[Cite as *Warren v. Warren*, 2009-Ohio-6567.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Kenneth J. Warren,	:	
Plaintiff-Appellant,	:	
		No. 09AP-101
v.	:	(C.P.C. No. 04DR-06-2336)
Karen Warren,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 15, 2009

Eugene R. Butler Co., *LPA*, and *Eugene R. Butler*, for appellant.

John I. Umpleby, for appellee.

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

SADLER, J.

{¶1} Plaintiff-appellant, Kenneth J. Warren ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting a divorce to appellant and to defendant-appellee, Karen Warren ("appellee").

{¶2} The parties were married on August 30, 1990 and two children were born as issue of the marriage: Matthew, born on July 13, 1991, and Jacob, born on April 4, 1995. The parties separated in the summer of 2003 and appellant filed this action for divorce in June 2004.

{¶3} The trial court bifurcated the financial issues and the issues of allocation of parental rights and responsibilities (except for child support, which was determined along with the other financial issues). The first part of the trial took place in December 2007. On January 11, 2008, the trial court journalized a decision and entry regarding allocation of parental rights and responsibilities. The court awarded sole legal custody to appellant, and designated appellant as the residential parent for school purposes. The court also ordered parenting time for both parents with each child.

{¶4} The trial on the financial issues took place over 12 days beginning on March 27, 2008, and ending on July 11, 2008. On December 22, 2008, the court held a hearing regarding the division of household goods and furnishings. On December 31, 2008, the court journalized a judgment entry – decree of divorce, which included the contents of the prior judgment regarding parental rights and responsibilities. On January 6, 2009, the trial court journalized a "nunc pro tunc" judgment entry – decree of divorce.

{¶5} Appellant timely appealed and advances the following six assignments of error for our review:

> ASSIGNMENT OF ERROR I
>
> The trial court erred in issuing a Nunc Pro Tunc Judgment Entry that made substantive changes to the property division in the original final judgment.

ASSIGNMENT OF ERROR II

The trial court erred in its division of property.

ASSIGNMENT OF ERROR III

The trial court erred in awarding child support to the non-custodial parent.

ASSIGNMENT OF ERROR IV

The trial court erred in calculating the guideline support owed by Defendant.

ASSIGNMENT OF ERROR V

The trial court erred in ordering insurance for the spousal support obligation.

ASSIGNMENT OF ERROR VI

The trial court erred in calculating the income of Plaintiff.

{¶6} In his first assignment of error appellant argues that the trial court erred in journalizing its second judgment entry, which it termed a "nunc pro tunc" entry, when, in reality, the second entry made substantive changes to the first and was therefore void.

{¶7} "The purpose of a nunc pro tunc entry is to have the judgment of the court reflect its true action. *McKay v. McKay* (1985), 24 Ohio App.3d 74. A nunc pro tunc can be exercised only to supply omissions in the exercise of functions which are merely clerical. *Jacks v. Adamson* (1897), 56 Ohio St. 397. It is not made to show what the court might or should have decided, or intended to decide, but what it actually did decide. *Webb v. Western Reserve Bond & Share Co.* (1926), 115 Ohio St. 247." *Fed. Home Loan Mtge. Corp. v. LeMasters*, 10th Dist. No. 07AP-420, 2008-Ohio-4371, ¶16. When a court improperly enters a purported nunc pro tunc judgment, that judgment or order is

void. *Plymouth Park Tax Servs., LLC v. Papa*, 6th Dist. No. L-08-1277, 2009-Ohio-3224, ¶18; *Smith v. Smith*, 3d Dist. No. 9-06-41, 2007-Ohio-1089, ¶16; *Dunn v. Marthers*, 9th Dist. No. 05CA008838, 2006-Ohio-4923, ¶20.

