

[Cite as *Lunger v. Lunger*, 2017-Ohio-9008.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JEANNE LUNGER)	CASE NO. 16 CO 0026
)	
PLAINTIFF-APPELLEE)	
)	
VS.)	OPINION
)	
JOHN RICHARD LUNGER)	
)	
DEFENDANT-APPELLANT)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Columbiana County, Ohio Case No. 2015 DR 162

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Barbara Plummer
1265 E. State Street
Salem, Ohio 44460

For Defendant-Appellant: Atty. Carl J. King
115 W. Lincoln Way
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: December 4, 2017

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WAITE, J.

{¶1} Appellant John Richard Lunger files this appeal arising out of a divorce decree granted to Appellant and Appellee Jeanne Lunger in the Columbiana County Court of Common Pleas. Appellant raises a single assignment of error relating to division of marital assets. Appellant contends Appellee committed financial misconduct which warranted an alternative division of marital assets in the final divorce decree. For the reasons that follow, Appellant’s assignment of error is overruled and the judgment of the trial court is affirmed.

Procedural and Factual History

{¶2} The parties were married on October 25, 2006. An incident of domestic violence occurred in January of 2014. A civil protection order was issued as a result and Appellant was ordered to leave the marital home. Appellant left with only his clothing and automobile in January of 2014. On April 24, 2015, Appellee filed for divorce in the Columbiana County Court of Common Pleas. Appellant filed his answer and counterclaim on June 1, 2015.

{¶3} On April 27, 2015, the trial court filed a journal entry setting forth temporary orders during the pendency of the divorce. Those orders restrained the parties, among other things, from, “[i]ncurring credit in the name of the other party or in the parties’ joint names, except for necessary food, housing, utilities, medical care and necessary transportation, or allowing a lien or loan to be placed against any of their real or personal property[.]” as well as from “[s]elling, damaging, destroying, or otherwise disposing of any of their real or personal property, including money (other

than regular income), of either party, or removing household goods and furniture from the marital residence[.]” (4/27/15 Magistrate Order, p. 1.)

{¶14} After he was forced to leave the marital residence in January of 2014, Appellant, who was employed full time, stopped paying all marital debts including all utilities and mortgage payments on the marital home. Appellee, who receives less than \$700 per month in Social Security Disability payments as a result of injuries sustained in a 2012 car accident, was unable to make any payments toward the parties’ mortgage and was forced to leave the home. She moved into an apartment in November of 2014. Appellee took a number of items with her into her new apartment. These included some marital property, property she owned prior to the marriage, and property she inherited from her mother. Appellee testified that she gave away the washer and dryer to the individuals who helped her move into the apartment, donated a number of items to her church, and sold some furniture to a friend, but that this friend never actually paid her for the furniture. Appellee also left a number of items of marital property in the house and backyard storage shed when she left. An action in foreclosure on the marital home was filed. This action was not defended, and the house and its contents were subsequently lost to foreclosure in late 2014 or early 2015.

{¶15} A contested divorce hearing was held on April 18, 2016. The magistrate issued a decision on May 9, 2016 finding that Appellant was employed and earning \$61,640 annually and that Appellee received \$686 per month from Social Security Disability and earned an additional \$200-\$300 per month by caring

for an elderly person. The magistrate determined that each party should retain the marital property currently in their possession, each should retain their own bank accounts and the vehicles in their possession along with any loans on these vehicles. The magistrate also concluded that each party was responsible for paying half of the IRS income tax debt which totaled over \$100,000 as a result of Appellant's failed business. Finally, the magistrate ordered Appellant to pay Appellee spousal support in the amount of \$1,000 per month for a period of 36 months commencing June 1, 2016.

{¶16} A transcript of the divorce hearing was filed and on May 23, 2016, Appellant filed his written objections to the magistrate's decision and on July 15, 2016, he filed a brief in support. On July 27, 2016, the trial court issued a judgment entry overruling Appellant's objections. The trial court adopted the magistrate's valuations of marital assets and liabilities and concluded that the evidence did not support a finding of financial misconduct on the part of Appellee.

