

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

David K. Epperson

Court of Appeals No. WD-14-054

Appellee/Cross-Appellant

Trial Court No. 2013DR0008

v.

Grace I. Epperson

DECISION AND JUDGMENT

Appellant/Cross-Appellee

Decided: June 19, 2015

* * * * *

Martin J. Holmes, Sr., Matthew O. Hutchinson, and Frederic E. Matthews, for appellee/cross-appellant.

John L. Straub and Rebecca E. Shope, for appellant/cross-appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} This is an appeal and cross-appeal from the decision of the Wood County Court of Common Pleas, Domestic Relations Division, in which the trial court granted appellee/cross-appellant, David Epperson, a divorce from appellant/cross-appellee, Grace

Epperson. For the reasons that follow, the judgment of the trial court is affirmed, in part, and reversed, in part.

A. Facts and Procedural Background

{¶ 2} The relevant facts in this case, presented at trial, are as follows: David was born in a small town outside of Houston, Texas, on July 19, 1955. After his father died in 1976, David returned home and enrolled at Houston Baptist University, where he met Grace.

{¶ 3} Grace was born in Indonesia in 1952. After immigrating to the United States, she secured two baccalaureate degrees, one in natural sciences and the other in nuclear medicine technology. Grace finished her education in 1978, and proceeded to secure employment in the field of nuclear medicine.

{¶ 4} Grace and David were eventually married on June 8, 1979. After getting married, the couple moved to Guadalajara, Mexico, where David attended medical school. During this time, Grace taught English courses at the university level.

{¶ 5} While in Mexico, Grace and David had two children; Jennifer and David. Prior to having children, David and Grace considered whether Grace would continue to pursue a career in medicine or become a “full-time mom.” The couple chose the latter option and, upon Jennifer’s birth in 1982, Grace ceased working.

{¶ 6} Following medical school, the couple moved to Chicago so that David could finish his clinical training at Loyola University. Eventually, in 1987, the family moved to

Toledo where David began his anesthesia residency. While in Toledo, the couple had three more children; Jason, Jacob, and Jeremy.¹

{¶ 7} Eventually, the family moved to Gainesville, Florida, where David completed his anesthesia residency and began his pursuit of critical care medicine. The family returned to the Toledo area in 1991, ultimately purchasing a home in Ottawa Hills, Ohio. In 1994, the couple sold the home and purchased a 6,500-square-foot residence located at 4600 Brookside in Ottawa Hills, where they resided for the duration of their marriage.

{¶ 8} Since moving back to Toledo in 1991, David has worked as an anesthesiologist and critical care physician for a number of entities including Anesthesia Consultants of Toledo and Toledo Critical Care. In 2011, David reached an agreement to sell those practices to ProMedica Physician Group. David has been employed by ProMedica since selling his practices.

{¶ 9} The bulk of the family's income was generated from David's compensation. Specifically, David has earned between \$1,016,000 to \$1,270,000 in recent years. However, according to David, ProMedica began a cost-containment program in late-2013 that will result in a reduction in David's earnings. Moreover, David asserted that his earnings over the last two years were inflated because he received income from the sale of Anesthesia Consultants of Toledo and Toledo Critical Care. David testified that he

¹ All five children are emancipated.

does not expect to receive any further income from the sale of these practices. David was projected to earn \$1,150,000 in 2014.

{¶ 10} In order to maintain his current earnings, David is forced to work approximately 70 hours per week, although his schedule varies considerably week-to-week. At trial, David indicated that he does not wish to continue working such hours. In fact, David stated that he has wanted to cut back on the amount of hours he works for “a number of years.” During her testimony, Grace acknowledged that David works long hours, labeling him a “workaholic.” Until recently, staffing issues have prevented David from reducing his workload. However, David stated that ProMedica has begun to hire more doctors, which should allow him to scale back his workload.

{¶ 11} While David was kept busy at work during the course of the marriage, Grace was responsible for managing the household, including the family finances. The funds from David’s paychecks, which he received on an irregular basis from multiple entities, were directly deposited into a joint checking account at Signature Bank. Due to the irregular nature of their cash flow, David and Grace opened a line of credit at Signature Bank. The line of credit was subsequently paid off in December 2011. In addition to the Signature checking account, the parties also maintained a joint checking account at Schwab and a joint investment account at Schwab.

{¶ 12} Grace kept meticulous financial records in binders in a home office at the marital residence. She also maintained detailed financial records electronically using

Quicken software. The couple's accounts were readily available for review as Grace maintained login information for all online accounts in the home office.

