

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

TINA OLIVER, :
 :
 Plaintiff-Appellee, : CASE NO. CA2011-01-004
 :
 - vs - : OPINION
 : 12/12/2011
 :
 ENOCH A. OLIVER, JR., :
 :
 Defendant-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR10-03-0361

Myron Wolf, 120 North Second Street, P.O. Box 741, Hamilton, Ohio 45012, for plaintiff-appellee

Fred S. Miller, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, P.J.

{¶1} Defendant-appellant, Enoch A. Oliver, Jr., appeals a decision of the Butler County Court of Common Pleas, Domestic Relations Division, granting a divorce between appellant and plaintiff-appellee, Tina Oliver, and dividing the parties' property. For the reasons discussed below, we affirm in part, reverse in part, and remand the cause to the trial court for further proceedings.

{¶2} The parties were married in May 1982 in Hamilton, Ohio, and have no minor

children. Appellee filed for divorce on March 26, 2010, and a final hearing on property division occurred on November 8, 2010. On December 20, 2010, the trial court entered its Judgment Entry and Decree of Divorce. Appellant timely appealed the trial court's decision, raising three assignments of error.

{¶3} Assignment of Error No. 1:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT FAILED TO AWARD * * * HIS SEPARATE, NON-MARITAL PROPERTY TO HIM."

{¶5} In his first assignment of error, appellant contends that the trial court erred when it classified twelve guns as marital property rather than as his separate property. Appellant maintains that ten of the twelve guns were gifts to him from his father, and therefore should not have been classified as marital property. Appellant further maintains that the trial court abused its discretion in failing to make finding of facts explaining why his separate property was not disbursed to him.

{¶6} Property division in a divorce proceeding is a two-step process. *Boyer v. Boyer*, Butler App. Nos. CA2010-04-083, CA2010-05-109, 2011-Ohio-989, ¶6. First, "the court shall * * * determine what constitutes marital property and what constitutes separate property." R.C. 3105.171(B). Second, the court must then "disburse a spouse's separate property to that spouse" and divide the marital property equally, unless the court finds an equal division would be inequitable. R.C. 3105.171(D); R.C. 3105.171(C)(1).

{¶7} Marital property includes all real and personal property that is currently owned by either or both of the spouses and that was acquired by either or both of the spouses during the marriage. R.C. 3105.171(A)(3)(a). Conversely, separate property includes all real and personal property that was acquired by one spouse prior to the date of the marriage, an inheritance by one spouse by bequest, devise, or descent during the course of the marriage,

or any gift of real or personal property that is made after the date of the marriage and is proven by clear and convincing evidence to have been given to only one spouse. R.C. 3105.171(A)(6)(a). "Clear and convincing evidence means that degree of proof that will provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Flynn v. Flynn*, Butler App. No. CA2011-01-002, 2011-Ohio-4714, ¶39. "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.*, citing *Hook v. Hook*, 189 Ohio App.3d 440, 2010-Ohio-4165, ¶20.

{¶8} "A trial court's classification of property as marital or separate must be supported by the manifest weight of the evidence, and an appellate court will not reverse the trial court's classification if its determination is supported by competent and credible evidence." *Boyer*, 2011-Ohio-989 at ¶8. "In determining whether competent and credible evidence exists, [a] reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony." (Internal quotation marks omitted.) *Zollar v. Zollar*, Butler App. No. CA2008-03-065, 2009-Ohio-1008, ¶10.

{¶9} After reviewing the record, we cannot say the trial court erred in classifying the twelve guns as marital property. Appellant failed to prove by clear and convincing evidence that the guns were gifts given only to him, at the exclusion of appellee. Beyond appellant's own self-serving statements that the guns were purchased and given to him by his father, there was no evidence that the guns were gifted exclusively to appellant. While it is true that appellee did not present evidence to contradict appellant's testimony regarding his characterization of the guns, "evidence tending to prove a fact does not necessarily become

uncontroverted or uncontested simply because an opposing party does not present rebuttal evidence." *Kranz v. Kranz*, Warren App. No. CA2008-04-054, 2009-Ohio-2451, ¶11, citing *Collins v. Collins* (Oct. 15, 2001), Clinton App. No. CA2000-09-023, at 5. "[E]ven where the opposing party does not present evidence to rebut the proffered evidence, the trier of fact is still not required to accept such evidence as credible. * * * Instead, it is the role of the trier of fact to weigh the testimony and credibility of the witnesses, and to resolve any disputes of fact." (Internal citation omitted.) *Id.* The trial court was therefore entitled to find that all twelve guns were marital assets.

