[Cite as *Gould v. Gould*, 2005-Ohio-416.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MARCIA D. GOULD,	:	
Plaintiff-Appellant,	:	CASE NO. CA2004-01-010
	:	O P I N I O N
- vs -		2/7/2005
	:	
DAVID W. GOULD,	:	
Defendant-Appellee.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR2002-10-1295

Patricia A. Baas, 3091 W. Galbraith Road, Suite 102, Cincinnati, Ohio 45239, for plaintiff-appellant

Fred Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellee

WALSH, J.

{¶1} Plaintiff-Appellant, Marcia D. Gould, appeals the decision of the Butler County Court of Common Pleas, Domestic Relations Division, valuing and disbursing marital assets, denying her motion to order defendant-appellee, David W. Gould, to pay spousal support, and denying her motions for a new trial and relief from judgment.

{¶2} Appellant and appellee married on December 27, 1977 in Colorado Springs, Colorado. Although the parties had no children together, appellee had four children from a prior marriage. Appellee was responsible for child support payments until his youngest child became emancipated in 1997. Appellant filed a divorce complaint against appellee on October 25, 2002. The trial court held hearings on May 22, 2003 and August 19, 2003, and issued a decree of divorce on September 22, 2003. On October 6, 2003, appellant moved for a new trial pursuant to Civ.R. 59(A)(3), and for relief from judgment pursuant to Civ.R. 60(A), and the trial court denied both motions.

{¶3} Appellant appeals the trial court's denial of her motions and several aspects of the divorce decree, raising seven assignments of error. For the purpose of clarity, we will discuss some assignments of error together.

{¶4} Assignment of Error No. 1:

{¶5} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT DISMISSED PLAINTIFF-APPELLANT'S MOTION FOR A NEW TRIAL FINDING IT HAD NOT BEEN TIMELY FILED AND SERVED PURSUANT TO CIV.R. 59."

{¶6} According to Civ.R. 59(B), a motion for a new trial must be filed and served within fourteen days after an entry of judgment. Further, Civ.R. 5(B) provides that,

{¶7} "[S]ervice upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile

transmission, mailing it to the last known address of the person to be served, or, if no address is known, leaving it with the clerk of the court. * * * Service by mail is complete upon mailing."

{¶8} The trial court found, and the record indicates, that appellant filed her motion on the 14th day after the court entered judgment, and that appellant served the motion upon appellee by mailing it to appellee's attorney on that day. The trial court dismissed appellant's Civ.R. 59 motion as untimely, even though appellant properly filed and served the motion within 14 days.

{¶9} Although the trial court incorrectly dismissed appellant's motion for a new trial based on timeliness, we find that the trial court's decision did not prejudice appellant. After considering the merits of appellant's motion for a new trial, we find that appellant is not entitled to a new trial based on accident or surprise.

{¶10} The decision to grant or deny a motion for a new trial pursuant to Civ.R. 59 rests in the sound discretion of the trial court, and will not be reversed absent an abuse of that discretion. Sharp v. Norfolk & W. Ry. Co., 72 Ohio St.3d 307, 312, 1995-Ohio-224. To find abuse of discretion, we must determine that 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, 219.

{¶11} Appellant filed a motion for a new trial pursuant to

Civ.R. 59(A)(3), which provides that a new trial may be granted upon accident or surprise which ordinary prudence could not have guarded against. Accident or surprise, to constitute grounds for a new trial, must not arise from the negligence of the aggrieved party or of her counsel. Kroger v. Ryan (1911), 83 Ohio St. 299, 306. A trial court's decision overruling a motion for a new trial on the ground of accident or surprise is not reversible error unless the moving party shows that she exercised proper diligence in the preparation of her case to prevent surprise and that she used all means reasonably available to overcome the effect of the surprise. Id.

{¶12} Appellant argues that the accident or surprise arises from the trial court's miscalculation of the amount of a Fifth Third savings account in appellant's name. The record indicates that in 1998, the parties informally agreed to divide the money in a savings account, with appellant taking $12,392.46 and appellee taking $10,380.80. The trial court found that appellee put his share into an account and paid all marital debts from that account. The trial court found that appellant put her share into a separate account, but did not make any significant withdrawals from the account until after filing the complaint for divorce. Based on the evidence presented, the trial court calculated that appellant's account increased to a total value of $126,021.02.

{¶13} After the trial court entered judgment, appellant moved for a new trial, claiming accident or surprise in the manner in which the trial court calculated the amount of the

account. At that time, appellant submitted additional evidence in an attempt to explain why she believed the court erred in it calculations.