{¶ 13} Throughout the course of the marriage, David and Grace participated in a variety of investments including, inter alia, a condominium in Tennessee for their children to occupy while in college and a home in Texas that was owned by Grace's brother, Timothy Winata, and leased to Grace's brother, Asher Winata. Regarding Grace's provision of funds for the purchase of the Texas condominium, Grace testified that David was consulted about the matter before the purchase was made. Grace stated that David was the one who suggested buying the residence so that her parents could move out of their previous home, which was deteriorating. However, Grace's parents refused to move. Consequently, Grace decided to remodel her parents' home so that they could remain there safely. Nonetheless, Grace still provided Timothy with the funds necessary to purchase the Texas condominium, thinking it was a "good buy." Grace testified that she showed David the loan documents and explained that Asher would be leasing the home instead of her parents. David did not object to the arrangement at that time. As of the date of trial, Timothy has repaid approximately \$75,000 towards Grace's total investment of \$117,771.

{¶ 14} In addition to the couple's real estate investments, Grace, along with her sister, Esther Charubhat, formed a toy business named Westside Kinder Toys, located in Houston, Texas. In forming the business, Grace contributed approximately \$200,000 and Esther contributed approximately \$100,000, plus an additional \$65,000 in available funds

from a line of credit. Three years after forming Westside Kinder Toys, Grace, along with Esther and Asher, opened an online toy business named Grow Smart Toys. At trial, Grace could not recall how much money she contributed to these businesses, but she acknowledged that the expenses of the businesses were paid using funds from the Signature joint checking account. However, the accountant for the businesses, Chuck Charubhat,² testified that the business currently owes Grace approximately \$257,000. He further stated that Westside Kinder Toys has operated at a loss every year since its inception. In light of the businesses' lack of profitability, Grace testified that she does not expect to be repaid the money she is owed. Further, Grace stated that she is no longer contributing money to the businesses.

{¶ 15} Concerning the toy businesses, David testified that he was not in favor of using family funds to support Grace's investments. David's reluctance to commingle family funds with the toy businesses was based upon a prior business investment that cost David, as well as several of his business partners, a significant sum of money. David testified that he was under the impression that the toy businesses were financed with local financing in Houston, not money from the family's bank account.

{¶ 16} In addition to running the toy businesses, Grace, who is licensed to sell insurance and securities, began to work as an agent for Northwestern Mutual in 2009. She was employed at Northwestern Mutual for approximately four years. During that time, Grace opened a personal bank account at Waterford Bank. As an agent with

² Chuck is Esther's husband and Grace's brother-in-law.

Northwestern Mutual, Grace was largely unsuccessful. Indeed, she only earned \$6,093 from 2009 through 2011, with expenses of \$48,244. At the close of David's case-in-chief, the parties stipulated to the admission of an occupational report prepared by Rod Durgin of Vocational Assessments, Inc. In his report, Durgin determined that Grace "retains the capacity to work full-time. She can expect to earn \$31,641 per annum."

{¶ 17} Also in 2009, Grace began to provide financial assistance to her parents. She stated that she discussed this practice with David prior to making the monetary gifts. In total, Grace provided her parents with \$21,263.80 from January 2009 through November 2013.

{¶ 18} Grace and David first discussed divorce and separation on Grace's birthday in September 2011. David subsequently sought legal advice concerning a divorce in December 2011. David eventually moved out of the marital residence in May 2012. After moving out of the marital residence, David leased a home in Waterville, Ohio, where he remained for one year.

{¶ 19} When he left the family residence in Ottawa Hills, David hired Two Men and a Truck to move his personal property to his home in Perrysburg, which required two trips with a U-Haul. David removed personal property from the home, which Grace estimated to be worth \$40,000-\$50,000. According to personal financial statements signed by both David and Grace and admitted at trial, the total value of the couple's personal property was \$300,000. Grace acknowledged that most of the personal property was still inside the home at 4600 Brookside as of the first day of trial.

{¶ 20} During the pendency of this case, David relocated from Waterville to a home on Hull Prairie Road in Perrysburg, Ohio. In order to secure residence at the Hull Prairie residence, David was forced to place a \$30,000 deposit on the home, which would be credited towards four months of rent or, in the event David decided to purchase the home, used as a down payment towards the purchase price. David eventually purchased the home with leave of the trial court, at a cost of \$620,000.

{¶ 21} After purchasing the home, David discovered several issues necessitating extensive repairs. Specifically, David discovered that the home was infested with flying squirrels, mice, and bees. Walls and flooring had to be removed in order to remediate the bee infestation. Further, electrical work was required as a result of the flying squirrels eating the electrical insulation throughout the home. Additionally, the heating system required replacement, a fact that was allegedly unknown to David when he purchased the home in the summer of 2013. The water filtration system at the home was also replaced.