{¶8} The parties do not disagree with these principles. They disagree as to whether the trial court's second judgment entry merely supplied inadvertent omissions and corrected clerical errors, or whether it made substantive changes to its earlier decision. Appellant contends that the second judgment entry increased his share of the parties' marital debt by $56,194.66. Specifically, appellant directs our attention to the differences in the manner in which the two judgment entries treat the parties' stock in Royal Associates and the marital debt associated with the "RPJ & JAJ Trusts." In the original judgment entry, the court stated:

> Inasmuch as the investment of Royal Associates stock has been determined to be a marital asset subject to division, the debt associated with the purchase of the investment is also determined to be marital.[1]
>
> * * *
>
> The RPJ & JAJ Trust loans in the amount of $112,389.35 shall be divided between the parties. The Husband shall pay $56,194.66 of this obligation as his division of the marital debt[.][2]

{¶9} In the "nunc pro tunc" judgment entry, the trial court stated:

> The investment of Royal Associates stock has been determined by the Court to be a marital asset subject to division however, the asset has no value. * * * The Court finds the Husband's testimony and evidence regarding the entire Royal Associates transaction to be so ambiguous that the Court has determined it should assign the debt to the RPJ

[1] Dec. 31, 2008 Judgment Entry – Decree of Divorce, 22.
[2] Dec. 31, 2008 Judgment Entry – Decree of Divorce, 48.

> and JAJ Trusts alleged to be owed by the Husband to him as his portion of debt.[3]
>
> * * *
>
> The RPJ & JAJ Trust loans in the amount of $112,389.35 shall be paid by Husband as his portion of the marital debt[.][4]

{¶10} Appellee contends that the second judgment entry divides the total marital debt equally between the parties, just as the first judgment entry did, and the second judgment entry merely corrects a mistake the court made in the first judgment entry regarding how the RPJ & JAJ Trust debt would be divided. She directs our attention to the balance sheet attached to the original judgment entry, pointing out that the division specified in the nunc pro tunc entry comports with the overall equal division of assets and liabilities in the original balance sheet. This, she contends, demonstrates that the court was merely making a correction and was not making any substantive changes. We disagree.

{¶11} The original judgment entry makes appellant responsible for one-half of the $112,389.35 in debt associated with the RPJ & JAJ Trusts, while the second judgment entry makes him responsible for all of this amount. This is a substantive change to the amount of certain marital debt for which appellant will be responsible. The nunc pro tunc entry does not indicate that the trial court was correcting a clerical mistake. Rather, it attempts to "amend" the December 31, 2008 final judgment entry by changing a substantive finding. Consequently, under the facts of this case, we conclude that the

[3] Jan. 6, 2009 Judgment Entry – Decree of Divorce, 22.
[4] Jan. 6, 2009 Judgment Entry – Decree of Divorce, 48.

nunc pro tunc order was improper and was void. Accordingly, appellant's first assignment of error is sustained.

{¶12} In his second assignment of error, appellant challenges the trial court's conclusion that all of the business-related debt on a National City Bank credit line in appellant's name was included within the valuation of appellant's law practice for purposes of property division, and its concomitant decision not to assign any portion of that debt to either party. He contends that there was no evidence to support the court's finding that the amount of the business-related debt on the National City credit line had been included in the valuation of appellant's law practice.

{¶13} Specifically, the trial court stated:

> The Husband had a personal line of credit with National City (#1440). The balance on this line of credit as of June 19, 2007 was $125,213.31. In support of the use of funds from this account, the Husband offered Plaintiff's Exhibit N, which is a summary of the expenses paid from this National City line of credit. In reviewing Exhibit N, the Court has determined that of the detailed expenses provided by Husband, $119,027.05 were expenses admitted by him to be for the law office. This portion of the debt is presumed by the Court to be included with the value of the law office and will not be apportioned separately.[5]

{¶14} The trial court subtracted the $119,027.05 from the total debt on the credit line ($125,213.31), leaving a balance of $6,186.26, which the court assigned to appellant as separate debt. But the court did not include the $119,027.05 in its calculation of either the marital or separate debt, leaving it off of the assets-and-liabilities balance sheet that it attached to its judgment entry.

[5] Dec. 31, 2008 Judgment Entry – Decree of Divorce, 19.