{¶14} After reviewing the evidence presented at trial, we find that appellant is not entitled to a new trial simply because she disagrees with the manner in which the trial court conducted its fact-finding. Appellant has failed to demonstrate that the additional evidence that she submitted with her Civ.R. 59 motion was not available for her to present at trial. It was appellant's burden to adequately demonstrate by the evidence the nature of the property or risk an adverse finding by the court. See Mayer v. Mayer (1996), 110 Ohio App.3d 233. Appellant's first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION TO STRIKE A PORTION OF PLAINTIFF-APPELLANT'S MOTION FOR NEW TRIAL."

{¶17} Appellant argues that the trial court abused its discretion in granting appellee's motion to strike evidence of pretrial conversations between the parties' attorneys. Appellant claims that evidence of pretrial correspondence between opposing counsel is admissible for purposes other than to prove liability, pursuant to Evid.R. 408.

{¶18} A trial court's decision to grant or overrule a motion to strike is within its sound discretion, and will not be overturned absent a showing of abuse of discretion. Riley

v. Langer (1994), 95 Ohio App.3d 151, 157. To find abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. Blakemore, 5 Ohio St.3d at 219.

{¶19} According to Evid.R. 408:

{¶20} "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose * * *."

{¶21} In appellant's motion for a new trial, she attached an affidavit of her attorney that referenced conversations with appellee's attorney. Among the discussions referenced was one that involved the discussion of a settlement offer and the amount of a disputed claim. Appellant offered these affidavits in order to show that she was justifiably surprised by appellee's refusal at trial to acknowledge an alleged agreement between the parties with regard to funds deposited in the Fifth Third savings account.

{¶22} In granting appellee's motion to strike this portion

of appellant's motion, the trial court found these statements to be inadmissible pursuant to Evid.R. 408. Although appellant claims otherwise, the record indicates that appellant attempted to use these statements to prove that the amount in the account never exceeded $85,575.71. In her motion for a new trial, appellant argued, "[a]s a result of the discussions and negotiations between the parties, [appellant] reasonably believed that [appellee] was seeking to have the Court determine the marital value of the account was a maximum of $85,573.711."

{¶23} After reviewing the record, we cannot say that the trial court abused its discretion in granting appellee's motion to strike statements detailing the settlement negotiations between the parties' attorneys. Evid.R. 408 expressly prohibits the introduction of settlement negotiations to establish the amount of a disputed claim. Appellant's second assignment of error is overruled.

{¶24} Assignment of Error No. 3:

{¶25} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT DENIED PLAINTIFF-APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT."

{¶26} Assignment of Error No. 5:

{¶27} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DETERMINING THE VALUE OF THE MARITAL ESTATE SUBJECT TO DIVISION BETWEEN THE PARTIES."

{¶28} In appellant's third assignment of error, she argues

that the trial court erred in finding property to be separate property and then including that property in the division of the marital estate. Appellant claims that because of this error, she is entitled to relief from judgment, as the trial court's decision is contrary to its previous findings.

{¶29} According to Civ.R. 60(A), "[c]lerical mistakes in judgment, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party * * *." Civ.R. 60(A) applies only to clerical mistakes which involve "blunders in execution" and not substantive mistakes "where the court changes its mind, either because it made a legal or factual mistake in making its original determination, or because, on second thought, it has decided to exercise its discretion in a different manner." Kuehn v. Kuehn (1988), 55 Ohio App.3d 245, 247.

{¶30} Our review of the trial court's calculations reveals an inconsistency with the trial court's decree of divorce. In the decree, the trial court found:

{¶31} "The following items are entirely marital assets of the parties with the value as indicated: * * * [Appellant's] Fifth Third Savings Account $126,021.02 reduced by [appellant's] $12,392.46 as separate property * * *. The parties had a Fifth Third Checking account with a balance of $23,192.18 which the parties divided to their mutual satisfaction October 26, 1998 with [appellant] receiving $12,392.46 and [appellee] receiving the balance of $10,799.72

which property is considered the separate property of each party."

{¶32} In calculating the value of the marital estate, the trial court deducted $12,392.46 from appellant's Fifth Third savings account as her separate property. However, the court included the $23,192.18 Fifth Third checking account as a marital asset, even though it previously had found $12,392.46 of the account to be appellant's separate property, and $10,799.72 to be appellee's separate property. We conclude that the trial court committed a clerical mistake in adding $23,192.18 to the marital estate.