{¶ 22} On January 22, 2013, David filed his complaint, seeking a divorce on the basis that the parties were incompatible. In his complaint, David alleged that he was an Ohio resident for at least 6 months and a resident of Wood County for at least 90 days immediately preceding the filing of the complaint. On that same day, the trial court entered its standard temporary restraining order, providing, in part,

that each spouse is enjoined from * * * selling, removing, transferring, encumbering, pledging, hypothecating, damaging, hiding, concealing, assigning or disposing of any and all property, real or personal, owned by

both or either spouse or a child (including household goods, vehicles, financial accounts or any deposits therein and the personal property of each) without the prior written consent of the spouse or the Court.

Excluded from this paragraph are expenditures made for the current necessary living costs of the parties or their children and expenditure from any business account made for current, ordinary and necessary business purposes * * *.

{¶ 23} At the time the complaint was filed, Grace was still managing the couple's finances. However, in late January 2013, David discovered that Grace had withdrawn \$50,000 from the joint checking account at Signature Bank and deposited the money into her personal account at Waterford Bank. Consequently, David opened a personal account at Signature Bank, and routed his compensation into that account instead of the joint account. Thereafter, David became actively involved in the management of the couple's finances.

{¶ 24} Grace filed her answer on March 20, 2013, denying that the parties were incompatible and denying David's allegation that he was a Wood County resident for 90 days immediately preceding the filing of the complaint.

{¶ 25} On April 10, 2013, David filed an amended complaint, once again asserting his residency in Wood County for "more than ninety (90) days immediately preceding the filing of [the] complaint." In addition to his allegation of incompatibility, David added an allegation that Grace was "guilty of gross neglect of duty and extreme cruelty."

{¶ 26} Subsequently, on May 8, 2013, Grace responded to David's amended complaint by filing an answer and cross-complaint for divorce. In her answer, Grace again denied David's allegations concerning residency and incompatibility. Further, she denied David's allegation concerning gross neglect of duty and extreme cruelty. Additionally, in her cross-complaint, Grace contended that she was entitled to a divorce based on her allegation that David was guilty of adultery. Grace's allegation of adultery was subsequently denied by David in a reply filed two days later.

{¶ 27} Seven months later, David filed a supplemental complaint, adding an additional basis for divorce, namely that the parties had "lived separate and apart without the benefit of cohabitation for a period of more than one year."

{¶ 28} After extensive discovery and motion practice, this case proceeded to trial on February 26, 2014. The four-day trial was ultimately completed on April 8, 2014, the court having heard testimony from Grace, David, and several other witnesses.

{¶ 29} On May 22, 2014, the trial court issued its decision, which was subsequently amended one week later, granting David's request for a divorce on the basis that David and Grace had lived separate and apart for more than one year. In its decision, the court examined several issues including spousal support, division and distribution of marital property, and attorney fees. The court also evaluated David's claim of financial misconduct related to Grace's investments in the toy businesses and Grace's provision of funds for the purchase of the Houston condominium.

{¶ 30} Concerning spousal support, the court awarded Grace \$14,000 per month. Additionally, the court ordered that the award of spousal support would increase to \$20,000 per month once the residence at 4600 Brookside is sold. The court’s award of spousal support was ordered to “continue subject to earlier termination upon [Grace’s] death, remarriage or cohabitation with another as if married without the benefit of ceremony, subject to review upon David’s retirement or further order of the court.”

{¶ 31} In its division of marital property, the court made several findings that are of note. First, the trial court concluded that the improvements David made to his Hull Prairie residence, amounting to \$187,788.71, would be considered a marital asset awarded to and owned by David. Second, the court determined that Timothy still owed Grace \$53,250 for the Texas condominium. Finding that the amount was likely to be repaid, the court awarded the receivable to Grace. Third, the court awarded Grace all of the couple’s personal property, which it valued at \$300,000. The court did not reduce the value of the personal property awarded despite David’s removal of personal property from the Brookside residence upon the couple’s separation. Finally, in dividing the marital estate, the court found that the \$257,299 note receivable from Westside Kinder Toys was a marital asset, but had no value given the business’s lack of profitability and the remote likelihood that the receivable would ever be repaid. Thus, the court did not count the receivable towards Grace’s distribution.

{¶ 32} Regarding the financial misconduct claims, the court concluded that Grace’s investment in the toy businesses did not amount to financial misconduct. In

support of its decision, the court noted that the investments were made several years prior to the parties' contemplation of divorce. Further, the court examined the parties' financial records and found that their prior tax returns made multiple references to the toy businesses. The court also denied David's financial misconduct claim concerning Grace's funding of the Texas condominium, reasoning that a large portion of Grace's investment had already been repaid and the remainder was likely to be repaid. Once again, this transaction occurred prior to the parties' contemplation of divorce.

{¶ 33} Finally, with respect to attorney fees, the court found that equity required David to pay Grace's attorney fees. The court reasoned that David possessed substantial income while Grace did not. Further, the court explained that Grace's marital assets, while substantial, were frozen in retirement accounts and were not liquid. Additionally, the court noted that David initiated the divorce proceeding, which Grace initially opposed on the basis of her convictions regarding the permanency of the marital covenant.

