

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Bret A. Newman,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 11AP-373
v.	:	(C.P.C. No. 09DR-08-3248)
	:	
Sherry A. Newman,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 5, 2012

Steven P. Billing, for appellant.

Elizabeth O'Leary, for appellee.

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

KLATT, J.

{¶ 1} Plaintiff-appellant, Bret A. Newman, appeals a judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, granting him and defendant-appellee, Sherry A. Newman, a divorce. For the following reasons, we affirm in part, reverse in part, and remand this case with instructions.

{¶ 2} Bret and Sherry married on December 9, 1995. They had one child during their marriage. Sherry originally filed a complaint for divorce on December 4, 2007, but the trial court dismissed that action for lack of prosecution. Bret then filed a complaint for divorce on August 17, 2009. Sherry answered and filed a counterclaim for divorce.

{¶ 3} Prior to trial, the parties signed and filed an agreed entry allocating their parental rights and responsibilities. The parties also agreed that neither sought spousal support from the other. Thus, at trial, the primary issue was the appropriate division of

the parties' marital debts and assets. Sherry testified that the poor condition of the parties' finances resulted from Bret's repeated failed attempts to launch business ventures. Sherry also testified that she paid the parties' living expenses when Bret exhausted the parties' resources.

{¶ 4} The evidence substantiates Sherry's testimony. In June 1998, the holder of the mortgage on the marital residence initiated a foreclosure action. Sherry withdrew approximately \$4,000 from her retirement account with the State of Ohio and paid the money to the mortgagee to stop the foreclosure.

{¶ 5} In April 2003, the parties refinanced a rental property that they owned. Bret was supposed to use the \$28,357 that the parties received as a result of refinancing to pay debt incurred in a failed business venture. Instead, Bret used the funds for a helicopter flight club that he was attempting to establish. Bret later lost \$6,200 in a deal to purchase a helicopter and spent \$8,000 to buy a Cessna airplane. Although Bret maintained complete control over the helicopter club's bank account, he could not explain what he purchased with a \$10,000 withdrawal from that account.

{¶ 6} In January 2007, Sherry withdrew \$60,000 from her retirement account. With the money, the parties remodeled the marital residence, paid delinquent property taxes, satisfied loans from friends and family, and paid household expenses. By May 2007, the parties had exhausted the entire withdrawal.

{¶ 7} After Sherry filed for divorce in December 2007, a magistrate issued temporary orders requiring Bret to pay one-half of the mortgage, taxes, and insurance on the marital residence. In late February 2008, Sherry obtained a civil protection order that forced Bret to leave the marital residence. Bret retaliated by ceasing all payments of the mortgage, taxes, and insurance on the marital residence.

{¶ 8} Sherry paid the mortgage and insurance on the marital residence from May to August 2008. Due to a lack of funds, Sherry did not pay the mortgage from September 2008 to March 2009. Sherry explained that, during this time, she was paying "for everything" as Bret refused to contribute or remit his court-ordered child support. (Tr. 204.) She did not have the funds to continue paying the mortgage.

{¶ 9} In the fall of 2008, the Franklin County Treasurer notified Sherry that it planned to sell a delinquent tax lien certificate with regard to the marital residence. To

prevent the sale, Sherry entered into a contract with the treasurer, whereby she agreed to pay the \$3,514.97 in unpaid property taxes through monthly installments of \$73.23. Sherry has since paid \$3,400 toward the delinquent property taxes.

{¶ 10} In March 2009, the holder of the mortgage on the marital residence again filed a foreclosure action. Sherry made two payments totaling \$7,784 so the mortgagee would dismiss that action. Sherry then paid the mortgage until July 2009, when she vacated the marital residence.

{¶ 11} Bret's refusal to pay any household bills meant that the mortgage on the parties' rental property also went unpaid. Prior to April 2008, Bret's mother occupied the rental property and paid the mortgage. Bret, however, evicted his mother after she supported Sherry when Sherry sought a civil protection order and she, too, filed for a civil protection order against him. Although Bret lived in the rental property from April 2008 until July 2009, he did not pay the mortgage. Bret's failure to pay the mortgage violated the temporary orders, which required Bret to pay the mortgage, taxes, utilities, and insurance on the rental property.

{¶ 12} In July 2008, the holder of the mortgage on the rental property filed a foreclosure action. Ultimately, the rental property was sold in foreclosure, but the sale proceeds did not satisfy the mortgage debt. Thus, a deficiency judgment in the amount of \$30,000 exists.