{¶10} Appellant's argument that the trial court was required to make findings of fact explaining its decision not to award him the guns as his separate property is without merit. R.C. 3105.171(D) provides that if the trial court decides not to disburse a spouse's separate property to that spouse, the court must make written findings of fact explaining the factors it considered in making its determination. However, in the present case, the trial court characterized the property in question as marital, not separate. Accordingly, no written findings of fact were required by the statute.

{¶11} Appellant's first assignment of error is therefore overruled.

{¶12} Assignment of Error No. 2:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT HELD HIM ACCOUNTABLE FOR THE ENTIRE \$35,000 GAMBLING DEBT."

{¶14} In his second assignment of error, appellant argues that the trial court erred by holding him accountable for a \$35,000 gambling debt. Appellant argues that because he removed \$35,000 from the parties' joint bank account a week before appellee filed for divorce, he should not be held solely responsible for the loss of the money he gambled away. Appellant maintains that the court should have divided the removed funds equally between

the two parties rather than crediting the entire amount to him and requiring him to pay appellee \$17,500 out of the marital assets awarded to him. Appellant further maintains that the court was required to make a finding of financial misconduct before it could order him to compensate appellee with a distributive award under R.C. 3105.171(E)(4). Appellee contends, however, that the court was not making a distributive award under R.C. 3105.171(E)(4), but was fashioning an equitable division of marital property.

{¶15} After determining whether property is separate or marital, the trial court shall disburse a spouse's separate property to that spouse and divide the marital property equally, unless the court finds an equal division would be inequitable. R.C. 3105.171(D); R.C. 3105.171(C)(1). "The trial court is given broad discretion in determining what constitutes an equitable division of property and [its holding] will not be reversed absent an abuse of that discretion." *Boyer*, 2011-Ohio-989 at ¶9. An abuse of discretion constitutes more than an error of law or judgment; it requires a finding that the trial court acted unreasonably, arbitrarily or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶16} In the present case, the trial court found that "on or about March 15, 2010, [appellant] removed \$35,000 from marital funds, which he shall retain and shall be credited to his assets." The court then proceeded to divide the parties' marital assets so that appellee was to receive approximately \$43,184.30 in assets, and appellant was to receive approximately \$78,015.12, a figure which reflected the \$35,000. The court then ordered that appellant sell marital assets awarded to him in order to repay appellee \$17,415.42. Upon payment of the \$17,415.42, the parties will have an equal share of the marital assets, with each party receiving nearly \$60,600 in marital assets.

{¶17} Appellant believes that the \$17,415.42 that he was ordered to pay appellee constitutes a "distributive award" pursuant to R.C. 3105.171(E)(4). R.C. 3105.171(E)(4) provides that "[i]f 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." A distributive award is "any payment or payments, in real or personal property * * * that are made from *separate property or income, and that are not made from marital property.*" (Emphasis added.) R.C. 3105.171(A)(1).

{¶18} We find no evidence to support appellant's contention that the court awarded a distributive award under R.C. 3105.171(E)(4). The court's Judgment Entry and Decree of Divorce is completely devoid of any mention of financial misconduct under R.C. 3105.17(E)(4). Further, appellant was ordered to pay appellee \$17,415.42 out of funds from the sale of marital property, not out of his separate property or income. The payment of funds to appellee was therefore not a distributive award.

{¶19} Upon review of the record, it is apparent that the payment of \$17,415.42 was intended to create an equitable distribution of marital assets. Appellant admitted that he alone withdrew \$35,000 from the parties' joint account and he alone gambled the money away. Because appellant solely benefited from use of the marital asset, it was not an abuse of discretion for the trial court to credit the entire \$35,000 to his share of the marital assets.

{¶20} Appellant's second assignment of error is overruled.

{¶21} Assignment of Error No. 3:

{¶22} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ORDERED THAT HIS BUSINESS EQUIPMENT BE SOLD IN ORDER TO EQUALIZE THE PROPERTY DIVISION."