{¶ 34} Ultimately, the court ordered David to reimburse Grace for her attorney fees in the amount of \$115,844.47. In so doing, the court recognized Grace's attorney charged an hourly rate of \$430, an amount that exceeds the average hourly rate for a domestic relations attorney in northwest Ohio. Nevertheless, the court found that the experience, reputation, and ability of Grace's lawyer justified the higher rate. Further, the court concluded that Grace's attorney fees were reasonable and necessary.

{¶ 35} On July 8, 2014, the trial court entered its final judgment entry of divorce, which included, among other things, the findings discussed above. This appeal and cross-appeal followed.

B. Assignments of Error

{¶ 36} In her appeal, Grace raises the following assignments of error for our review:

1. The trial court committed reversible error in determining that certain of the “household furnishings,” which it awarded to Mrs. Epperson, had a value of \$300,000, and further erred in failing to compensate Mrs. Epperson for the value of the personal property removed by Dr. Epperson from the marital residence prior to trial.
2. The trial court committed reversible error in awarding Mrs. Epperson spousal support equal to less than 20% of Dr. Epperson’s income, which award was also inconsistent with evidence of Mrs. Epperson’s actual expenses and standard of living.
3. The trial court committed reversible error in failing to find that Dr. Epperson had committed financial misconduct through his specific violations of court orders and intentional conduct designed to deprive Mrs. Epperson of marital assets and income.

4. The trial court committed reversible error in failing to require Dr. Epperson to maintain life insurance with Mrs. Epperson as the beneficiary in order to guarantee payment of spousal support in the event of his death.

5. The trial court committed reversible error in failing to divide the health savings account between the parties.

6. The trial court committed reversible error in failing to award Mrs. Epperson unpaid interim spousal support.

{¶ 37} In addition, David has cross-appealed, raising the following assignments of error:

Assignment of Error No. 1: The trial court erred in finding that a note receivable in the sum of \$257,299 from Westside Kinder Toys was a marital asset with a value of zero dollars (\$0.00).

Assignment of Error No. 2: The trial court erred in finding that the value of Grow Smart Toys was “negligible” and awarding said business to Grace with a value of zero dollars (\$0.00).

Assignment of Error No. 3: The trial court erred in not making a financial misconduct finding as to the wife’s concealment and non-disclosure.

Assignment of Error No. 4: The trial court erred in awarding an unequal division of property by including \$187,788.71 that was expended to make David’s residence habitable.

Assignment of Error No. 5: The trial court erred in awarding attorney fees in the sum of \$115,844.47.

{¶ 38} For ease of discussion, we will address the parties' assignments of error out of order.

II. Analysis

A. Financial Misconduct

{¶ 39} In Grace's third assignment of error and David's third assignment of error, each party argues that the trial court erred in refusing to find the other party liable for financial misconduct during the pendency of the divorce proceedings.

{¶ 40} Under R.C. 3105.171(E)(4), a trial court may compensate an offended spouse with a distributive award or with a greater award of marital property if a spouse has "engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets." Similarly, R.C. 3105.171(E)(5) provides for compensation if a spouse has substantially and willfully failed to disclose marital property, separate property, assets, expenses, income, or debt. The burden of proving financial misconduct rests with the offended spouse. *Lindsay v. Lindsay*, 6th Dist. Sandusky No. S-11-055, 2013-Ohio-3290, ¶ 21, citing *Gallo v. Gallo*, 11th Dist. Lake No. 2000-L-208, 2002-Ohio-2815, ¶ 43. "To find financial misconduct, a court must look to the reasons behind the questioned activity or the results of the activity and determine whether the wrongdoer profited from the activity or intentionally dissipated, destroyed, concealed, or fraudulently disposed of the other spouse's assets."

Thomas v. Thomas, 5th Dist. Delaware No. 11CAF090079, 2012-Ohio-2893, ¶ 63; *see also Jump v. Jump*, 6th Dist. Lucas No. L-00-1040, 2000 WL 1752691, *5 (Nov. 30, 2000).

{¶ 41} Once financial misconduct is established, the decision to make a compensating distributive award rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Mikhail v. Mikhail*, 6th Dist. Lucas No. L-03-1195, 2005-Ohio-322, ¶ 25. Accordingly, it must be shown that the trial court's decision was arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 42} In Grace's third assignment of error, she argues that the trial court erred in failing to find that David committed financial misconduct by violating specific court orders and engaging in conduct designed to deprive her of marital assets and income.

