

[Cite as *Stephens v. Stephens*, 2010-Ohio-4964.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TRACY STEPHENS	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellant	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ADRIAN STEPHENS	:	Case No. 2009CA00295
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas,
Domestic Relations Division, Case No.
2009DR00126

JUDGMENT: Affirmed/Reversed in Part & Remanded

DATE OF JUDGMENT ENTRY: October 12, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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Farmer, J.

{¶1} On September 22, 2007, appellant, Tracy Stephens, and appellee, Adrian Stephens, were married. One child was born as issue of the marriage. On February 4, 2009, appellant filed a complaint for divorce.

{¶2} A hearing commenced on October 27, 2009. By final entry decree of divorce filed November 3, 2009, the trial court ordered shared parenting, did not award appellant spousal support, and issued orders relative to the marital residence.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING SHARED PARENTING FOR THE PARTIES MINOR CHILD."

II

{¶5} "THE COURT ERRED AND ABUSED ITS DISCRETION IN NOT AWARDING SPOUSAL SUPPORT TO THE WIFE."

III

{¶6} "THE COURT ERRED AND ABUSED ITS DISCRETION IN ORDERING THE WIFE TO SELL THE MARITAL HOME AND PAY THE HUSBAND ALL OF THE EQUITY AS HIS SEPARATE PROPERTY."

I

{¶7} Appellant claims the trial court abused its discretion in ordering shared parenting because neither party requested it. We agree.

{¶8} The trial court found shared parenting was in the best interest of the child. However, the threshold issue is whether a trial court can order shared parenting when neither party requested it. In *Kish v. Dobos*, Delaware App. No. CAF 10 0058, 2009-Ohio-4895, ¶39-40, this court found it could not:

{¶9} "In *Torch v. Torch* (June 19, 1996), Tuscarawas App.No. No. 95AP060041, 1996 WL 363429, we held as follows: 'The thrust and philosophy of the shared parenting scheme in Ohio is to permit the parents to participate jointly in determining a satisfactory plan that is livable to *all* parties. By statute, the legislature placed the responsibility of proposing a shared parenting plan on the parties, not the trial court. A trial court is not given the authority to force shared parenting when none has been requested.' (Emphasis in original). See, also, *Stalaker v. Stalaker* (Dec. 20, 1999), Stark App.No.1999CA00059, 2000 WL 1676.****"

{¶10} R.C. 3109.04 governs allocation of parental rights and responsibilities and shared parenting. Subsections (A)(1), (D)(1)(a), and (G) state the following, respectively:

{¶11} "(A) In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and responsibilities for the care of a child, upon hearing the testimony of either or both parents and considering any mediation report filed pursuant to section 3109.052 of the Revised Code and in accordance with sections 3127.01 to 3127.53 of the Revised Code, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. Subject to division (D)(2) of this section, the court may allocate the parental rights and responsibilities for the care of the children in either of the following ways:

{¶12} "(1) If neither parent files a pleading or motion in accordance with division (G) of this section, if at least one parent files a pleading or motion under that division but no parent who filed a pleading or motion under that division also files a plan for shared parenting, or if at least one parent files both a pleading or motion and a shared parenting plan under that division but no plan for shared parenting is in the best interest of the children, the court, in a manner consistent with the best interest of the children, shall allocate the parental rights and responsibilities for the care of the children primarily to one of the parents, designate that parent as the residential parent and the legal custodian of the child, and divide between the parents the other rights and responsibilities for the care of the children, including, but not limited to, the responsibility to provide support for the children and the right of the parent who is not the residential parent to have continuing contact with the children.

{¶13} "(D)(1)(a) Upon the filing of a pleading or motion by either parent or both parents, in accordance with division (G) of this section, requesting shared parenting and the filing of a shared parenting plan in accordance with that division, the court shall comply with division (D)(1)(a)(i), (ii), or (iii) of this section, whichever is applicable.

{¶14} "(G) Either parent or both parents of any children may file a pleading or motion with the court requesting the court to grant both parents shared parental rights and responsibilities for the care of the children in a proceeding held pursuant to division (A) of this section. If a pleading or motion requesting shared parenting is filed, the parent or parents filing the pleading or motion also shall file with the court a plan for the exercise of shared parenting by both parents. If each parent files a pleading or motion requesting shared parenting but only one parent files a plan or if only one parent files a

pleading or motion requesting shared parenting and also files a plan, the other parent as ordered by the court shall file with the court a plan for the exercise of shared parenting by both parents. The plan for shared parenting shall be filed with the petition for dissolution of marriage, if the question of parental rights and responsibilities for the care of the children arises out of an action for dissolution of marriage, or, in other cases, at a time at least thirty days prior to the hearing on the issue of the parental rights and responsibilities for the care of the children. A plan for shared parenting shall include provisions covering all factors that are relevant to the care of the children, including, but not limited to, provisions covering factors such as physical living arrangements, child support obligations, provision for the children's medical and dental care, school placement, and the parent with which the children will be physically located during legal holidays, school holidays, and other days of special importance."

