

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

Denise L. Hook

Court of Appeals No. WD-09-059

Appellee/Cross-Appellant

Trial Court No. 2007DR0153

v.

Darrin R. Hook

DECISION AND JUDGMENT

Appellant/Cross-Appellee

Decided: September 3, 2010

* * * * *

Drew A. Hanna, for appellee/cross-appellant.

Robert E. Searfoss, III, for appellant/cross-appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from the June 22, 2009 judgment of the Wood County Court of Common Pleas, which found that shares of gifted stock and all of the traceable assets purchased with the liquidated shares were non-marital property. Upon consideration of the assignment of error, we affirm the decision of the lower court. Appellant, Darrin Hook, asserts the following single assignment of error on appeal:

{¶ 2} "The trial court committed prejudicial error by concluding, contrary to settled law and all competent evidence, that all shares of Pax Machine Works, Inc. were Plaintiff-Appellee's separate property, and for awarding it and all the property purchased from its liquidation solely to Plaintiff-Appellee."

{¶ 3} Appellee also filed a cross-appeal, but did not submit a brief and assignments of error.

{¶ 4} This divorce action, filed July 9, 2007, was resolved by a final hearing before a magistrate in 2008 and a final decision was rendered on January 21, 2009. The major assets of the family were the family home, valued at \$237,300, and 36.84 acres of farmland, valued at \$81,400, for a total of \$318,700. The parties owe \$274,311 in unpaid taxes and other debt for a total of \$425,180 of debt. Appellee alone was given stock in two family-owned companies, Pax Machine Works, Inc. and Pax Products, by her parents prior to and during her marriage. That stock was later liquidated and the \$3,035,461 in proceeds paid to appellee alone but deposited into the couple's joint bank account. An accountant testified that upon a review of the bank records, he could determine that the house and farmland and other assets of the couple were purchased and debt paid off with the money from the redeemed stock.

{¶ 5} The magistrate found that:

{¶ 6} "4. Most of the parties' assets were purchased from separate property received by [appellee] in the form of stock in a family business.

{¶ 7} "5. [Appellee] has tracked the source of the funds to buy the marital home to a stock redemption of this stock. * * *

{¶ 8} "* * *

{¶ 9} "7. Wife purchased the equipment for her business, the Camry, the Prius (which was demolished) and the pickup truck with the redemption of her separate stock money.

{¶ 10} "* * *

{¶ 11} "13. Wife purchased a new van, valued at approximately \$18,000.00 with her separate money from the family stock proceeds that went into a Lincoln Annuity."

{¶ 12} Because the magistrate found that the stock gifts and the money acquired from liquidating that stock had been used to purchase specific property, the magistrate awarded appellee the marital home and farmland, and all the appliances and fixtures.

{¶ 13} Appellant filed objections to the magistrate's decision on February 3, 2009. Appellant specifically objected to Item No. 4 arguing that: "The Magistrate found that '[appellee] redeemed stock and received approximately three million in the last 3-4 years.' It should be emphasized that this money was used by and fully benefited [appellant] and the entire family, too [sic]. The parties both established a standard of living, to which they had both become fully accustomed." Appellant was permitted to file an addendum to his objections on May 26, 2009, in which he cited to portions of the transcript to support his argument that the money appellee spent benefited the entire family.

{¶ 14} In its June 22, 2009 judgment the trial court adopted the factual findings of the magistrate and issued the same order regarding the division of property. The trial court judge noted the numerous objections filed by the parties and stated that he would address all of the points raised by the objections but not each individual objection. The trial court did not specifically address the issue raised by appellant about the liquidated stock being used to purchase marital property, but did adopt the findings and recommendations of the magistrate. Appellant filed an appeal from this decision on July 8, 2009.

{¶ 15} Appellant challenges the findings of fact made by the court and numbered 4, 5, 7, 13, and 22 and judgment entries numbered 5 and 8 related to the stock appellee received from her parents. He agrees that the Pax Products, Inc. stock was gifted prior to the marriage. However, he argues that the gifts of 19,889.2063 shares of Pax Machine Works, Inc. were given during the marriage and there was no evidence presented to prove that the gifts were intended to be given only to appellee.

{¶ 16} Appellant further argues that there was absolutely no evidence to support a finding that the stock shares were intended to be a gift to appellee alone and, because there is a presumption that all property acquired during the marriage is marital property, all of the assets that can be traced back to the liquidation of the stock are not separate property. Furthermore, he argues that all of the proceeds from the liquidated shares were deposited into the joint checking account and then spent directly or indirectly to benefit the family. The major asset of the couple was the real estate, which was titled in both of

their names. Finally, appellant argues that the additional gift of 14,331 shares given during the marriage but after the recapitalization of the stock, which were never liquidated, have never been accounted for in the property distribution.