{¶ 43} Specifically, Grace cites David's expenditure of marital funds to pay for the costs of repairs and improvements to the Hull Prairie residence, including "excessive" expenditures for services rendered by the couple's long-time handyman, Tom Elliott, as support for her assertion that David committed financial misconduct. She also complains that David restricted her access to financial assets and income by, *inter alia*, reducing the credit limit on their joint American Express card to \$2,000 despite retaining a \$15,000 credit limit for himself. Grace contends that David's conduct, paired with his failure to disclose his expenditures, violated the court's temporary restraining order and amounted to financial misconduct for which she should have been compensated.

{¶ 44} For his part, David denies any failure to disclose the expenditures made in order to repair and improve his Hull Prairie Residence. Moreover, he asserts that his purchase of the residence using marital funds did not violate the trial court's temporary restraining order since he was granted leave to purchase the home by the trial court. In any event, David notes that the trial court *did*, in fact, find him liable of financial misconduct concerning the expenditures for the Hull Prairie residence, and subsequently reduced his property award by \$187,788.71.

{¶ 45} In its May 29, 2014 decision, the trial court examined Grace's claim of financial misconduct concerning David's expenditures for repairs and improvements to the Hull Prairie residence. The court provided a detailed analysis of David's renovation expenditures totaling \$187,788.71. In examining David's use of marital funds, the court referenced its prior temporary restraining order prohibiting David from transferring or disposing of marital property, excluding expenditures for "current necessary living costs," without Grace's consent. The court ultimately concluded:

Some of these expenses undoubtedly increased the fair market value of the residence above the \$620,000 purchase price, and the remainder was clearly an imprudent and excessive use of marital funds above and beyond current necessary living costs. Therefore the improvements of \$187,788.71 will be deemed to be a marital asset awarded to and owned by David.

{¶ 46} In light of the foregoing, we find that the trial court has already granted the relief sought by Grace in her third assignment of error as it relates to a finding of

financial misconduct and a corresponding distributive award based upon David's expenditures on the Hull Prairie residence. Therefore, we find no merit to her argument that the trial court erred in not finding that David engaged in financial misconduct in purchasing, repairing, and improving the Hull Prairie residence.

{¶ 47} As to Grace's argument concerning David's use of marital funds to pay for the services of Tom Elliott, the trial court stated: "Mr. Elliott is a handyman who performed a substantial amount of work first at 4600 Brookside and then at 26321 Hull Prairie. From the evidence before the court it is not possible to separate the work that could be classified as a capital improvement from normal handyman work."

{¶ 48} The evidence presented at trial reveals that David and Grace have used Elliott's services on a routine basis throughout the course of their marriage. This practice continued during the pendency of the divorce action, although Grace testified that Elliott refused to continue working at the Brookside residence per instructions he received from David. Having reviewed the record in its entirety, we conclude that Grace has not met her burden of establishing financial misconduct relating to David's use of marital funds to pay for Elliott's services.

{¶ 49} Lastly, Grace asserts that David wrongfully restricted her access to financial assets and income when he took over the marital finances and reduced her credit limit on their joint American Express card. At trial, David testified that he reduced Grace's credit limit in a broader effort to rein in the couple's spending during the pendency of the divorce.

{¶ 50} Notably, Grace fails to identify how David’s management of the couple’s finances resulted in a “dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets” under R.C. 3105.171(E)(4). Further, apart from the improvements made to the Hull Prairie residence discussed above, there is no evidence that David profited from his management of the finances or intentionally defeated Grace’s distribution of marital assets. Therefore, we cannot say that the trial court abused its discretion in its analysis of Grace’s claims of financial misconduct.

{¶ 51} Accordingly, Grace’s third assignment of error is not well-taken.

{¶ 52} In David’s third assignment of error, he argues that the trial court erred in failing to find that Grace committed financial misconduct by her concealment and nondisclosure of marital assets in violation of R.C. 3105.171(E)(3) and (5).

{¶ 53} R.C. 3105.171(E)(3) states: “The trial court shall require each spouse to disclose in a full and complete manner all marital property, separate property, and other assets, debts, income, and expenses of the spouse.” Where a spouse fails to make such disclosures, R.C. 3105.171(E)(5) allows a trial court to compensate the offended spouse with a distributive award.

{¶ 54} Here, David argues that Grace “attempted to conceal the significant funds she provided to her brother, Timothy, to purchase a condominium in Texas for another brother, Asher.”

{¶ 55} At the outset, it is worth noting that Grace’s provision of funds for the purchase of the Texas condominium took place on August 29, 2011, *prior to* the date the

couple first discussed the possibility of divorce. Thus, we find no evidence of wrongdoing in Grace's use of marital assets to finance the purchase of the condominium, especially in light of Grace's testimony that she discussed the purchase of the condominium with David prior to closing. While David makes much of the fact that the initial discussions regarding the purchase of the condominium revealed that it would be used as a residence for Grace's elderly parents, Grace testified at trial that, after purchasing the property, she explained to David that Asher would be leasing the home instead of her parents and Timothy would be repaying the loan. According to Grace's testimony, David did not object to the arrangement at that time.