{¶23} In his third assignment of error, appellant maintains that the trial court erred when it ordered him to sell business equipment in order to pay appellee \$17,415.42 as a means of equalizing the division of marital property. Appellant is self-employed in the concrete business. He operates a business known as E. Oliver & Son Concrete. The

equipment and tools associated with appellant's business were found to be marital property by the court, and appellant does not challenge this finding. Rather, appellant challenges the court's order requiring him to sell the business equipment when there were alternative ways in which the court could have divided the marital assets so that the sale of the equipment could have been avoided. Even if the court did not abuse its discretion in ordering appellant to sell the business equipment, appellant maintains that an ambiguity exists in the court's order regarding which business equipment must be sold.

{¶24} At the final hearing on the division of marital property, the court orally held that appellant was to begin liquidating business equipment immediately in order to pay appellee \$17,415.42. The court then stated that if appellant "finds some other money in order to pay [appellee] what he owes her, instead of selling all of the business equipment, he can pay her cash of \$17,615.42 [sic]." The court did not include this provision in its Judgment Entry and Decree of Divorce. Rather, the Judgment Entry and Decree of Divorce ordered appellant to sell "all the assets of the business as follows: 1989 Sierra Chevrolet vehicle; 1980 Ford Dump Truck valued at \$1,500.00; the skid loader 246 valued at \$12,000.00; the tandem trailer valued at \$1,000.00; the Better Built Tandem Axel Trailer valued at \$2,000.00; all miscellaneous business equipment valued at \$5,600.00. [Appellant] shall sell these assets forthwith; and from the proceeds from the sale of the assets, [appellant] shall pay to [appellee] \$17,415.42 * * *."

{¶25} As previously stated, "[t]he trial court is given broad discretion in determining what constitutes an equitable division of property and [its holding] will not be reversed absent an abuse of that discretion." *Boyer*, 2011-Ohio-989 at ¶9. R.C. 3105.171(J)(2) provides the trial court with the authority to order the sale of personal property to ensure the equitable division of property. When dividing property, "[t]he court may issue any orders * * * that it determines equitable, including * * * [a]n order requiring the sale * * * of any real or personal

property, with the proceeds from the sale * * * to be applied as determined by the court."
R.C. 3105.171(J)(2).

{¶26} In the present case, in order to achieve equity in the distribution of marital assets, the court was entitled to order appellant to sell the business equipment and pay appellee \$17,415.42 from the proceeds of the sale. Although the trial court could have fashioned alternative methods for the distribution of the marital property so that the sale of the business equipment could have been avoided, it was not required to do so. The business equipment was classified as marital property, and the trial court was entitled to order the sale of the equipment pursuant to R.C. 3105.171(J)(2). We do not find the court's order to sell the business equipment to be arbitrary, unreasonable, or unconscionable. Accordingly, the trial court did not abuse its discretion.

{¶27} Furthermore, the trial court did not err by failing to incorporate in the Judgment Entry and Decree of Divorce a provision allowing appellant to pay appellee the \$17,415.42 with funds derived from an alternative source. The court was not required to include such a provision in its entry. Additionally, appellant and his counsel approved and agreed to the terms and division of property when they signed the Judgment Entry and Decree of Divorce.

{¶28} Appellant contends that even if the court did not abuse its discretion by ordering him to sell the business equipment, the trial court's entry contains an ambiguity that prevents him from complying with the order. Appellant takes issue with the court's order that he sell "all miscellaneous business equipment valued at \$5,600." Although the Judgment Entry and Decree of Divorce awards appellant miscellaneous business equipment valuing \$5,600, the individual assets that constitute the "miscellaneous business equipment" have also been listed as household goods and furnishings in Exhibit A of the court's entry. Those household goods and furnishings listed in Exhibit A are to be divided by alternate selection between the parties. Because the miscellaneous business equipment are assets that have been awarded

to appellant through an equitable division of the marital property, these same assets cannot be listed a second time as household goods and furnishings that are available for selection by the parties.

{¶29} Appellant's third assignment of error is therefore sustained. We remand the matter back to the trial court for a determination of what assets constitute the "miscellaneous business equipment" so that such assets may be awarded to appellant and be removed from Exhibit A's listing of household goods and furnishings.

{¶30} Judgment is affirmed in part, reversed in part, and the cause remanded to the trial court for further proceedings consistent with this opinion.

RINGLAND, P.J., and PIPER, J., concur.