

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Susan M. Heller,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-312
v.	:	(C.P.C. No. 04DR-09-3723)
	:	
John A. Heller,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 14, 2010

Robert C. Hetterscheidt, for appellee.

Mowery Youell & Galeano, Ltd., James S. Mowery, Jr., and Nicholas W. Yeager, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

McGRATH, J.

{¶1} This is a second appeal from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce to the parties, defendant-appellant, John A. Heller ("appellant"), and plaintiff-appellee, Susan M. Heller ("appellee"). For the following reasons, we reverse.

{¶2} Appellee and appellant were married on June 29, 1974, and two children were born as issue of the marriage, both of whom were emancipated at the commencement of these proceedings. On September 27, 2004, appellee initiated the

within action for divorce, and, on October 28, 2004, appellant filed a counterclaim for divorce. One of the marital assets is appellant's 39.5 percent interest in a Subchapter S corporation known as H&S Forest Products, Inc. ("H&S"). Appellant also works at H&S and draws a salary.

{¶3} Among the issues presented to the court for decision was the value of appellant's interest in H&S and how it was to be distributed to the parties. The issue of spousal support was also litigated.

{¶4} After receiving extensive expert testimony from both parties, the trial court adopted a value of appellant's interest in H&S based on utilizing the "income approach" to valuing a business, relying primarily on the future profits of the business. Additionally, after reviewing all of the factors in R.C. 3105.171, the trial court concluded that it was equitable to make an equal division of the assets between the parties. As part of the division of assets, the appellant was awarded his 39.5 percent interest in H&S. The trial court then distributed property of equal value to the appellee in an effort to equalize the distribution of assets.

{¶5} After making an equal distribution of assets, the trial court then ordered appellant to pay spousal support to appellee in a set amount per month as an indefinite award of spousal support. In addition to this monthly spousal support payment, the trial court ordered appellant to also pay appellee "additional spousal support" consisting of "twenty (20%), of each payment of additional gross (pretax) income paid to [appellant] by H & S Forest Products that has been characterized in this trial as bonus/shareholder distribution of income within ten (10) days of his receipt of said payment." (Second Decision and Judgment Entry March 9, 2010, at 29; see also First Judgment Entry

Decree Sept. 24, 2007, at 23.) The trial court stated that "[t]he sole purpose of the additional 20% award of spousal support in the divorce decree was to account for the unpredictable nature of [appellant's] income from the company in excess of his salary." (Second Decision and Judgment Entry, at 23.)

{¶6} In the first appeal, this court concluded that the trial court had "double dipped," when it awarded appellee both one-half of the H&S asset and then another 20 percent of appellant's half in additional spousal support. *Heller v. Heller*, 10th Dist. No. 07AP-871, 2008-Ohio-3296, ¶22. This matter was reversed and remanded back to the trial court for further proceedings consistent with this court's decision. The trial court in its second decision and judgment again awarded appellee both one-half of the H&S asset, and then another 20 percent in additional spousal support. Appellant appealed a second time.

{¶7} In this appeal, appellant raises the following assignment of error for our review:

The trial court erred as a matter of law by failing to abide by the Tenth District Court of Appeal's decision rendered June 30, 2008 reversing and remanding the original decree of divorce filed in this case on September 24, 2007.

{¶8} Upon remand, the trial court addressed the "double dip" issue and referred to a variety of journal and internet articles, as well as other states' cases, to support an argument that a rigid adherence to a rule prohibiting the "double dip" may lead to an unfair result in some cases and, thus, instead, "guidelines must be developed for the 'double dip' situation that will work fairness to both sides of a divorce." (Second Decision and Judgment Entry, at 9.) In the first appeal, there was no language in our decision to

suggest that this court intended to promulgate a flat prohibition against double dipping applicable to every income-producing asset; rather, this court addressed the "double dip" issue only as it applies to the facts of this case.

{¶9} The question that this court entertained in the first appeal of this case was whether the trial court abused its discretion in drawing twice from the same well, i.e., appellant's share of H&S's future profits, in dividing marital assets and in ordering spousal support. While our research did not reveal any Ohio case passing upon this issue as it would apply to the facts of the present case, we did find that the trial court had unfairly double-dipped.¹ We remanded the issue and instructed the trial court to revise the award so that it did not contain a "double dip," and it was incumbent upon the trial court to do so. However, the trial court again used a methodology that conferred an award to appellee that contained an unfair "double dip." Accordingly, we sustain appellant's single assignment of error and find that the trial court erred as a matter of law when it failed to abide by this court's decision.

{¶10} Based on the foregoing, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is reversed, and we again remand this matter to that court for further proceedings consistent with this decision.

Judgment reversed; cause remanded.

BRYANT and KLATT, JJ., concur.

¹ For a thorough explanation on the "double dip" issue in this case please see our previous decision.