{¶ 13} In its March 17, 2011 judgment, the trial court determined that equity demanded that it distribute the marital portion of Sherry's pension and the liability arising from the foreclosure unequally. Thus, in dividing the marital portion of Sherry's pension, which the parties stipulated had a value of \$140,000, the trial court awarded Sherry \$105,000 and Bret \$35,000. Also, the trial court allocated to Bret the entire \$30,000 deficiency judgment owed after the foreclosure and sale of the rental property.

{¶ 14} Bret now appeals that judgment, and in the "Assignments of Error" section of his brief, he states:

The trial court has committed reversible error in the distribution of the marital estate. The net value of the distributed award to each party reflects a grossly disproportionate share to appellant, contrary to the intent of Ohio Revised Code Section 3105.171. The specific

assignments of error contributing to the inequitable division of the marital estate are as follows:

- (1) The trial court erred in finding that Plaintiff committed financial misconduct.
- (2) The trial court erred in the division to appellant of \$35,000 or 25% of defendant-appellee's pension compared to a division of \$105,000 or 75% of the pension to [appellee].
- (3) The trial court erred in the inclusion and distribution of a Cessna airplane to plaintiff, valued at \$8,000 as a marital asset.
- (4) The trial court erred in the division of the entire Sofa Express credit card as an obligation to appellant.

{¶ 15} Because Bret's first and second assignments of error are related, we will address them together. Essentially, Bret argues that the trial court erred in the manner it allocated the marital portion of Sherry's pension and the deficiency judgment. We disagree.

{¶ 16} The first sentence of R.C. 3105.171(C)(1) requires trial courts to divide marital property equally. However, in the next sentence, R.C. 3105.171(C)(1) provides that "[i]f 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." Thus, although the starting point is an equal division of marital property, a trial court must adjust the division to favor one party and disfavor the other if equity so requires. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5. To ensure an equitable division of marital property, a trial court must consider the factors set forth in R.C. 3105.171(F). *Id.*; R.C. 3105.171(C)(1). A trial court has broad discretion in the allocation of marital property, so an appellate court will not reverse an allocation absent a showing of an abuse of discretion. *Id.*

{¶ 17} Here, in its analysis of the R.C. 3105.171(F) factors, the trial court concluded that Bret was voluntarily underemployed throughout the parties' marriage, which terminated on February 26, 2008, and thereafter. The trial court additionally found that:

T[he] lack of [marital] assets is, in large part, a consequence of the undeniable dissipation, financial mismanagement and, possibly, fraudulent disposition of assets by [Bret]. * * *

[Sherry] expended vast sums of marital money for payments related to the marital residence that [Bret] never paid—mostly due to his resentment over the domestic violence actions—but also due to the fact that he wasted much of the union pursuing various business ventures that never panned out financially for the family.

Judgment Entry-Decree of Divorce, at 29. Moreover, the trial court determined that Sherry's only source of income, now that she is retired, is her monthly retirement check. Given Bret's history of noncompliance with court orders and failure to pay child support, the trial court concluded that Sherry likely will not receive any financial assistance from Bret without resort to further litigation and expense. Based on these findings, the trial court decided that an unequal award of the marital portion of Sherry's retirement account and the deficiency judgment was necessary. We perceive no abuse of discretion in the trial court's findings or its division of the marital asset or debt at issue.

{¶ 18} Bret contends that the trial court relied on his financial misconduct to justify its unequal distribution of the marital asset and debt at issue. Bret then argues that the trial court erred in finding that he engaged in financial misconduct because he did not profit from his actions or intentionally damage Sherry's property interest. We disagree with Bret's interpretation of the trial court's decision. The trial court simply determined, after an analysis of the R.C. 3105.171(F) factors, that an equal division was not equitable. As the trial court did not abuse its discretion in that determination, we overrule Bret's first and second assignments of error.

{¶ 19} By Bret's third assignment of error, he argues that the trial court erred in finding that the Cessna airplane was a marital asset. The parties stipulated that Bret purchased a Cessna airplane in 2003 for \$8,000. At trial, Bret clarified that he actually bought a one-half interest in the airplane, not the entire airplane.¹ Bret testified that he sold his interest to Steve Wolfe, the co-owner of the airplane, in 2007. Sherry, however, introduced an entry from the Federal Aviation Administration ("FAA") registry, dated November 19, 2010, showing that Bret was the registered owner of a Cessna airplane. Bret explained that Wolfe had failed to notify the FAA of the sale, so the registry displayed

¹ Unfortunately, Bret never clarified whether his half of the airplane cost \$8,000 or the entire airplane cost \$8,000.

outdated information. Bret testified, "I guarantee you I would not be able to put a key in that plane and fly it. I do not have rightful ownership to it." (Tr. 140-41.) After Bret's testimony, the parties orally stipulated that Bret sold his share of the Cessna airplane to Wolfe for \$4,000. (Tr. 214.)