{¶33} In appellant's fifth assignment of error, she argues that the trial court erred in finding a motor vehicle appellant purchased to be separate property when it found another motor vehicle to be marital property. Also, appellant maintains that the trial court erred in determining that the marital value of appellant's Fifth Third savings account totaled $126,021.02.[1]

{¶34} A trial court has broad discretion in determining the equitable division of property in a divorce proceeding. Cherry v. Cherry (1981), 66 Ohio St.2d 348, paragraph two of the syllabus. The characterization of the parties' property in a divorce proceeding is a factual inquiry and the trial court's determination will not be reversed if supported by some competent, credible evidence. Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159.

{¶35} In the decree of divorce, the trial court found that appellant owns, as separate property, a 2003 Chevrolet van that she purchased for $19,388. The court assigned no marital value to the van, nor did the court reduce the marital estate by the purchase price or any other amount related to the value of the van. The court found the van to be personal property, because appellant purchased it for her own use.

{¶36} The record supports the trial court's determination that the van is appellant's separate property. According to the record, approximately two weeks before appellant filed her complaint for divorce, she withdrew money from her Fifth Third savings account. The record indicates that appellant used this money to purchase the van, to pay for an eye examination, contact lenses, and glasses, and also to pay for laser hair removal. Appellant admitted that she purchased this van without discussing it with appellee, and admitted that it was for her benefit alone, and not for the benefit of the marriage. Because competent, credible evidence supports the trial court's findings, the trial court did not abuse its discretion in finding the van to be appellant's separate property.

{¶37} In determining the value of the marital estate, the trial court found the value of appellant's Fifth Third savings account to be $126,021.02. The court arrived at that figure by adding up all of the deposits and interest over the life of the account, and then deducting $54,392.46 to account for

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1. We note that the trial court ultimately deducted $12,392.46 from appellant's bank account as the court found that amount to be her separate

appellant's separate property. The court awarded the remaining $71,628.56 to appellant to account for a portion of her share of the marital estate.

{¶38} Appellant argues that at most, her account should have been valued at $85,573.71, which is the final balance of the account including all of appellant's withdrawals, less all of appellant's deposits. Appellant claims the court erred in determining the value of the account by adding deposits she made without considering that one deposit consisted entirely of funds she had previously withdrawn from the same account.

{¶39} According to the record, appellant admitted that on June 26, 2002 she had $85,573.71 in her Fifth Third savings account. Appellant testified that she withdrew $49,713.67 on December 30, 2002, and then "redeposited" $45,000 of those funds on January 31, 2003. At a hearing on April 8, 2003, appellant stated that her account contained $6,803.85, and that at that time, she gave her attorney $42,000 to be placed in his trust account. Also, appellant maintained that she had no other bank accounts, and that she had no other sources of funds other than her job at Wal-Mart. However, appellant admitted to having approximately $2,000 in cash at her home.

{¶40} After reviewing the record, we conclude that the trial court incorrectly included appellant's $45,000 deposit in determining the value of the account. It is undisputed that appellant withdrew $49,713.67 from her account and then deposited $45,000 in the same account one month later. There

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property.

is no evidence in the record to refute appellant's assertion that she had no source of funds other than her savings account and her job. In its calculations, the trial court added $45,000 even though the funds from that deposit had already been factored into the value of the account.

{¶41} After deducting $23,192.18 to account for the checking account and deducting appellant's $45,000 deposit from the value of the marital estate, we find the value of the marital estate to be $347,566.40. In the decree of divorce, the trial court ordered appellee to transfer $42,692.92 from his Fidelity Destiny IRA II to appellant to balance the marital assets among the parties. We modify the trial court's order, and order appellee to pay $65,989.29 to appellant. The difference between this figure and the $42,692.92 the trial court awarded is comprised of $796.37 which represents the trial court's error from including and equally dividing the Fifth Third checking account after the court had found that account to be nonmarital property. The $22,500 balance represents the trial court's error from incorrectly calculating the value of appellant's share of the Fifth Third savings account. As ordered by the trial court, appellee may roll over funds from his IRA to satisfy this obligation, and may use any other source of funds available. Appellant's third assignment of error is sustained, and appellant's fifth assignment of error is overruled in part and sustained in part.

{¶42} Assignment of Error No. 4:

{¶43} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-

APPELLANT IN FAILING TO ISSUE WRITTEN FINDINGS OF FACT WHEN IT DISBURSED PLAINTIFF-APPELLANT'S SEPARATE ASSETS TO DEFENDANT-APPELLEE."

