[Cite as *Best v. Best*, 2011-Ohio-6668.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Beth A. Best, :

Plaintiff-Appellee, :

v. : No. 11AP-239
(C.P.C. No. 08DR-06-2339)

John W. Best, :
(REGULAR CALENDAR)

Defendant-Appellant. :

D E C I S I O N

Rendered on December 22, 2011

Linda J. Miller, for appellee.

Watson Law Group, LLP, David C. Watson and *Titus G. Donnell*, for appellant.

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

KLATT, J.

{¶1} Defendant-appellant, John W. Best, appeals a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, which granted him and plaintiff-appellee, Beth A. Best, a divorce. For the following reasons, we affirm.

{¶2} The parties married on May 4, 1985. During the marriage, the parties had a daughter, who is now 20 years old, and a son, who is now 17 years old. Beth filed suit seeking a divorce on June 11, 2008.

{¶3} Prior to trial, the parties stipulated that their marriage terminated on September 1, 2007. As the parties could not agree on the division of their assets or whether John would pay Beth spousal support, the trial focused largely on matters related to those two issues. Moreover, at trial, both parties sought to demonstrate that the other had committed financial misconduct.

{¶4} According to the parties' testimony, John willingly conceded to Beth's complete control over the parties' finances throughout their marriage. Both parties deposited their paychecks into a joint checking account, from which Beth paid the bills. John did not even look at the parties' bills.

{¶5} In 2005, the parties' combined gross income was $78,367; in 2006, it was $88,635; and in 2007, it was $94,097. John, who works for the Ohio Bureau of Workers' Compensation, earns significantly more than Beth, who works for the Vineyard Church of Columbus.

{¶6} Sometime in 2003, John opened an account at a credit union and diverted $200 per month from his paycheck into the account. John did not tell Beth about the account. He hid the existence of the account from Beth by directing the credit union to send account statements to a post office box instead of the marital residence. John maintained the account throughout the remainder of the parties' marriage.

{¶7} In May 2005, with John's consent, Beth obtained a home equity line of credit ("HELOC"). John understood that Beth would use HELOC funds to satisfy their credit card debt. At that time, John believed that the parties owed approximately $10,000 to $15,000 on their credit cards.

{¶8} Upon receiving access to the HELOC, Beth immediately wrote a $52,000 check to herself. Within a month, Beth used HELOC funds to pay amounts outstanding on two credit cards by writing checks for $9,500 to Capital One and $11,650 to Discover Card. In July 2005, Beth wrote a check to herself for $2,100. Both Beth and John possessed and used credit cards linked to their HELOC account.

{¶9} Generally, John did not know how Beth spent the HELOC funds or how much the couple owed on the HELOC. However, John was aware that in January 2006, Beth wrote a $4,500 check drawn on the HELOC for the purchase of an automobile from John's parents.

{¶10} After the parties' separation in September 2007, John investigated Beth's use of HELOC funds. He discovered that he and Beth owed approximately $75,000 on the HELOC. John also learned that he and Beth owed about $44,000 on their credit cards.

{¶11} Although John moved out of the marital residence in September 2007, he continued to deposit a large portion of his bi-weekly paycheck into the parties' joint checking account until May 2008. Beth used this money to pay the family's expenses, including the mortgage, automobile payments, automobile insurance, and the children's medical bills. When John stopped depositing money in the parties' joint account, Beth decided to withdraw money from a Hartford Leaders IRA that was in her name. Beth neither informed John nor sought his permission before withdrawing $73,078, from which she received approximately $55,000 after penalties and fees were assessed. According to Beth, from the $55,000, she paid $11,859 to settle debt owed on a Discover Card,

$8,975 to settle debt owed on a Capital One credit card, and $7,493 to settle debt owed for the children's medical expenses. The remaining amount Beth used to make automobile, automobile insurance, and HELOC payments.

{¶12} The parties sold the marital residence in December 2008. After paying the mortgage and amount owed on the HELOC, the parties received approximately $12,000 in profit. The parties used the $12,000 to satisfy the debt owed on their LL Bean credit card.

{¶13} On February 11, 2011, the trial court issued a judgment entry/decree of divorce. In the judgment, the trial court divided the parties' marital assets and liabilities equally, decided custody of the parties' son, and ordered John to pay both child and spousal support. The trial court also addressed, although it did not directly determine, whether the parties had engaged in financial misconduct. In essence, the trial court found neither John nor Beth had "clean hands," and thus, it refused to compensate either party for the other's financial misconduct. (R. 137 at 3-5.)

{¶14} John now appeals the February 11, 2011 judgment, and he assigns the following errors:

> I. THE TRIAL COURT ERRED BY FAILING TO FIND DEFENDANT/APPELLANT WAS ENTITLED TO COMPENSATION BECAUSE OF PLAINTIFF/APPELLEE'S FINANCIAL MISCONDUCT PURSUANT TO R. C. 3105.171(E)(3)[.]
>
> II. THE TRIAL COURT ERRED BY NOT MAKING THE EFFECTIVE DATE OF ITS SPOUSAL SUPPORT ORDER RETROACTIVE [TO] THE DE FACTO TERMINATION DATE OF THE COUPLE'S MARRIAGE[.]