{¶15} These statutes indicate that shared parenting implies a commitment of trust and respect from the parties for the shared parenting structure.

{¶16} Although we concede that appellee's argument is not without merit, we nonetheless find that absent a motion by either party for shared parenting, a trial court is not empowered to award it.

{¶17} Assignment of Error I is granted.

II

{¶18} Appellant claims the trial court erred in not awarding her spousal support. We disagree.

{¶19} An award of spousal support is in the trial court's sound discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64. 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.

{¶20} The parties were married on September 22, 2007, and the complaint for divorce was filed less than two years later on February 04, 2009.

{¶21} After considering the factors enumerated in R.C. 3105.18(C)(1), the trial court found spousal support was not appropriate. We concur with this conclusion.

{¶22} In its final entry decree of divorce filed November 3, 2009 at Finding of Fact No. 5, the trial court found the following regarding the parties' respective income:

{¶23} "The husband, age 32, is in good physical, mental and emotional health. He is a high school graduate and he is currently attending Stark State College with 72 hours completed. Husband is unemployed; he receives unemployment compensation of \$1,833.00 a month. He is laid off from the Timken Company as a machine operator.

{¶24} "The wife, age 33, is in good physical, mental and emotional health. She is also a high school graduate employed at SARTA as a coach operator earning \$32,526 annually. She has health benefits and retirement with PERS. The wife also receives \$385 a month in child support for a child not issue of this marriage. A third child also resides with her, however she receives no child support for that child.

{¶25} "The Court finds the husband's gross income to be \$21,966 and the wife's annual gross income to be \$32,526.***"

{¶26} Based upon the income figures, each party will have an equalized standard of living from their own employment. The marriage was less than two years.

The marital residence was ordered to be sold, and appellant was granted exclusive occupancy until it sold.

{¶27} Upon review, we fail to find that the trial court abused its discretion in failing to award appellant spousal support.

{¶28} Assignment of Error II is denied.

III

{¶29} Appellant claims the trial court erred in ordering the sale of the marital residence and ordering her to pay appellee \$29,306.00 from the equity as his separate property. We disagree.

{¶30} Pursuant to R.C. 3105.171(A)(6)(a)(ii):

{¶31} " 'Separate property' means all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

{¶32} "(ii) Any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage."

{¶33} Subsection (A)(6)(b) states, "[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."

{¶34} Appellant challenges the trial court's findings that the down payment on the marital residence was made from appellee's funds:

{¶35} "In his testimony, the husband claims that he contributed \$29,400 toward the down payment on the 40th Street property. He claims that the periodic lump sum payments into the CSE account were for the specific purpose of obtaining a down payment. He denies that he gifted these funds to the wife. The Credit Union account

statement for the period of time does show that deposits totaling \$29,390, which is consistent with the husband's testimony that he contributed \$29,400 toward the down payment. The account statement also indicates that on March 20th, 2007 a money order was paid out of the CSE account in the amount of \$29,305.68, which the Court finds was issued for the down payment on the 40th Street property. The subsequent deposit of a tax refund check in the amount of \$3,286 occurred on March 27th, after the down payment occurred. As such, the Court finds that the husband contributed the sum of \$29,305.68 toward the down payment of the marital residence from separate property funds. The Court finds that wife's separate property tax refund of \$3,286 went into her account one week later. The Court is unable to trace the continued existence of those funds.

{¶36} ****

{¶37} "The marital residence is to be sold. The cost of sale and outstanding taxes, the proceeds are to be given to the husband in the amount not to exceed his separate property down payment of \$29,306. In the unlikely event that the sale proceeds exceed that amount, any excess amount is to be divided equally between the parties.

{¶38} ****

{¶39} "The wife is granted the option of purchasing the marital residence by paying to the husband the sum of \$20,615 (representing the equity in the home available to pay his pre-marital contribution) and refinancing the home, removing the husband's liability. She is required to exercise this option within 60 days of this order,

otherwise the order to sell will control." November 3, 2009 Final Entry Decree of Divorce at Finding of Fact No. 9 and Conclusion of Law Home.

{¶40} The property was purchased on March 20, 2007, prior to the marriage. T. at 54. However, both parties were on the deed and mortgage. T. at 54-55.

{¶41} Appellee testified he gave his own premarital funds for the down payment to purchase the home. T. at 84. Plaintiff's Exhibit No. 27 included a money order for \$29,305.68 made out to the sellers that appellee testified came from deposits he made to the CSE Credit Union account. T. at 84, 86. Appellee testified none of the money was appellant's. T. at 86.

{¶42} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶43} We note the trial court ordered any equity over \$29,306.00 to be divided equally between the parties.

{¶44} Upon review, we find the trial court did not err in determining the stated amount was solely appellee's funds.

{¶45} Assignment of Error III is denied.

{¶46} The judgment of the Court of Common Pleas of Stark County, Ohio, Domestic Relations Division, is hereby affirmed in part and reversed in part.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES

SGF/sg