{¶ 56} In addition to his allegation of financial misconduct concerning the purchase of the Texas condominium, David asserts that Grace violated R.C. 3105.171(E)(5) because she did not disclose her loan to Timothy on her schedules filed with the trial court. Indeed, David's allegation is supported by our review of Grace's property disclosure schedule, which was filed with the trial court on May 10, 2013. Grace's loan to Timothy does not appear on that schedule, nor is it listed on the exhibit attached thereto. Instead, with regard to real estate, Grace averred that her property interests were "all unknown at this point." Further, Grace did not disclose the loan in the section of the schedule entitled "miscellaneous assets," which expressly includes promissory notes and "loans to others."

{¶ 57} Despite Grace's failure to disclose the loan in her schedule filed with the court, Grace insists that her conduct did not rise to the level of financial misconduct

because David was already aware of the loan and she did not profit from its nondisclosure. Having reviewed the trial testimony in this case, we find support for Grace's assertion that David was aware of the arrangement between Grace and Timothy concerning the Texas condominium. Nonetheless, R.C. 3105.171 does not limit financial misconduct based on a spouse's nondisclosure of assets to circumstances where the offended spouse was unaware of the existence of the undisclosed assets. Rather, R.C. 3105.171(E)(3) demands disclosure of all marital property, separate property, and other assets, debts, income, and expenses of each spouse in a "full and complete manner." Further, R.C. 3105.171(E)(5) allows the trial court to compensate the offended spouse for substantial and willful nondisclosures.

{¶ 58} Based on the clear language of these statutory provisions, we hold that a spouse in a divorce proceeding must not substantially and willfully fail to disclose to the trial court his or her marital property, separate property, and other assets, debts, income, and expenses, irrespective of the other spouse's knowledge of the existence of such items. However, we find that the trial court did not abuse its discretion in failing to find financial misconduct on the basis of Grace's nondisclosure of the loan to Timothy. Indeed, there is no evidence in the record to establish that Grace *willfully* failed to disclose the loan, as required under R.C. 3105.171(E)(5). Further, the trial court accounted for the balance of the loan that remains unpaid in its division of marital

property, finding that the balance was likely to be repaid and awarding it to Grace. Under these facts, we find that the trial court did not abuse its discretion.

{¶ 59} Accordingly, David's third assignment of error is not well-taken.

B. Division of Marital Property

{¶ 60} Having found the parties' assignments of error regarding financial misconduct not well-taken, we now turn to Grace's first and fifth assignments of error, and David's first, second, and fourth assignments of error, all of which challenge the trial court's division of marital property.

{¶ 61} It is well-established that an appellate court may not reverse a trial court's property allocation decision absent a showing of an abuse of discretion. *Cherry v. Cherry*, 66 Ohio St.2d 348, 421 N.E.2d 1293 (1981). In determining whether the trial court abused its discretion, a reviewing court cannot examine the valuation and division of a particular marital asset or liability in isolation. *Briganti v. Briganti*, 9 Ohio St.3d 220, 459 N.E.2d 896 (1984). Instead, the reviewing court must view the property division in its entirety. *Id.*

{¶ 62} In a divorce proceeding, a trial court shall divide the marital property between the spouses in accordance with the provisions in R.C. 3105.171. According to R.C. 3105.171(C)(1), the trial court's division of marital property shall be equal. However, if an equal division of marital property would be inequitable, the court shall instead divide it between the spouses in the manner the court determines equitable. R.C. 3105.171(C)(1).

{¶ 63} Here, the trial court determined that an equal distribution would be equitable given the length of the marriage and the absence of any separate property. To that end, the trial court provided for a division of marital property as follows:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant, Grace I. Epperson, is awarded and shall receive the following marital property as her sole and separate property free and clear of any claim of Plaintiff:

Item	
Defendant's 2004 Toyota Land Cruiser	\$15,762.00
I-Openers account	\$42,474.00
Texas Condo Receivable	\$53,250.00
Personal Property from 4600 Brookside	\$300,000.00
Northwestern Mutual . . . 3088	\$14,251.00
Waterford Checking	\$37,360.00
Farmers Insurance Premium Refund	\$10.00
Westside Kinder Toys	\$0.00
Grow Smart Toys	\$0.00
Total	\$463,107.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, David K. Epperson, is awarded and shall receive the following marital property as his sole and separate property free and clear of any claim of Defendant:

Item	
26321 Hull Prairie Rd., Perrysburg	\$116,975.00
Hull Prairie Improvements	\$187,788.71
Plaintiff's 2007 Toyota FJ Cruiser	\$17,560.00
Life Insurance	\$117,798.00
Signature Checking . . . 6590	\$24,227.00
Schwab Checking . . . 2254	\$18,917.00
Total	\$483,265.71

{¶ 64} In its decision, the court went on to order David to pay Grace the sum of \$10,079.35 in order to render the distributions equal.