{¶15} A trial court's assignment of an asset's value must be based upon competent, credible evidence. *Hightower v. Hightower*, 10th Dist. No. 02AP-37, 2002-Ohio-5488, ¶22. This means evidence that is both competent, credible evidence of value and a rational basis upon which to establish the value. *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, 576-78. The record contains no evidence that the law practice-related debt on the National City credit line should be included within the value of the practice. Neither party's witnesses testified that the value of the business included anything related to the National City credit line.

{¶16} Appellee argues that it is of no consequence that the trial court treated the $119,027.05 credit line debt as part of the value of appellant's law practice because the evidence showed that that debt was incurred for the law practice, so it should be paid by appellant in any case. She argues that it was merely harmless error for the court to have left that debt off of the balance sheet and out of its allocation of marital assets and liabilities.

{¶17} We disagree with appellee's assertion. Ownership of property does not control its character as marital or separate. R.C. 3105.171(H). Rather, the controlling factor is whether or not the property was acquired during the marriage. R.C. 3105.171(A)(3)(a)(i). It is undisputed that the National City debt was incurred during the marriage. The trial court treated the law practice as a marital asset and utilized its value in dividing the marital assets, but rather than allocate the debt associated therewith, the trial court omitted that debt from its calculations. As a result, the judgment contains no rationale for the trial court's unequal division of marital debts. For this reason, appellant's second assignment of error is sustained.

{¶18} In his third assignment of error appellant challenges the trial court's child support award. The trial court calculated child support according to the guideline child support worksheet, with appellant as the obligee and appellee as the obligor, which resulted in a child support amount of zero. This appellant does not challenge. The trial court went on to conclude that it is in the best interests of the children to order appellant to pay to appellee child support in the amount of $1,000 per month.

{¶19} Appellant argues that the trial court erred in awarding child support to appellee when it had designated appellant as the custodial parent. In essence, appellant contends that a parent who is not named the custodial parent can never be awarded child support. He provides no citation to authority for this proposition, but argues that child support orders are to be based on equal parenting time, and that because appellee only spends a substantial amount of time with one of the two children, it was inappropriate to order appellant to pay child support for both children.

{¶20} We have not passed on the issue whether it is ever appropriate to order a custodial parent to pay child support, but other Ohio appellate districts have. They have held that there should be no blanket rule that a custodial parent can *never* be ordered to pay child support. Instead, they have favored a case-by-case approach and held that if the court has ordered that the parties' parenting time be essentially equal, then the custodial parent can be ordered to pay child support where the court determines that it is in the children's best interests. See, e.g., *Prusia v. Prusia*, 6th Dist. No. L-02-1165, 2003-Ohio-2000; *Frey v. Frey*, 3d Dist. No. 5-06-36, 2007-Ohio-2991; *Kanel v. Kanel* (Oct. 19, 1989), 8th Dist. No. 56013.

{¶21} In this case, the court's judgment orders parenting time as follows:

> The Mother shall exercise parenting time with the minor child, Matthew Warren on an alternating weekend basis beginning on Thursdays after school (or at 5:00 p.m. if there is no school) and continuing through Monday morning until school begins (or until 9:00 a.m. if there is no school). During the weeks, and at all other times not with Mother, Matthew shall be with his father.
>
> The Mother shall exercise parenting time with the minor child, Jacob Warren on a weekly basis beginning on Mondays at school time (or at 9:00 a.m. if not school) until Thursday after school (or until 5:00 p.m. if no school).
>
> The Father shall exercise parenting time with the minor child, Jacob Warren on an alternating weekend basis beginning on Thursdays after school (or at 5:00 p.m. if there is no school) and continuing through Monday morning until school begins (or until 9:00 a.m. if there is no school). It is the intention of this Court that the minor children shall be together and share the parenting time at each parent's home on their alternating weekend schedule.
>
> The Mother and Father shall exercise additional parenting time with the minor children for holidays and days of special meaning in accordance with the provisions of Local Rule 27 as currently written and attached hereto.[6]

{¶22} This schedule means, roughly, that Matthew is with appellant for 22 of 30 days per month, and with appellee eight of 30 days per month; while Jacob is with appellant for eight of 30 days per month, and with appellee 22 of 30 days per month. Though this arrangement does not provide equal time for both parents with *both* children, it does result in equal parenting time *overall*. We adhere to the case-by-case approach taken by other Ohio appellate courts in the cases cited above and now must examine the trial court's findings and conclusions supporting its deviation from the guideline child support amount.