{¶ 20} The parties also stipulated that Bret attempted to purchase a helicopter in 2003. Bret forwarded a down payment of \$6,200 to the owner of the helicopter. When the deal fell apart, the owner did not return Bret's down payment.

{¶ 21} In addressing the Cessna airplane and the helicopter, the trial court stated:

With respect to the 1963 Cessna 150D aircraft and the 1965 Hughes 269B helicopter, the Court has insufficient evidence to determine whether either of these aircraft remain in the possession/control of [Bret]. In any event, the funds for the helicopter clearly originated from the refinance loan against the [rental property]; this property has since been lost in a foreclosure action * * *. As such, the Court declines to separately re-assess the \$6,200 down payment to [Bret] as such would be unfair. However, as neither party credibly posited a separate property origin for the \$8,000 sum used to purchase [the] 1963 Cessna 150D aircraft, the Court properly deems these funds marital in nature and shall allocate the value on the marital balance sheet as such.

Judgment Entry-Decree of Divorce, at 17. From this analysis, the trial court appears to be contemplating whether to allocate the money lost on the helicopter and spent on the airplane. However, neither of these amounts constituted an asset or debt existent at the end of the marriage. *See* R.C. 3105.171(A)(3) and (6). Rather, they were only amounts expended during the marriage, and thus, they are not subject to allocation. "If, at the end of a marriage, 'property then no longer exists, it cannot be divided as marital property or awarded as separate property pursuant to R.C. 3105.171 in a decree of divorce.' " *Hood v. Hood*, 10th Dist. No. 10AP-999, 2011-Ohio-3704, ¶ 22, quoting *Wertz v. Wertz*, 2d Dist. No. 19520, 2003-Ohio-3782, ¶ 17.

{¶ 22} In the marital balance sheet, the trial court listed the Cessna airplane as a marital asset and valued it at \$8,000. This action suggests that the trial court found that Bret still owned the Cessna airplane when the parties' marriage ended. However, such a finding is inconsistent with the trial court's earlier conclusion that it could not determine

whether the airplane was in Bret's "possession/control." It is also inconsistent with the parties' stipulation that Bret sold his share of the airplane for \$4,000.

{¶ 23} Given the confusion inherent in the trial court's discussion and treatment of the Cessna airplane, we cannot definitively determine whether the trial court allocated money spent during the marriage or an existing marital asset. As the fourth assignment of error requires a remand to the trial court, we instruct the trial court to clarify its ruling on the Cessna airplane on remand. A court can only divide an existing marital asset, not funds expended during the marriage. Thus, if the trial court believes that Bret owned the airplane when the marriage terminated, it must explicitly state so. In that case, the trial court's treatment of the airplane in the judgment stands. On the other hand, if the trial court believes that Bret did not own the airplane when the marriage terminated, then it must remove the airplane from the list of the parties' assets. Therefore, we sustain Bret's third assignment of error.

{¶ 24} By his fourth assignment of error, Bret argues that the trial court erred in allocating the entire debt owed on the parties' Sofa Express credit card to him. We agree.

{¶ 25} During the parties' marriage, they incurred \$5,567 in debt through the use of a Sofa Express credit card. Bret testified that he used the credit card to buy a living room suite for his mother, as well as a dining room set, stools, couches, and chairs for the marital residence. Sherry testified that the debt was incurred through the purchase of a living room suite for Bret's mother, and a living room suite, brown leather couch and love seat, and stools for the marital residence. Sherry acknowledged that she currently possesses the living room suite, couch, and love seat purchased for the marital residence.

{¶ 26} In the judgment, the trial court allocated the entire \$5,567 debt to Bret. Besides the deficiency judgment, the Sofa Express credit-card debt is the only debt the trial court did not divide equally. As we discussed above, a trial court need not distribute marital assets and debt equally. However, here, the trial court did not explain why an unequal division of the Sofa Express credit-card debt was equitable. The trial court's finding that an unequal award was necessary extended only to Sherry's pension and the deficiency judgment. Thus, we conclude that the trial court erred in its division of the Sofa Express credit-card debt, and we sustain Bret's fourth assignment of error.

{¶ 27} For the foregoing reasons, we overrule Bret's first and second assignments of error, and we sustain Bret's third and fourth assignments of error. We affirm in part and reverse in part, and we remand this case to the Franklin County Court of Common Pleas, Division of Domestic Relations, for further proceedings consistent with law and this decision.

*Judgment affirmed in part, reversed in part;
cause remanded with instructions.*

BROWN, P.J., and BRYANT, J., concur.
