

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Michael Ross,	:	
Plaintiff-Appellant,	:	
v.	:	No. 15AP-253 (C.P.C. No. 13DR-2589)
Heidi Ross,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 10, 2015

Steven E. Hillman, for appellant.

Donald W. Roberts, for appellee.

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

BRUNNER, J.

{¶ 1} This decision is a review of specified parts of a decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations, ordering the preparation of a Qualified Domestic Relations Order ("QDRO") concerning the distribution of funds from plaintiff-appellant, Michael Ross, to defendant-appellee, Heidi Ross, to equalize their retirement accounts, and concerning an order for appellant to pay attorney fees on behalf of appellee. For the reasons set forth in this decision, we overrule appellant's three assignments of error and affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

{¶ 2} The parties to this action were married on May 27, 1995, and three children were born to them during their marriage. Prior to the trial of several contested issues related to the termination of their marriage, the trial court established December 31, 2009

as the de facto termination date of their marriage on motion of appellant. The trial proceeded over the course of five days. The issues raised in this appeal concern the determination of passive interest and investment earnings or losses attributable thereon due to passive growth from December 31, 2009 to the date of transfer to equalize the parties' retirement accounts, along with the award of attorney fees in favor of appellee.

{¶ 3} With respect to the retirement accounts, the trial court decided:

Plaintiff shall retain free and clear of any claims of the Defendant his 401(k) issued by Dayton Heidelberg [sic] with the exception of a transfer of \$55,636.54 to the Defendant's [I]RA to equalize the division of the retirement accounts. The Court orders that Plaintiff prepare a QDRO to effectuate the transfer within 60 days of the Decree. The QDRO should include passive interest and investment earnings or losses attributable thereon due to passive growth from December 31, 2009 to the date of transfer. Defendant shall retain free and clear of any claims of the Plaintiff her Dillard/Wells Fargo stock ownership and the Mass Mutual IRA which is marital property.

Defendant shall also maintain free and clear of the Plaintiff her separate property including the inheritance and the Beneficial IRA issued by Allianz Insurance Company.

(May 1, 2015 Decision and Judgment Entry, 10.)

{¶ 4} In his appeal, appellant does not contest the division of the accounts or transfer amount, but objects to the trial court's inclusion in the QDRO any passive appreciation or depreciation for the period running from the marriage termination date to the date appellant effects the transfer amount of \$55,636.54 to appellee's IRA. In addition, appellant seeks to set aside the trial court's net award of \$4,807.52 for appellee's attorney fees, representing the amount of \$7,000.00 offset by overpaid spousal support to appellee by appellant.

II. ASSIGNMENTS OF ERROR

{¶ 5} Appellant assigns three errors concerning the court's divorce decree:

I. The Trial Court erred in ordering passive income when the Appellee did not present any evidence as to the amount of passive income therefore not meeting its burden to prove passive income.

II. The Court required the Appellant's attorney to establish the passive income for the Appellee after the trial was concluded which violates the ethical obligations that an attorney must afford his client and obviates the Appellee's burden to prove the passive income and in effect has the Appellant assuming the Appellee's burden.

III. The Trial Court erred by ordering the Appellant to pay attorney fees when the Appellee had liquid assets of \$140,000.00 and the Appellant had virtually no liquid assets.

III. STANDARD OF REVIEW

{¶ 6} In a divorce, "[t]he trial court's role in dividing the property is to evaluate all relevant facts and arrive at an equitable division. * * * 'Equitable need not mean equal.' * * * We review a trial court's division of property for an abuse of discretion." *Hood v. Hood*, 10th Dist. No. 10AP-999, 2011-Ohio-3704, ¶ 14, quoting *Cherry v. Cherry*, 66 Ohio St.2d 348, 355 (1981). Also, the decision to award attorney fees in a divorce action will be reversed only on a showing that the trial court abused its discretion. *Trott v. Trott*, 10th Dist. No. 01AP-852 (Mar. 14, 2002); *Colley v. Colley*, 10th Dist. No. 09AP-333, 2009-Ohio-6776, ¶ 59; *Dunbar v. Dunbar*, 68 Ohio St.3d 369, 371 (1994). "The term 'abuse of discretion' connotes more than an error of law or judgment, it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Trott*, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

