

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michele (Pittenger) Franklin,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-713 (C.P.C. No. 10DR-08-3434)
William Lemar Franklin,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 24, 2012

William Lemar Franklin, pro se.

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

BROWN, P.J.

{¶ 1} William Lemar Franklin, defendant-appellant, appeals from a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, in which the court granted William a divorce from Michele (Pittenger) Franklin, plaintiff-appellee. Michele has not filed an appellate brief.

{¶ 2} The parties were married on September 27, 2004, and Michele filed a complaint for divorce on August 12, 2010. One child, who is still a minor, was born as issue of the marriage. William did not file an answer to the complaint. At the final hearing on July 29, 2011, Michele presented a judgment entry decree of divorce ("decree") to the trial court, which was signed and "approved" by Michele and her attorney. William did not appear at the final hearing and did not sign or approve the decree. The court filed the decree the same day. Among other things, the decree awarded Michele sole custody of the

child and awarded the marital home to Michele. William appeals the judgment of the trial court, asserting the following assignments of error:

[I.] APPELLANT ASSERTS THAT THE TRIAL COURT ABUSED ITS DISCRETION AND ACTED CONTRARY TO LAW IN ITS DIVISION OF MARITAL PROPERTY. APPELLANT CONTENDS THAT THE TRIAL COURT COMMITTED ERROR IN ITS DISTRIBUTION OF PROPERTY IN THAT THE COURT FAILED TO MAKE SPECIFIC FINDINGS OF FACT IN AN UNEQUAL DISTRIBUTION OF PROPERTY ACCRUED DURING THE MARRIAGE. BECAUSE R.C. 3105.171 PROVIDES GUIDELINES FOR THE UNEQUAL DISTRIBUTION OF PROPERTY ACCORDING TO EQUITABLE PRINCIPLES, AND R.C. 3105.171(G) PROVIDES THAT ANY DIVISION OF PROPERTY ACCORDING TO R.C. 3105.171 REQUIRES WRITTEN FINDINGS OF FACT BY THE TRIAL COURT, APPELLANT SUBMITS ANY UNEQUAL DISTRIBUTION OF PROPERTY IN A DIVORCE PROCEEDING REQUIRES THE TRIAL COURT TO ENTER WRITTEN FINDINGS OF FACTS SUPPORTING ITS DECISION.

[II.] THE TRIAL COURT'S FAILURE TO MAKE A RECORD OF THE PROCEEDINGS BELOW HAMPERS THE APPELLATE COURT'S NECESSARY REVIEW OF THE PROCEEDINGS BELOW FOR EQUITY AND FAIRNESS AND APPELLANT SUBMITS THAT THE ABSENCE OF RECORD REQUIRES A REMAND OF THE CASE TO THE LOWER COURT FOR MAKING OF A RECORD OF ITS DECISION. APPELLANT SUBMITS THAT THIS IS AN ERROR THAT APPLIES TO BOTH THE DECISIONS REGARDING THE DIVISION OF PROPERTY, AS WELL AS THE CUSTODIAL ORDERS PERTAINING TO THE MINOR CHILD OF THE PARTIES.

{¶ 3} William argues in his first assignment of error that the trial court erred when it equitably divided the assets of the parties without making specific findings as required by R.C. 3105.171(C)(1) and (G). Pursuant to R.C. 3105.171(C)(1), an equal division of marital assets is the starting point in a court's analysis of what would constitute an equitable division. *See Cherry v. Cherry*, 66 Ohio St.2d 348 (1981). The trial court must make written findings of fact that support the determination that the marital property has been equitably divided. R.C. 3105.171(G). R.C. 3105.171(C) and (G) provide:

(C)(1) Except as provided in this division or division (E) of this section, the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section.

* * *

(G) In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property has been equitably divided and shall specify the dates it used in determining the meaning of "during the marriage."