III. THE TRIAL COURT ERRED BY NOT CONSIDERING THE CASH ADVANCES PLAINTIFF/APPELLEE RECEIVED FROM THE COUPLE'S VARIOUS LINES OF CREDIT AND THE 2007 TAX RETURN WHEN DETERMINING THE SPOUSAL SUPPORT AWARD[.]

{¶15} By his first assignment of error, John argues that the trial court should have awarded him a greater share of the marital property to compensate him for Beth's financial misconduct. Because we find no abuse of discretion in the trial court's division of the marital property, we reject John's argument.

{¶16} In divorce proceedings, a trial court must classify property as marital or separate property. R.C. 3105.171(B). Then, the trial court must divide the marital property equally or, if an equal division is inequitable, the court must divide the marital property equitably. R.C. 3105.171(C)(1); *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶5. A trial court has broad discretion in the allocation of marital property, and an appellate court will not disturb its judgment absent an abuse of discretion. Id.

{¶17} A court may find an equal division of marital property inequitable if one spouse demonstrates that the other has committed financial misconduct. "If 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." R.C. 3105.171(E)(4). Financial misconduct occurs when one spouse engages in some type of knowing wrongdoing, by which the spouse either profits or intentionally interferes with the other spouse's property rights. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶33; *Heller v. Heller*, 10th Dist. No. 07AP-871, 2008-

Ohio-3296, ¶27; *Hamad v. Hamad*, 10th Dist. No. 06AP-516, 2007-Ohio-2239, ¶62. This court has affirmed findings of financial misconduct where a spouse has violated the court's restraining orders; dissipated marital assets without the knowledge or permission of the other spouse; stole equipment, inventory, and records of the other spouse's business so as to interfere with the business' continued operation; cashed an insurance check and used the proceeds for the spouse's own purposes; and sold stock owned by the other spouse, without that spouse's knowledge or permission. Id. (listing examples); *Galloway v. Khan*, 10th Dist. No. 06AP-140, 2006-Ohio-6637, ¶27 (same).

{¶18} The complaining spouse bears the burden of proving financial misconduct. *Heller* at ¶27; *Hamad* at ¶61; *Galloway* at ¶26. The trial court has discretion in determining whether financial misconduct occurred, and an appellate court will only reverse that determination if it is against the manifest weight of the evidence. *Heller* at ¶27; *Hamad* at ¶61; *Parker v. Parker*, 10th Dist. No. 05AP-1171, 2006-Ohio-4110, ¶12.

{¶19} In the case at bar, John initially argues that the trial court abused its discretion in finding that he engaged in financial misconduct. John does not dispute that he concealed money from Beth by depositing a portion of his paycheck into a credit union account that Beth did not know about until immediately before trial. John, however, attempts to justify his conduct. First, John argues that his actions do not amount to financial misconduct because he deposited the vast majority of his paycheck into the couple's joint account. We are not persuaded by this argument. While the low amount of money that John hid might lessen the degree of his financial misconduct, it does not negate the misconduct itself.

{¶20} Next, John asserts that he did not secret money to deprive his family, but instead, to cover his basic expenses. This excuse does not explain why John hid money during the four years before the marriage broke down. Prior to John leaving the marital residence, his and the rest of the family's living expenses were paid out of the joint account. Thus, John had no need to create an alternative source of funds to pay for his basic expenses.

{¶21} John also argues that he lacked any malicious intent. As we explained above, to find financial misconduct, a court must only determine that a spouse has engaged in knowing wrongdoing. *Taub* at ¶33; *Heller* at ¶27; *Hamad* at ¶62. Thus, the trial court did not have to determine that John acted maliciously to find that he committed financial misconduct. Moreover, the trial court could infer John's knowledge of his wrongdoing from the extraordinary steps John took to conceal "his" money, including directing the credit union to send account statements to a post office box rather than the marital residence.

{¶22} Finally, John "firmly asserts" that the trial court erred in basing its finding of financial misconduct partially on John's failure to comply with the temporary orders that required him to pay certain household bills. (Appellant brief, at 9.) John, however, presents no argument supporting his assertion. Absent any argument, we cannot find that the trial court abused its discretion.

{¶23} Despite John's arguments to the contrary, we conclude that the manifest weight of the evidence supports the trial court's finding that John engaged in financial misconduct. Necessarily, then, the trial court did not abuse its discretion.

{¶24} In light of this conclusion, John alternatively argues that he should receive more of the marital property than Beth because she engaged in greater financial misconduct than he did. According to John, his financial misconduct only deprived Beth of approximately $18,000, while Beth withdrew roughly $152,000 from the marital estate[1] and incurred $44,000 in credit card debt.