[6] Dec. 31, 2008 Judgment Entry – Decree of Divorce, 26.

{¶23} R.C. 3119.22 provides that a trial court may order an amount of child support that deviates from the amount of child support that would otherwise result from the use of the basic child support schedule and the applicable worksheet if, after considering the factors and criteria set forth in R.C. 3119.23, the court determines that the amount calculated would be unjust or inappropriate and would not be in the best interest of the child. Pursuant to R.C. 3119.23:

> The court may consider any of the following factors in determining whether to grant a deviation pursuant to section 3119.22 of the Revised Code:
>
> (A) Special and unusual needs of the children;
>
> (B) Extraordinary obligations for minor children or obligations for handicapped children who are not stepchildren and who are not offspring from the marriage or relationship that is the basis of the immediate child support determination;
>
> (C) Other court-ordered payments;
>
> (D) Extended parenting time or extraordinary costs associated with parenting time, provided that this division does not authorize and shall not be construed as authorizing any deviation from the schedule and the applicable worksheet, through the line establishing the actual annual obligation, or any escrowing, impoundment, or withholding of child support because of a denial of or interference with a right of parenting time granted by court order;
>
> (E) The obligor obtaining additional employment after a child support order is issued in order to support a second family;
>
> (F) The financial resources and the earning ability of the child;
>
> (G) Disparity in income between parties or households;
>
> (H) Benefits that either parent receives from remarriage or sharing living expenses with another person;

> (I) The amount of federal, state, and local taxes actually paid or estimated to be paid by a parent or both of the parents;
>
> (J) Significant in-kind contributions from a parent, including, but not limited to, direct payment for lessons, sports equipment, schooling, or clothing;
>
> (K) The relative financial resources, other assets and resources, and needs of each parent;
>
> (L) The standard of living and circumstances of each parent and the standard of living the child would have enjoyed had the marriage continued or had the parents been married;
>
> (M) The physical and emotional condition and needs of the child;
>
> (N) The need and capacity of the child for an education and the educational opportunities that would have been available to the child had the circumstances requiring a court order for support not arisen;
>
> (O) The responsibility of each parent for the support of others;
>
> (P) Any other relevant factor.

{¶24} In the present case, the basic child support schedule and applicable worksheet resulted in a child support amount of zero. The court found that "[t]he parties have a great disparity of income and both households need to be able to provide for the minor children." (Dec. 31, 2008 Judgment Entry, 34.) (We note that even though appellant challenges the trial court's calculation of his income in his fifth assignment of error, he does not challenge the trial court's finding that there is a great disparity between his and appellee's incomes.) The court also found that, given the fact that Matthew was primarily residing with appellant and Jacob was primarily residing with appellee, "it is obvious to this Court that a deviation is appropriate." Id. The trial court expressly stated

that it had considered all of the R.C. 3119.23 factors, and concluded that the amount determined by the applicable worksheet would be unjust and inappropriate and not in the best interests of the children.

{¶25} Appellant argues that, in reality, appellee does not exercise much of her eight monthly days of parenting time with Matthew. However, we must look at the parenting time ordered in the court's judgment to determine if its accompanying child support order is appropriate. Unless and until appellant obtains a modification of the court's order regarding parenting time, we cannot review the child support order based on a different parenting schedule.

{¶26} Given the essentially equal parenting time provided in the court's decree, and given the parties' substantial disparity in incomes, the trial court did not abuse its discretion in making its child support order. For this reason, appellant's third assignment of error is overruled.

{¶27} In his fourth assignment of error appellant argues that the trial court erred in calculating child support because it failed to include the spousal support award as part of appellee's income. For support of this proposition, appellant cites the cases of *Godar v. Godar*, 5th Dist. No. 2005CA00260, 2006-Ohio-5994, and *Avery v. Avery*, 2d Dist. No. 2001-CA-100, 2002-Ohio-1188. In both of those cases, the courts of appeals concluded that R.C. 3119.05(B) specifically requires that any spousal support that a parent actually receives from the other parent is to be included as part of the recipient's gross income for purposes of calculating child support.

