indication as to how the coin flip was to resolve the dispute.

{¶33} The record indicates most of the personal property had been divided by agreement of the parties. The record does not disclose that this method was actually used to divide any goods, nor does appellant's suggest the division ended up with a disparate result. We conclude appellant has not demonstrated the trial court erred in entering this order.

{¶34} The sixth assignment of error is overruled.

{¶35} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Licking County, Ohio, is affirmed.

By Gwin, P.J., and

Delaney, J., concur

Hoffman, J., concurs in part;

dissents in part

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

Hoffman, J., concurring in part and dissenting in part

{¶36} I concur in the majority's analysis and disposition of Appellant's first, fourth and fifth assignments of error.

{¶37} I dissent from the majority's disposition of Appellant's second assignment of error. The majority finds the value of the asset [Appellant's STRS account and/or Appellee's survivorship benefit] was not clearly established by the evidence at trial. I disagree.

{¶38} I find Trial Exhibit 12 and Appellant's Exhibit LLL provided sufficient evidence to establish value. Because of Appellant's election of a joint and survivor annuity rather than a single life annuity, Appellee received a survivorship benefit from Appellant's pension. This Court has previously held a former spouse's survivorship interest in retirement benefits has some value despite the fact the interest may never be realized. *Blackledge v. Blackledge*, 2004-Ohio-2086. In *Alexander v. Alexander*, 2009-Ohio-5856, the appellate court found the trial court abused its discretion by excluding survivorship interest in a pension plan from the marital balance sheet. The fact the trial court's overall property division was equitable does not render necessarily harmless error in the valuation of an individual asset used in that equitable division.

{¶39} Accordingly, I would sustain Appellant's second assignment of error.

{¶40} I further dissent from the majority's disposition of Appellant's third and sixth assignment of error without further opinion.

HON. WILLIAM B. HOFFMAN