{¶ 65} On appeal, Grace argues that the trial court erred in its valuation of the parties' personal property, and also erred in failing to divide the parties' health savings account. Additionally, David contends that the trial court committed reversible error when it determined that Westside Kinder Toys and Grow Smart Toys had zero value, and further erred when it reduced his share of the marital property by an amount equivalent to the renovation expenses he paid in order to make the Hull Prairie residence habitable.

We will address the parties' arguments concerning the division of marital property in turn.

i. Westside Kinder Toys and Grow Smart Toys

{¶ 66} In David's first and second assignments of error, he argues that the trial court erred in awarding Westside Kinder Toys and Grow Smart Toys to Grace with a deemed value of zero dollars each.

{¶ 67} Regarding Westside Kinder Toys, the parties stipulated at trial that Grace is in possession of a note receivable with a value of \$257,299. Despite its conclusion that the note receivable is an asset in Grace's name, the trial court reduced its value to zero. In its May 29, 2014 amended order, the trial court noted that "Westside Kinder Toys has never been profitable. * * * From 2008 through 2012 it always lost money – between \$38,000 to \$79,000 each year. * * * It lost \$9,920 for the first three months of 2013, the last months that financial information is available." Relying upon the company's lack of profitability, the court found that the note receivable was unlikely to be repaid and awarded it to Grace with a deemed value of \$0.

{¶ 68} Similarly, Grow Smart Toys has proven to be an unprofitable venture for Grace. As previously stated, Grace is a one-third owner of Grow Smart Toys. Regarding the company's financial situation, the trial court reviewed the evidence in the record, and noted in its amended order that Grow Smart Toys "lost \$33,850.00 in 2010, lost \$27,388 in 2011, and made \$2,497 in 2012." The court went on to state: "Though Grow Smart Toys had partner equity of \$940 as of December 31, 2012, the court finds that the value

of the business is negligible. * * * This asset will be awarded to Grace with a deemed value of zero dollars.”

{¶ 69} On appeal, David asserts that there was no evidence to support the trial court’s conclusion that the note receivable is unlikely to be repaid. Rather, David contends that Westside Kinder Toys is an ongoing business and that, as such, the note may be able to be repaid in the future. Further, David argues that the trial court, given the lack of evidence as to collectability in the record, should have instructed the parties to present evidence of the note’s value in light of collectability concerns. Regarding the trial court’s conclusion that the value of Grow Smart Toys was “negligible,” David asserts that the trial court ignored the fact that Grace’s capital account was \$23,114.95.

{¶ 70} We must disagree with David’s assertion that the trial court’s determination as to the values of Grow Smart Toys and the Westside Kinder Toys note was unsupported by the evidence. Indeed, Grace testified at trial that she does not expect to be repaid by Westside Kinder Toys or Grow Smart Toys. Further, the exhibits admitted at trial reveal that both businesses suffered yearly losses of several thousand dollars. Although David insists that expert testimony should have been used to demonstrate that the Westside Kinder Toys note receivable was partially collectable, we note that David himself had an opportunity to present such evidence and failed to do so. Having examined the evidence contained in the record, we find that the trial court did not abuse its discretion in awarding the note receivable and Grow Smart Toys to Grace with deemed values of \$0 each.

{¶ 71} Accordingly, David's first and second assignments of error are not well-taken.

ii. David's Renovation Expenses

{¶ 72} In David's fourth assignment of error, he argues that the trial court erred when it applied his renovation expenses toward his share of the marital assets in dividing the marital assets. As discussed above in our analysis of Grace's third assignment of error, the trial court properly concluded that David's use of marital funds as payment for the renovation expenses constituted financial misconduct. As such, it was within the trial court's discretion to compensate Grace with a greater award of marital property. R.C. 3105.171(E)(5).

{¶ 73} Accordingly, David's fourth assignment of error is not well-taken.

iii. Personal Property

{¶ 74} In her first assignment of error, Grace argues that the trial court erred in determining that the personal property within the marital estate had a value of \$300,000. She asserts, without pointing to evidence in the record to support her assertion, that the evidence upon which the trial court relied in valuing the personal property was an unreliable indicator of the actual value of the personal property. Citing her testimony given at trial, Grace insists that the actual value of the personal property was significantly less than \$300,000.

{¶ 75} At trial, Grace provided the following testimony regarding the valuation of the personal property:

Q: Do you have any personal opinion as to the value of the furniture/furnishings and appliances that remain in the home?

A: What do you mean * * * the value?

Q: What do you think they're worth if you had to sell them?