{¶28} Appellee argues that adding the spousal support that she receives from appellant would not change the parties' total gross income when added together because

the same amount would be deducted from appellant's gross income. This is true, however, as appellee concedes, it could change appellant's child support obligation because it would change the percentages that each party is obligated to contribute toward the children's support.

{¶29} While former R.C. 3113.215(A)(2) required inclusion in gross income only of spousal support received from an ex-spouse who was *not a party* to the case in which child support was being determined, the General Assembly repealed that statute in 2000. See S.B. 180. In its place, R.C. 3119.01(C)(7) now provides, " 'Gross income' means * * * spousal support actually received." The statute contains no limitation as to the source of the spousal support. Moreover, R.C. 3119.05(B) provides, "[T]he amount of any court-ordered spousal support actually paid shall be deducted from the gross income of that parent to the extent that payment under the child support order or that payment of the court-ordered spousal support is verified by supporting documentation."

{¶30} By repealing the statute that included spousal support in a party's gross income only if such spousal support was paid by someone not a party to the child support order being calculated, and replacing it with the foregoing statutes, the General Assembly clearly intended that courts include within the recipient's gross income any spousal support that one party receives from the other. In this case, both parties agree that the trial court failed to include the spousal support that appellant pays to appellee in calculating appellee's gross income for child support purposes. Because this was contrary to R.C. 3119.01(C)(7) and 3119.05(B), appellant's fourth assignment of error is sustained.

{¶31} In his fifth assignment of error, appellant argues that the trial court erred in ordering that appellant maintain a life insurance policy naming appellee as the beneficiary, in order to secure appellant's spousal support obligation. We agree. In the case of *Addy v. Addy* (1994), 97 Ohio App.3d 204, 211, we held that security in the form of life insurance is generally inappropriate for spousal support payments. Citing *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, we reasoned that because spousal support terminates upon the death of either party pursuant to R.C. 3105.18(B), unless the order containing the award expressly provides that the spousal support obligation shall not terminate upon the death of either party, there is no need for life insurance as security for payment.

{¶32} In this case, the order for spousal support terminates four years from the date of the judgment or upon the death of either party and, thus, does not fall into the exception provided for in R.C. 3105.18(B). Accordingly, security in the form of life insurance was inappropriate in this case. For this reason, appellant's fifth assignment of error is sustained.

{¶33} In his sixth assignment of error, appellant challenges the court's failure to deduct from his income, as ordinary and necessary business expenses, the principal and interest payments he makes, or would make, toward the National City line of credit, because the loan was used directly for generating gross receipts for his law practice.

{¶34} The actual cost of acquiring an income-producing asset is an ordinary and necessary business expense for the purpose of determining gross income of a support obligor. *Kamm v. Kamm*, 67 Ohio St.3d 174, 1993-Ohio-60, paragraph one of the syllabus. Payment of both principal and interest on debt reduces the gross receipts of the

obligor in the year the payments are made. *Helfrich v. Helfrich* (Sept. 17, 1996), 10th Dist. No. 95APF12-1599. Here, the parties do not dispute that the trial court ordered appellant to be responsible for the law practice-associated debt, but did not take payments on this debt into account in calculating appellant's gross income for support purposes. Appellee simply argues that the trial court acted reasonably and did not abuse its discretion. We disagree. In accordance with the foregoing authorities, the trial court erred in failing to account for appellant's loan payments actually made on the law practice-related debt when calculating appellant's income for support purposes. Accordingly, appellant's sixth assignment of error is sustained.

{¶35} In summary, appellant's first, second, fourth, fifth, and sixth assignments of error are sustained, his third assignment of error is overruled, the December 31, 2008 judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed in part and reversed in part, the January 6, 2009 judgment entry is declared void and is vacated, and this cause is remanded to the trial court for further proceedings consistent with this decision.

Judgment affirmed in part, reversed in part; cause remanded.

BROWN and CONNOR, JJ., concur.

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