IV. DISCUSSION

A. Appreciation/Loss in Appellant's 401(k) Account after December 31, 2009

{¶ 7} We consider the first two assignments of error together. Relying on *White v. White*, 11th Dist. No. 2000-P-0036 (Oct. 12, 2001), appellant contends that his former wife, appellee, had the burden to prove passive income from appellant's 401(k) account for the period of December 31, 2009 to the date of transfer. However, it was appellant's duty to effectuate the transfer. *White* is not the keystone of appellant's bridge to finality in this divorce because the burden acknowledged in *White* applies to a party seeking to have the appreciation of value for separate and not marital property. " 'Passive income' means income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse." R.C. 3105.171(A)(4). Separate property includes "[p]assive income and

appreciation acquired from separate property by one spouse during the marriage." R.C. 3105.171(A)(6)(a)(iii). Only if the funds deposited into appellee's IRA account had originated as separate property would appellee have the burden to prove their value, since any passive income and appreciation accruing in the account also would be separate property. *Banjoko v. Banjoko*, 2d Dist. No. 25406, 2013-Ohio-2566, ¶ 22.

{¶ 8} But there is no contention that appellant's 401(k) account, including any passive income and appreciation up to the marriage termination date of December 31, 2009, was anything but marital property and subject to division by the court. Appellant does not dispute the equalization amount of \$55,636.54 as of the December 31, 2009 termination date. At trial, it appears that the parties and the court operated under the impression that appellee had to produce a witness in order to prove any gains on the equalization amount after the marriage termination date and as of the date of transfer of funds to her IRA. On the final day of trial, appellee called investment executive Donna Carr of Fifth Third Securities to testify that passive growth would occur and that the total passive growth in the account was the difference between \$152,383 and \$264,574 on October 30, 2014, the end date of the Morningstar calculations for the mutual funds in the account. No actual projection of future growth or decline was attempted.

{¶ 9} In her decision, the trial judge finally ruled that the transfer amount should include appreciation or depreciation on the transfer amount determined to be appellee's equalization share of the parties' retirement accounts after the December 31, 2009 valuation date.

{¶ 10} In *Sieber v. Sieber*, 12th Dist. No. CA2014-05-106, 2015-Ohio-2315, ¶ 75, the Twelfth District stated:

With respect to retirement accounts, there is no controlling legal authority directing that any appreciation or depreciation in an account value between the date of judgement and the date of disbursement be shared equally between the spouses or, alternatively, directing that the benefit or loss go exclusively to the account-holder spouse. Rather, the issue is left to the discretion of the trial court.

Id., citing *Cwik v. Cwik*, 1st Dist. No. C-090843, 2011-Ohio-463, ¶ 72-76. In *Sieber*, the parties agreed to a valuation date and then, believing his wife had agreed to an equal division of 401(k) accounts as of that date, the husband moved funds he expected would

go to his wife out of various stock investments and into a stable value fund. He testified that he essentially converted these funds into cash so his wife would not lose money as a result of his investment decisions; his counsel notified the wife that her funds had been moved in this manner, and she could invest her share as she saw fit. However, those funds remained in the stable value fund while the husband's portion appreciated in value. Under the circumstances, the trial court decided not to include in the QDRO any passive appreciation or depreciation after the valuation date.

{¶ 11} There was no suggestion in *Sieber* that an expert or other witness was needed to establish the actual appreciation in the husband's 401(k) account. In the matter under review as well, this information should be readily apparent in the husband's 401(k) account statement and available for preparation of the QDRO. The parties in *Sieber* agreed to split evenly each of their 401(k) accounts. As a result of the trial court's holding, the parties retained any appreciation or depreciation thereafter in their respective halves of the wife's two 401(k) accounts as well as the husband's account at issue. The Twelfth District concluded:

While we may have divided the 401(k) accounts in a different manner, we cannot substitute our judgment for that of the trial court. * * * Given the circumstances of this case, we agree with the trial court that such a division is fair and equitable.

(Citation deleted.) *Id.* at ¶ 77.

{¶ 12} The circumstances under which the trial court divided the appreciation or depreciation in appellant's 401(k) account after December 31, 2009 are different from the situation in *Sieber*, and so was the trial court's division of the passive income or loss on those funds. The record discloses no intent or action by the parties to segregate the transfer amount from or within appellant's 401(k) accounts. Nor does appellant argue that the inclusion of passive interest and investment earnings or losses results in an inequitable division of assets between the parties.

{¶ 13} Appellant's reliance on *Teaberry v. Teaberry*, 7th Dist. No. 07 MA 168, 2008-Ohio-3334, is problematic. In *Teaberry*, the Seventh District recognized a presumption in favor of marital, rather than separate, property, and the party asserting property to be separate has the burden of proof on that issue. That party also has the burden of proving that the increase in value of the allegedly separate property during the

marriage constitutes passive income—that is, the increase "was not due to the labor, monetary, or in-kind contribution of either spouse." *Id.* at ¶ 18. In the case under review, appellant's 401(k) account was an undisputed marital asset, subject to division and the trial court's broad discretion under R.C. 3105.171(B). *See id.* at ¶ 13, citing *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5, and *Stevens v. Stevens*, 23 Ohio St.3d 115, 120 (1986).