{¶17} Appellant filed this appeal presenting a single assignment of error.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING THAT THE PLAINTIFF/APPELLEE DID NOT ENGAGE IN FINANCIAL MISCONDUCT [SIC] AND THUS NOT MAKING A DISTRIBUTIVE AWARD IN FAVOR OF THE APPELLANT [SIC] OR AN OFFSET TOWARDS APPELLANT'S [SIC] SPOUSAL SUPPORT [SIC] OBLIGATION.

{¶18} In his assignment of error Appellant contends the trial court erred when it held that Appellee committed no financial misconduct by selling and disposing of marital property.

{¶19} A trial court has broad discretion to make divisions of property in domestic relations matters. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998). In divorce proceedings, the trial court must classify property as marital or separate, determine the value of that property, and then divide the marital property equitably between the spouses. R.C. 3105.171(B).

{¶10} Parties in a divorce action are prohibited from dissipating assets during the marriage or while the divorce action is pending. R.C. 3105.171(E)(4) governs financial misconduct in domestic relations cases and states:

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.

{¶11} By the inclusion of the term “may” in R.C. 3105.171(E)(4), the decision regarding whether to compensate a party for the financial misconduct of the opposing party lies within the discretion of the trial court. *Oliver v. Oliver*, 5th Dist. No. 2012 AP 11 0067, 2012-Ohio-4389, ¶ 38. A trial court’s decision on this issue will not be reversed on appeal absent an abuse of discretion. The term “abuse of discretion”

implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶12} In order to find financial misconduct on the part of a party to a divorce, the record must show wrongdoing such that it interferes with a spouse's property rights and results in a profit to the wrongdoer, or that reflects some intentional act meant to defeat the nonoffending spouse's distribution of assets. *Jacobs v. Jacobs*, 4th Dist. No. 02CA2846, 2003-Ohio-3466. The trial court must look to the reasons behind the alleged conduct and determine whether the alleged wrongdoer profited from the activity or intentionally dissipated, destroyed, concealed, or fraudulently disposed of the other spouse's assets.

{¶13} Appellant cites to a number of cases in support of his contention that financial misconduct is always present when a spouse diminishes assets without knowledge or permission of the other spouse or where the timing of the dissipation of assets "may often demonstrate wrongful scienter." (Appellant's Brf., p. 5.) In *Hoffman v. Hoffman*, 10th Dist. No. 94APF01-48, 1994 WL 424998 (Aug. 11, 1994), the Tenth District held that a husband's support of his paramour's sole proprietorship, using liens on marital vehicles and credit card accounts which totaled in excess of \$40,000, was financial misconduct. Appellant cites this case for the proposition that diminishing marital assets without the other spouse's knowledge or permission amounts to financial misconduct. While failing to obtain permission or to inform a spouse of certain financial expenditures may be one factor in determining an act of financial misconduct, this alone will not suffice. In *Hoffman*, the husband put liens on

both his vehicle and his wife's and took out lines of credit to support his paramour's business, a business in which he had no interest. The husband also failed to pay marital debts, including mortgage and credit card debt. Instead, he funneled that money to his girlfriend's business. It was the combined effects of this behavior that lead the *Hoffman* court to determine that the husband had engaged in financial misconduct.

{¶14} Appellant also cites *Babka v. Babka*, 83 Ohio App.3d 428, 436, 615 N.E.2d 247 (1992) in support of his contentions. In *Babka*, the Ninth District upheld a finding of financial misconduct where the husband liquidated a marital account of approximately \$16,000, allegedly to pay marital bills, but without providing any accounting of the funds or bills paid. *Id.* The court determined that the husband was draining marital accounts in anticipation of a divorce action. We have held that when one spouse takes marital funds intended to pay for marital debt and, instead, hides the money for future personal use in anticipation of divorce, financial misconduct has occurred. *Carpenter v. Carpenter*, 7th Dist. No. 06-NO-331, 2007-Ohio-1238. In *Carpenter*, the wife regularly received cash from the husband from his pay which she would deposit into a joint account to pay marital debts. However, for approximately one and one-half years before filing for divorce, the wife began taking this money and depositing it in a separate bank account in her name only and to which her husband had no access. She also failed to pay marital debts, including the utilities and mortgage on the marital home which subsequently went into foreclosure. Wife intercepted all mail coming to the home in order to prevent her husband from

discovering that these bills were not being paid. We held that the wife, who was largely responsible for paying all the marital debt and was entrusted with the marital funds, committed financial misconduct clearly for her own profit by depositing marital funds in her own checking account without access by her spouse. *Id.* at ¶ 39.