{¶ 4} R.C. 3105.171(G) codifies the Supreme Court Ohio's holding that a trial court must indicate the basis for its division of the marital property in sufficient detail to enable a reviewing court to determine whether the award is fair, equitable, and in accordance with the law. *See Cole v. Cole*, 4th Dist. No. 93CA515 (July 29, 1994), citing *Kaechele v. Kaechele*, 35 Ohio St.3d 93, 97 (1988). The only time a trial court need not make the written findings of fact required by R.C. 3105.171(G) is if it distributed the property according to the terms of a separation agreement entered into by the parties. *Goode v. Goode*, 70 Ohio App.3d 124, 132 (10th Dist.1991). *See also Pawlowski v. Pawlowski*, 83 Ohio App.3d 794, 799 (10th Dist.1992) (the parties may waive their rights under R.C. 3105.171 if they clearly intend their agreement to be a complete settlement of all issues). A waiver should not be implied unless there is full disclosure of assets before the parties reach a settlement agreement. *Davis v. Davis*, 4th Dist. No. 99CA630 (Sept. 5, 2000), citing *Pawlowski*. Furthermore, a trial court's failure to clearly indicate in its decision that the factors enumerated in R.C. 3105.171(F) were considered in making a division of marital property constitutes an abuse of discretion. *Casper v. DeFrancisco*, 10th Dist. No. 01AP-604, 2002-Ohio-623.

{¶ 5} In addition, as a part of these findings under R.C. 3105.171(G), the trial court should assign a value to at least the major marital assets. *Kestner v. Kestner*, 173 Ohio App.3d 632, 2007-Ohio-6222, ¶ 11 (7th Dist.), citing *Spychalski v. Spychalski*, 80

Ohio App.3d 10 (6th Dist.1992), and *Hruby v. Hruby*, 7th Dist. No. 93-C-9 (June 11, 1997); *Goode; Raff v. Raff*, 5th Dist. No. 2004CA00251, 2005-Ohio-3348, ¶ 29; *Roberts v. Roberts*, 10th Dist. No. 08AP-27, 2008-Ohio-6121, ¶ 19 (generally, the trial court must value major assets); *Kohler v. Kohler*, 9th Dist. No. 96CA006313 (Aug. 14, 1996) (the court cannot be expected to place a value on each individual item of personal property accumulated during a marriage).

{¶ 6} In the present case, the trial court indicated in the general findings near the beginning of the decree:

[Michele] waives property valuation and allocation of debts for purposes of equal distribution and agrees and understands that the present distribution of property, while not precisely equal, is in fact equitable and in accord with law. Further, [Michele] does hereby waive written Findings of Fact and Conclusions of Law thereon.

The trial court reiterated, in almost identical language, this same finding later in the decree under the "Division of Property" section. Furthermore, Michele also contemporaneously filed with the court a waiver indicating that she had been advised that she was entitled to have each piece of property and each debt valued for purposes of equal distribution, but she was waiving such valuation, as well as waiving findings of fact and conclusions of law and agreeing that the property distribution and allocation of debts in the decree were not equal but equitable.

{¶ 7} William acknowledges that Michele executed the waiver waiving her right to the valuation of each piece of property and each debt and her right to findings of fact and conclusions of law. However, William contends that he did not waive, and could not have waived, these rights because he was not present at the final hearing and had no notice of the final hearing. Thus, William contends, because the trial court made an equitable division of assets, and he never waived his right to the findings of fact and conclusions of law under R.C. 3105.171(C)(1) and (G), the trial court erred.

{¶ 8} We agree with William's argument. Although Michele may have waived her right to a valuation of the parties' marital assets and her right to findings under R.C. 3105.171(G), William did not impliedly or explicitly waive these rights. William's failure to attend the final hearing did not act as an implicit waiver to the right to findings under R.C. 3105.171(G) or relieve the trial court of its duty to make findings as to valuation of the

parties' marital assets. A party's absence at the divorce hearing does not allow a trial court to bypass asset valuation and deviate from the requirements of R.C. 3105.171(G), and the court cannot find that findings as to the valuation of assets were voluntarily waived when that party did not sign the other party's proposed journal entry. *See Rudloff v. Rudloff*, 7th Dist. No. 96 CA 60 (Aug. 26, 1999). *See also Stacey v. Stacey*, 6th Dist. No. L-00-1079 (Apr. 6, 2001) (even if the party adversely affected by the lack of factual findings fails to object and to request findings of fact in the trial court, an appellate court must reverse and remand a case with inadequate factual findings so that the trial court can make the necessary findings). Furthermore, we note that the default judgment rule in Civ.R. 55 does not apply in divorce proceedings pursuant to Civ.R. 75(F); therefore, a party may still appear at the final hearing and present evidence regardless of that party's failure to answer the complaint. *See Rue v. Rue*, 169 Ohio App.3d 160, 2006-Ohio-5131, ¶ 63 (2d Dist.).