{¶ 14} *Cwik* further instructs that the trial court is not bound to the established valuation date and may take into account subsequent appreciation or depreciation for purposes of the QDRO. *Cwik* at ¶ 73-76. In *Cwik*, the value of the retirement accounts had dropped due to market conditions in the 20 months after the August 27, 2007 stipulated valuation date, and so the court ordered that the retirement benefit plans be divided by a QDRO into two equal portions as of April 8, 2009. "The trial court has broad discretion when determining the value of a marital asset for the equitable division of property." *Id.* at ¶ 76. As in *Cwik*, appellant "has not demonstrated that the trial court's valuation was inequitable, and thus he has not demonstrated an abuse of discretion." *Id.*

{¶ 15} Finally, despite the language in his second assignment of error, appellant provides no legal argument demonstrating that the trial court's inclusion of appreciation or depreciation in the QDRO places his counsel in a position to violate any ethical obligations. In this context, appellant's counsel was in the position of having to submit post-trial proof of appellee's passive income. Appellant has only to produce a statement from his one and only 401(k) account for the QDRO which includes gains or losses on the transfer amount since December 31, 2011. Finding no abuse of discretion in the trial court's division of the parties' retirement accounts that includes appreciation or depreciation in appellant's 401(k) account up to the date of effectuation of the funds transfer, we overrule appellant's first and second assignments of error.

B. Attorney Fees

{¶ 16} R.C. 3105.73(A) permits an award of all or part of reasonable attorney fees and litigation expenses in an action for divorce "to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." The trial court

awarded appellee \$7,000 for attorney fees on account of her substantially lower income, despite delays the trial court attributed to her. The court heard appellee's testimony that she owed fees to her original attorney, who served up to the final two days of trial, in the amount of at least \$15,000, vouched by the attorney's billing statements totaling \$12,180.

{¶ 17} From the fee award of approximately \$7,000.00 the court deducted overpaid spousal support in the amount of \$2,192.49, and gave a net award of \$4,807.52 (apparently miscalculated by a penny). The court made no award for successor counsel's fees in light of his late appearance and because appellee paid him from her separate property. The court further stated that it may have considered a larger award, but appellee's change of counsel at what the court deemed to be the end of the trial with one remaining witness "caused undue delay of the case and caused both Defendant and Plaintiff to incur additional attorney fees." (May 2, 2015 Decision and Judgment Entry, 16.)

{¶ 18} Appellant objects to the award because appellee had life insurance valued at \$55,550 and an inheritance of \$85,000, and argues that appellee and her counsel caused delays in the trial court by failing to procure a qualified witness to establish passive income from appellant's retirement account. However, as we have discussed, appellant's retirement account was properly treated as marital and not separate property, and there was no real issue between the parties that income realized on the account was passive income. Though the trial judge pressed appellee to produce a witness, in response to which appellee produced a witness to prove that there was income, that witness could not provide an evidentiary quality projection of the amount of passive income after the marriage termination date. As we have noted, this information easily could have come from appellant, the account holder. The trial judge ultimately ordered, within her discretion, that appellant should prepare the QDRO including the passive income or loss. The parties have given no indication that the account information and amounts may be in dispute.

{¶ 19} Though appellee's original counsel did not testify about the details of his billing, this court's holding in *Ward v. Ward*, 10th Dist. No. 85AP-61 (June 18, 1985), is apposite here:

The trial court is able to evaluate, in a large measure, the work performed by an attorney in a domestic relations case by

merely looking at the record before the court. Furthermore, the court was obviously aware that defendant's attorney was expending time in the hearing and in the preparation of documents * * *. While the evidence regarding the nature of the services rendered and the reasonableness of the fee is scanty, the trial court is permitted to use its own knowledge with respect to those elements and the trial court in this case did not abuse its discretion * * *.

Accordingly, we cannot conclude that the award of attorney fees was an abuse of discretion, and we overrule the third assignment of error.

V. CONCLUSION

{¶ 20} For the reasons stated in this decision, we overrule appellant's three assignments of error and affirm the amended judgment nunc pro tunc of the Franklin County Court of Common Pleas, Division of Domestic Relations.

Judgment affirmed.

SADLER & LUPER SCHUSTER, JJ., concur.