{¶44} Appellant argues that the trial court erred in failing to explain the factors it considered in making its decision to include the $23,192.18 Fifth Third checking account in the marital estate. Our resolution of appellant's third assignment of error renders this assignment of error moot. See App.R. 12(A)(1)(c).

{¶45} Assignment of Error No. 6:

{¶46} "THE COURT ERRED TO PLAINTIFF-APPELLANT'S PREJUDICE WHEN IT FAILED TO TAKE INTO CONSIDERATION THE TAX CONSEQUENCES OF THE DIVISION OF THE MARITAL ASSETS."

{¶47} Appellant argues that the court abused its discretion in failing to consider the tax consequences resulting from the division of the marital estate. Appellant claims that in ordering appellee to transfer funds from his IRA to balance the division of the marital estate, the trial court failed to consider appellant's income tax liability and the possible penalties should she choose to withdraw funds.

{¶48} According to R.C. 3105.171(F)(6), in making a division of marital property, and in determining whether to make and the amount of any distributive award, a trial court is required to consider the tax consequences of the property division upon the respective awards. When a trial court's order forces a party to dispose of an asset to meet an obligation imposed by the court, the court must consider the

tax consequences. Hermann v. Hermann (Nov. 6, 2000), Butler App. Nos. CA99-01-006 and CA99-01-011. However, a court is not required to consider the tax consequences of an award if those consequences are speculative. Day v. Day (1988), 40 Ohio App.3d 155, 159.

{¶49} The trial court ordered appellee to transfer to appellant $42,692.92, and provided that appellee could roll over funds from the IRA to meet this obligation. We have modified that amount, and appellant is now entitled to $65,989.29. However, neither party is required to withdraw any funds from the account to meet any obligation imposed by the court. Further, there is no evidence in the record that appellant has the need to withdraw funds to meet any current financial obligation. Therefore, any potential tax consequences or early withdrawal penalties are purely speculative. Appellant's sixth assignment of error is overruled.

{¶50} Assignment of Error No. 7:

{¶51} "THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO ORDER DEFENDANT-APPELLEE TO PAY SPOUSAL SUPPORT TO PLAINTIFF-APPELLANT."

{¶52} Appellant argues that the trial court abused its discretion in refusing to order appellee to pay spousal support. Appellant maintains that due to appellee's career in the military, she was unable to pursue a career or obtain adequate employment to generate a substantial pension.

{¶53} A trial court has broad discretion in determining whether to award spousal support. Vanderpool v. Vanderpool

(1997), 118 Ohio App.3d 876, 878. A trial court's decision as to whether to award spousal support will not be disturbed absent an abuse of discretion. Kunkle v. Kunkle (1990), 51 Ohio St.3d 64, 67. To find abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. Blakemore, 5 Ohio St.3d at 219. So long as a trial court considers the factors set forth in R.C. 3105.18, it is well within the court's discretion not to award spousal support. See Carman v. Carman (1996), 109 Ohio App.3d 698.

{¶54} In making the determination not to award spousal support, the trial court noted that the marital assets had been evenly divided, including appellee's retirement pension. The trial court found that the parties earn approximately the same income, that both parties are earning to their relative capacity, and that neither party suffers from any condition that would inhibit their continued employment.

{¶55} Also, the court considered the duration of the marriage, the parties' standard of living, and the extent of the parties' education. The court found that it would not be inappropriate for either party to be remain employed outside of the home, that the assets of the marriage were evenly divided, and that there were no remaining marital liabilities. Further, the court found that neither party contributed to the education, training, or earning ability of the other party, and that there was no evidence that either party needs any time or expense necessary to acquire education, training, or job

expense to continue in their employment. Finally, the court considered the tax consequences of support.

{¶56} According to the record, the trial court properly considered the appropriate factors enumerated in R.C. 3105.18(C)(1)(a) through (m). There is nothing in the record to indicate that the trial court's findings are unreasonable, arbitrary, or unconscionable. Moreover, we agree with the trial court's findings that nothing prevented appellant from pursuing an educational benefit while the parties were living on military bases and periodically relocating. Also, there is no evidence that appellant could not obtain employment other than her decision not to do so. Accordingly, appellant's seventh assignment of error is overruled.

{¶57} Judgment affirmed as modified.

YOUNG, P.J., and POWELL, J., concur.