A: I hate to do that, but 50, 75,000, maybe.

Q: You're guessing?

A: I'm guessing.

{¶ 76} In addition to Grace's testimony, evidence pertaining to the value of the parties' personal property was also offered in the form of the parties' financial statements. These statements were prepared by Grace, signed by both parties, and provided to Signature Bank in 2008, 2009, 2011, and 2012. Grace listed the value of personal property at \$300,000 for each year except 2011. Notably, the most recent financial statement was prepared on July 14, 2012, two months after David moved out of the marital residence.

{¶ 77} In light of the evidence outlined above, we find that the trial court's valuation of the personal property was not arbitrary, unreasonable, or unconscionable. Although Grace's testimony arguably contradicted the financial statements upon which the trial court's valuation was based, she acknowledged that she was merely guessing as to the value of the personal property. Moreover, Grace testified that David had already removed personal property from the home. Nonetheless, Grace acknowledged that most of the personal property was still inside the home as of the first day of trial. By her

estimates, the personal property David removed was worth between \$40,000 and \$50,000, a fact that would seem to contradict her assertion that all of the personal property in the marital estate was only worth between \$50,000 and \$75,000.

{¶ 78} In addition to her argument concerning the trial court's valuation of the personal property in the marital estate, Grace also contends that the trial court erred in failing to reduce the value of the personal property attributable to her by the value of the personal property that David removed from the home prior to trial.

{¶ 79} Upon examination of the record in this case, we agree with Grace that the court erred in not reducing the value of the personal property she received by an amount equal to the value of the personal property David removed from the marital residence. Indeed, David does not dispute that he removed personal property from the home, nor does he deny that doing so required two trips with a U-Haul truck. Moreover, the only evidence offered to establish the value of such personal property was in the form of Grace's testimony estimating the value to be between \$40,000 and \$50,000.

{¶ 80} In its final judgment entry of divorce, the court stated that the parties were entitled to an equal division of the marital assets. The court went on to award Grace all of the personal property from the marital estate. However, the court was silent as to the personal property already taken from the marital residence by David prior to trial.

{¶ 81} Upon examination of the entirety of the trial court's property division, and given the court's express intent to divide the marital assets equally, we find that the trial court abused its discretion in failing to reduce the value of the personal property

distribution attributable to Grace in an amount equivalent to the value of the personal property taken by David. Further, David's receipt of the personal property should have been reflected in his overall distribution.

{¶ 82} In light of the foregoing, Grace's first assignment of error is well-taken. Since the value of the personal property in David's possession has not been determined by the trial court, we remand this matter to the trial court for a determination of the value of said personal property and modification of the property award to account for David's receipt of the personal property.

C. Spousal Support, Life Insurance, and Attorney Fees

{¶ 83} In her second and sixth assignments of error, Grace challenges the trial court's award of spousal support. In her fourth assignment of error, she argues that the trial court erred in failing to require David to maintain a life insurance policy naming her as a beneficiary to secure payment of spousal support in the event of his death.

Additionally, in David's fifth assignment of error, he asserts that the trial court erred in awarding attorney fees to Grace in the amount of \$115,844.47. In light of our determination that the trial court abused its discretion in failing to account for David's removal of certain personal property from the marital residence when it divided the marital property, we do not reach these assignments of error.

{¶ 84} Regarding Grace's second, fourth, and sixth assignments of error involving the trial court's award of spousal support, R.C. 3105.171(C)(3) states that "[t]he court shall provide for an equitable division of marital property under this section *prior to*

making any award of spousal support to either spouse under section 3105.18 of the Revised Code and without regard to any spousal support so awarded.” (Emphasis added.) Thus, Grace’s remaining assignments of error are premature. *Zona v. Zona*, 9th Dist. Medina No. 05CA0007-M, 2005-Ohio-5194, ¶ 10 (“Because the division of property was defective, so was the determination of spousal support and it must, therefore, also be reheard by the trial court.”). Further, David’s fifth assignment of error regarding attorney fees is also premature, as the trial court, on remand, may reconsider whether an award of attorney fees would be equitable in this case after issuing its new division and distribution of marital property. *Raymond v. Raymond*, 10th Dist. Franklin No. 11AP-363, 2011-Ohio-6173, ¶ 26.

III. Conclusion

{¶ 85} In light of the foregoing, we reverse the trial court’s division of marital property and remand this matter to the trial court for a determination of the value of the personal property removed from the marital residence by David and a modification of the award to account for such removal. On remand, the trial court may also consider Grace’s arguments regarding the division of the health savings account referenced in Grace’s fifth assignment of error. Pursuant to App.R. 24, costs of this appeal are to be divided equally between the parties.

Judgment affirmed, in part,
and reversed, in part.

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

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, P.J.

JUDGE

James D. Jensen, 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>.