{¶25} R.C. 3105.171(E)(4) states that a trial court "may" compensate a spouse for the other spouse's financial misconduct. Consequently, even if it determines that financial misconduct has occurred, a trial court has the discretion to refuse to award the offended spouse any compensation. *Day v. Day*, 10th Dist. No. 08AP-440, 2009-Ohio-638, ¶17, 20.

{¶26} Here, for two reasons, we conclude that the trial court appropriately exercised its discretion to reject John's request for compensation for Beth's financial misconduct. First, John suffered no prejudice from Beth's withdrawal of $77,000 from the Hartford Leaders IRA. In dividing the parties' marital assets, the trial court valued the IRA as of September 1, 2007, the date of the de facto termination of the parties' marriage. As Beth made her withdrawal in May 2008, eight months after the de facto termination date, the value assigned in the judgment did not reflect the withdrawal. The trial court allocated the IRA to Beth. Thus, Beth alone bore the adverse consequences of her unilateral withdrawal. Beth received an asset that the trial court valued at $82,366 that was actually worth less than $15,000.

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[1] Presumably, John reaches the $152,000 figure by adding the $75,000 owed on the HELOC as of September 2007 and the $77,000 Beth withdrew from the Hartford Leaders IRA in May 2008.

{¶27} Second, the evidence does not indicate at what point Beth's handling of the parties' finances became wrongful. Beth and John both used credit cards to pay for the family's everyday expenses, such as food, gas, clothes, school fees, tickets to sporting events, a home internet connection, and a gym membership. Beth testified that she drew on the HELOC to satisfy this credit card debt, purchase an automobile from John's parents, and remodel three bathrooms. John remembered using HELOC funds to paint the marital residence and go on a cruise with Beth. None of these expenditures constitute financial misconduct.

{¶28} The finding that Beth committed financial misconduct arises from the fact that the parties' debt was unduly excessive in light of their income and expenses, and Beth failed to explain why. However, because John did not involve himself with the parties' financial affairs, he could not state how much of the debt owed as of September 1, 2007 was due to wrongful dissipation rather than payment of expenses that the family legitimately incurred. The trial court, therefore, had no basis on which to determine how much money Beth wrongfully dissipated. The absence of any evidence that quantified Beth's financial misconduct precluded the trial court from comparing John's financial misconduct to Beth's.

{¶29} Ultimately, under the facts of this case, we find that the trial court did not abuse its discretion in declining to compensate John for Beth's financial misconduct, when John also engaged in financial misconduct. See *Ballas v. Ballas*, 7th Dist. No. 04 MA 60, 2004-Ohio-5128, ¶51-53 (upholding the trial court's refusal to award either spouse

compensation when neither spouse appeared before the court with clean hands). Accordingly, we overrule John's first assignment of error.

{¶30} By his second assignment of error, John argues that the trial court erred in not setting September 1, 2007, the de facto termination date, as the starting date for John's spousal support obligation. We disagree.

{¶31} A trial court's selection of a commencement date for spousal support is subject to the abuse-of-discretion standard of review. *Muzechuk v. Muzechuk*, 5th Dist. No. 2001 AP 090089, 2002-Ohio-2527. Here, the trial court ordered John to begin paying spousal support "immediately upon the journalization of this Judgment Entry Decree of Divorce." (R.137 at 19.) Although the trial court could have chosen a different commencement date, such as the de facto termination date, nothing required the trial court to do so. We thus find no abuse of discretion in the selection of the date of the judgment's journalization as the commencement date for spousal support. Accordingly, we overrule John's second assignment of error.

{¶32} By his third assignment of error, John argues that, for the purposes of determining supposal support, the trial court should have considered the amounts that Beth drew from the HELOC in June and July 2005, as well as the parties' 2007 federal tax refund, a part of Beth's income. We disagree.

{¶33} In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, a trial court must consider a number of factors, including "[t]he income of the parties, from all sources, including, but not limited to, income derived from property

divided, disbursed, or distributed under section 3105.171 of the Revised Code[.]" R.C. 3105.18(C)(1)(a). In compliance with R.C. 3105.18(C)(1)(a), the trial court considered the parties' stipulation that John's annual income was $78,000 and Beth's annual income was $29,000.

{¶34} John now contends that the trial court erred in not adding to Beth's income the draws from the HELOC that Beth made in 2005 and the 2007 tax refund. John argues that the draws and tax refund qualify as income because they are "distributed property." (Appellant brief, at 12.) John is incorrect about the nature of the HELOC draws. Those draws constituted debt, not a marital asset that the trial court distributed. With regard to the tax refund, John misapplies R.C. 3105.18(C)(1)(a). That statute requires a court to consider "*income derived from* property * * * distributed" under R.C. 3105.171. R.C. 3105.18(C)(1)(a) (emphasis added). A tax refund is not income derived from property. We thus reject John's argument and overrule his third assignment of error.

{¶35} For the foregoing reasons, we overrule John's three assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.