{¶ 9} In *Hightower v. Hightower*, 10th Dist. No. 02AP-37, 2002-Ohio-5488, the trial court's decision purported to divide the parties' marital and non-marital property but it contained no valuation of any of the property, no indication that the court considered the statutory factors set forth in R.C. 3105.171(F) in making its division of property, and no written findings of fact to support the court's property division. On appeal, the appellee conceded that the trial court failed to value the marital property or comply with the mandates of R.C. 3105.171(F) and (G), but the appellee contended that the appellant waived these rights by failing to appear for trial. We found that the appellant's mere silence by failing to appear at the final hearing did not amount to an implied waiver when he was under no duty to speak, and there was also no clear indication of an intent to waive, particularly when appellant was not properly notified of the final hearing date. *Id.* at ¶ 28-29. *See also Didick v. Didick*, 7th Dist. No. 01APO760, 2002-Ohio-5182 (failure to consider the mandatory statutory factors in R.C. 3105.171(F), even in an uncontested divorce action, is an abuse of discretion).

{¶ 10} We agree that, in the present case, there is no indication that William intended to waive any of the requirements for findings under R.C. 3105.171(G), the considerations under R.C. 3105.171(F), or findings as to the valuation of the parties' marital assets. The parties did not enter into a settlement agreement. Michele submitted

and approved the proposed final decree, which included her explicit waiver of these requirements, but William never signed the proposed entry or waived the requirements. We note that, like the appellant in *Hightower*, here, William also contends he had no notice of the final hearing date because he received no court documents in the mail at his home, and he was led to believe by Michele, who was ill at the time, that she had placed the proceedings on hold. Notwithstanding, for purposes of the present case, we cannot find that William intended to waive the requirements under R.C. 3105.171.

{¶ 11} We also note that the circumstances in this case are unlike those in *Roberts*, in which we found the parties had waived their right to have the trial court place a value on certain assets. In that case, the trial court heard testimony as to the value of household goods and furnishings retained by each party but gave a value of \$1 to each of the parties' retained goods and furnishings instead of using the true value, noting that neither parties' testimony was credible as to the value of the furnishings each retained. We found that the trial court was not required to place a value on every personal effect that was a marital asset, particularly when the parties failed to submit sufficient evidence as to the value of those items. Therefore, we concluded that, given the parties' failure to submit any present values of the property divided between them, any resultant error was due to the parties' failure to provide sufficient evidence for the court to use in determining an equitable distribution. *Id.* at ¶ 24.

{¶ 12} In contrast, in the present case, there was no discussion by the trial court as to the value of any marital assets. In *Roberts*, the trial court attempted to value the marital assets but was thwarted by the failure of the parties to submit sufficient evidence. In the present case, neither party even attempted to value the assets, and there was no request for such information by the trial court. Although William could have assured that the trial court valued the marital assets by appearing before the court, under the circumstances of this case, we cannot find that his failure to do so necessarily absolved the trial court of its responsibility to only approve a decree that is fair and equitable and to give its reasons, which most likely would include placing a value at least on the major assets. For all the foregoing reasons, we find the trial court erred when it failed to make the required findings under R.C. 3105.171 prior to making its equitable division. William's first assignment of error is sustained.

{¶ 13} William argues in his second assignment of error that the trial court erred when it failed to make a record of the proceedings regarding the division of property and allocation of parental rights and responsibilities, thereby hampering this court's ability to review the proceedings. We disagree. William presents no authority for the proposition that a domestic court is required to make a record of the final hearing before issuing a decree. Sup.R. 11(A) addresses the recording of court proceedings and provides that "[p]roceedings before any court and discovery proceedings may be recorded by stenographic means, phonographic means, photographic means, audio electronic recording devices, or video recording systems." The rule clearly does not require every proceeding to be recorded. *See Levengood v. Levengood*, 5th Dist. No. 1998AP100114 (June 7, 2000) (Sup.R. 11 does not require every proceeding to be recorded). As the court in *Levengood* pointed out, the Staff Notes to Sup.R. 11(A) provide that "[i]n civil matters, there is no obligation to record the proceedings before the court. However, the court must provide a means of recording the proceedings in a civil matter upon the request of a party." Here, William does not contend that a record was requested by a party. Therefore, we find the trial court did not err when it failed to record the proceedings, and William's second assignment of error is overruled.

{¶ 14} Accordingly, William's first assignment of error is sustained, his second assignment of error is overruled, the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is reversed as to only the division of property and debt, and this cause is remanded to that court for further proceedings in accordance with law and consistent with this decision

*Judgment affirmed in part and reversed in part;
cause remanded.*

BRYANT and KLATT, JJ., concur.