{¶15} In contrast, the record before us supports the trial court's decision that no financial misconduct occurred. The facts here differ greatly from the cases on which Appellant relies. There is no evidence in this record that Appellee engaged in any conduct for her own profit or to intentionally deprive Appellant of any assets.

{¶16} The record here reveals that the parties had grossly disparate incomes, with Appellant earning approximately \$61,000 per year and Appellee receiving less than \$1,000 per month. Appellant was the party entrusted to pay the marital debts, including the utilities and mortgage on the marital home. He stopped paying these debts after his removal from the marital home following an incident of his domestic violence. Appellant testified at trial that he was living with his daughter and her four children and paying all of the expenses of his new household. (Tr., p. 93.) However, Appellant presented no evidence in support of that contention, nor does it appear that he is under any legal obligation to pay the debts of his daughter and her children.

{¶17} Moreover, when Appellant was forced to leave the marital home due to his violent conduct, he elected to take only his clothing and automobile. There was evidence at trial that while he attempted to modify the protection order, he failed to appear at the hearing. There is no evidence in the record that Appellant attempted to

legally return to or to contact the sheriff's department in order to visit the marital home in order to obtain any of his personal items.

{¶18} Appellant presented a list of items that he alleged were in the house when he left and that he claimed totaled more than \$70,000. The parties never had their personal property appraised. Appellant testified that he researched the items himself and valued them at purchase or replacement value, rather than fair market value. Moreover, Appellee testified that many items on Appellant's list were actually her separate property from her previous marriage, or items she had inherited from her mother. She also stated that certain items on Appellant's list had been removed from the household during their marriage. (Tr., pp. 29-37.)

{¶19} At hearing, Appellant failed to account for one and one-half years of income which he earned and during which he refused to pay the marital debts. There was no evidence that Appellant paid any marital bills. The record does reveal that the marital home was foreclosed for Appellant's failure to pay the mortgage. Evidence also shows that, despite having had the IRS debt reduced, Appellant failed to make payments on that debt, as well.

{¶20} As the trial court correctly noted, "[b]oth parties lost as a result of the foreclosure and neither party profited." (7/27/16 J.E., p. 7.) Although Appellee testified at length about items from the marital home which she gave away, attempted to sell, or left at the house, there is no evidence that Appellee profited by her actions in any way. When she received notice to leave the house due to its foreclosure, Appellee enlisted the help of members of her church to move her into an apartment.

In return, she gave them the washer and dryer. There is no evidence of the value of these items, although the trial court judgment entry indicates they had an approximate value of \$1,500. Appellee also testified that she gave old furniture to her church and left several items in the house and storage shed when she moved out. Appellant testified that Appellee ignored him when he attempted to ask about marital property, but there was no evidence he ever attempted to obtain any items from the home. Appellant failed to defend the foreclosure action, and it was this foreclosure that led to the loss of marital property, both real and personal.

{¶21} Appellee's behavior, even if it could be characterized as careless, hardly rises to the level of financial misconduct. There is no evidence to establish Appellee profited from her conduct and, in fact, the record reveals her monthly expenses far outweighed her income at the time of trial. Dissipation of assets does not automatically signify financial misconduct for the purposes of R.C. 3105.171(E)(4). Appellant, through his own conduct, caused the greater amount of dissipation of marital assets. Used furniture and other household items, although not formally appraised in anticipation of trial, possess a value typically far below that of the equity in a house. Allowing the marital home to go into foreclosure by willfully failing to pay the mortgage when he possessed the majority of the marital income and was specifically ordered to pay the debts did greater harm to the parties' financial situation than the loss of a few household goods. Moreover, the trial court granted Appellee three years of spousal support at \$1,000 per month but also divided the

\$100,000 IRS debt in half between the parties. Thus, it is clear Appellee has not profited by any behavior on her part.

{¶22} Based on the foregoing, we cannot conclude the trial court erred in failing to find Appellee committed financial misconduct. Appellant's assignment of error is overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.