{¶ 17} Appellee argues first that appellant waived his right to raise this assignment of error on appeal because he never made such an objection in the trial court to the finding that the stock was separate, non-marital property. Civ.R. 53(D)(3)(b)(iv) provides that a party waives the right to assign as error on appeal the court's adoption of a factual finding, with the exception of plain error, if he failed to make an objection to such finding in the trial court. Appellant objected to the magistrate's decision and argued that liquidated stock proceeds were treated like marital property and used to purchase marital property. On appeal, appellant asserts that with this "objection" he really intended to argue that there was insufficient evidence to support a finding that the stock proceeds were not marital property when the couple treated them like marital property. While this is a close case, we find that appellant has not waived the issue of the marital/separate property determination for purposes of appeal. However, appellant never objected to the findings of the magistrate to argue that some of the stock which was gifted during the marriage was never accounted for during the distribution and we will not address that issue on appeal.

{¶ 18} Generally, the trial court's determination of what constitutes an equitable division of the property will not be overturned on appeal unless the court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. However, the

determination of whether property is separate or marital involves a mixed question of law and fact and, therefore, is not a discretionary matter. Such matters are reviewed under a manifest weight of the evidence standard. *Schober v. Schober*, 6th Dist. No. OT-08-061, 2009-Ohio-4408, ¶ 26, citing *Murphy v. Murphy*, 4th Dist. No. 07CA35, 2008-Ohio-6699, ¶ 17. A trial court decision will only be reversed on appeal under the manifest weight of the evidence standard if it is not supported by some competent and credible evidence. *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 642, and *Schober v. Schober*, supra, at ¶ 27.

{¶ 19} Generally, the party claiming that an asset is separate property has the burden of proving the claim by a preponderance of the evidence. *Okos v. Okos* (2000), 137 Ohio App.3d 563, 570, and *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. However, R.C. 3105.171(A)(6)(a)(vii) provides that: "(a) '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: * * * (vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse." Because of the presumption that property acquired during marriage is marital property, R.C. 3105.171(3)(a)(i), this presumption can only be overcome with clear and convincing evidence. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 168. "'Clear and convincing evidence' means that degree of proof which will provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Id.*

{¶ 20} The party asserting that a gift was separate property bears the burden of showing an intention to make a separate gift—to benefit one spouse and exclude the other spouse from any rights and interest in the items as marital property. *Id.* at 169; *Kotch v. Kotch*, 178 Ohio App.3d 358, 2008-Ohio-5084, ¶ 30, citing *Marshall v. Marshall* (May 4, 2001), 2d Dist. No. 2000 CA 95; and *Tyulty v. Tyulty*, 9th Dist. No. 22022, 2004-Ohio-5198, ¶ 5-12.

{¶ 21} Appellant questions whether the testimony of appellee's father is sufficient evidence to meet the clear and convincing standard of proof. Appellant correctly notes that title alone is not sufficient evidence to determine if property is marital or separate. R.C. 3105.171(H). However, in this case, there was the additional testimonial evidence of appellee's father that the gifts of stock were always made to appellee alone. Furthermore, there is evidence that Pax Products, Inc. and Pax Machine Works, Inc. are family-owned businesses and the stock gifts were made to the Pax children for estate planning purposes.

{¶ 22} Appellant emphasizes that the proceeds from the stock were used for "marital purposes" and argues that this fact demonstrates that the stock gift was intended to be given to the couple. We disagree. The intention of the parents is not reflected in the use to which the recipient puts the gift. Appellant used the funds to purchase a home and business because she had no marital resources for such a purchase. Furthermore, appellant's argument actually concerns the doctrine of transmutation, which is no longer applicable in property division determinations if the separate status of property can be

traced. R.C. 3105.171(A)(6)(b) and *Adams v Adams*, 6th Dist. No. WD-09-022, 2009-Ohio-6257, at ¶ 48.

{¶ 23} The court found that this evidence was convincing proof that the gifts were intended to be separate property. Since there is some evidence to support the trial court's finding, we cannot find that the trial court's judgment was contrary to the manifest weight of the evidence. *Froham v. Froham*, 11th Dist. No. 2001-T-0021, 2002-Ohio-7274, ¶ 33.

{¶ 24} Appellant's sole assignment of error is not well-taken.

{¶ 25} Having found that the trial court did not commit error prejudicial to appellant and that substantial justice has been done, the judgment of the Wood County Court of Common Pleas is affirmed. Finding that appellee did not file a cross-appeal brief and assignments of error, the cross-appeal is hereby ordered dismissed pursuant to App.R. 18(C). Appellant is hereby ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.