

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

LINDA J. MALONEY	:	
Plaintiff-Appellant/	:	C.A. CASE NO. 22027 and
Cross-Appellee	:	22040
v.	:	T.C. NO. 01 DR 475
JOSEPH D. MALONEY	:	
Defendant-Appellee/	:	(Civil Appeal from Common
Cross-Appellant	:	Pleas Court, Domestic Relations)

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OPINION

Rendered on the 29th day of February, 2008.

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WOLFF, P.J.

{¶ 1} Linda and Joseph Maloney have been involved in protracted litigation incident to their divorce, with numerous disputes over the distribution of marital assets. Both parties appealed from the trial court's initial judgment and decree of divorce, which was rendered in June 2003. We affirmed the trial court's judgment in part and reversed and remanded on

numerous issues. *Maloney v. Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368, 826 N.E.2d 864 (“*Maloney I*”). The trial court conducted a hearing on remand and, on January 18, 2007, it issued a Judgment on Remand. Both parties again appeal. The issues center on the division of Joseph’s marital interest in Brower Insurance Company (“Brower”), an insurance brokerage partnership in which Joseph is a partner, and tracing his non-marital assets.

{¶ 2} Linda raises six assignments of error on appeal, and Joseph raises two assignments on cross-appeal. Linda’s first assignment of error asserts that, in several respects, the trial court exceeded the scope of the remand or ignored the law of the case. Substantively, this assignment consists of arguments that are also raised in other assignments of error. As such, we will not address it separately. We will discuss Linda’s second through sixth assignments of error in an order that facilitates our discussion.

{¶ 3} “V. “THE TRIAL COURT ERRED IN FAILING TO FIND A VALUE FOR DEFENDANT-APPELLEE JOSEPH MALONEY’S CAPITAL ACCOUNT WITH BROWER INSURANCE COMPANY.”

{¶ 4} Linda claims that the court had previously found the value of Joseph’s capital account to be \$161,000. She interprets our previous opinion to limit the trial court’s consideration on remand to the very narrow issue of whether Joseph’s capital account was included in its valuation of the business, and she contends that the trial court erred in concluding that the value of the account at the time of separation could not be determined. She further contends that, contrary to the trial court’s findings on remand, the funds in the account represented earnings and were divisible. With respect to life insurance policies held by the partnership, which would be used to finance a buy-out if one of the partners died, Linda claims

that the trial court erred in finding that the cash value of life insurance policies was not divisible and did not add value to the partnership.

{¶ 5} Joseph argues that our prior decision ordered the trial court to determine whether the value of the capital account was included in the value that the court had attributed to the partnership. Joseph supports the trial court’s conclusion that treating the capital account as an asset in addition to the partnership assets that were already considered would result in double-counting of assets. Joseph also agrees with the trial court’s conclusion that the life insurance owned by the partnership does not add divisible value to the partnership.

{¶ 6} In *Maloney I*, we stated:

{¶ 7} “If the valuation of Brower and Joseph’s share of that value did not include his capital account, then the court undervalued the portion of Joseph’s interest in Brower that is divisible as marital property. On remand, the court must determine whether the value it found did or did not include Joseph’s capital account and enter judgment accordingly.”

{¶ 8} As a preliminary matter, Linda contends that the trial court acted contrary to our mandate by taking additional evidence with respect to the capital account. Our prior opinion, however, was silent on the issue of taking additional evidence. We agree with Joseph that our instructions on remand were for the trial court to determine whether the value of the Brower partnership – \$7,300,000 – included the value of Joseph’s capital account. The trial court concluded that the evidence needed to resolve the questions related to the capital account was “incomplete.” We are sympathetic to the trial court’s view that additional clarification of this issue was needed, and we find no error in its consideration of additional testimony. Thus, the trial court did not ignore the law of the case, as Linda contends, by taking additional evidence to

understand the nature and value of the capital account. Our opinion did not foreclose such action.

{¶ 9} Upon closer examination, the trial court concluded that the capital account is not an independent financial account but is a financial construct which reflects a partner's financial contribution to the firm, as well as unpaid earnings and other liabilities. Because the capital account reflects a partner's investment in the enterprise and monies that have been earned but not yet distributed – items that had already been taken into account in the Maloneys's division of marital assets – the trial court properly concluded that treating the capital account as an additional asset “would result in dividing the same monies twice.” Expert testimony supported this conclusion. Moreover, the proportionate value of a partner's capital account is reflected in the value of the partnership as a whole. Thus, the trial court did not err in concluding that the capital account was not an asset subject to division and transfer over and above Linda's compensation for the marital portion of Joseph's interest in the partnership as a whole.

{¶ 10} In sum, the trial court determined that the value of the business enterprise – \$7.3 million – included the value of the capital account. Thus, the court declined to treat the capital account as an additional asset. Based on our review of the record, this decision was correct, and it did not violate the law of the case.

{¶ 11} Linda also claims that, with respect to life insurance policies held by the partnership, the trial court erred in finding that the cash value of the life insurance policies was not divisible and did not add value to the partnership. The purpose of the life insurance was to finance a buy-out if one of the partners died. The trial court concluded that the partnership's life insurance policies on the lives of the individual partners, including Joseph, did not create a value

to Joseph that was divisible in the divorce. The court noted that Joseph could not borrow against the policy, cash it out, or divide it in any manner because the policy was owned by and payable to the partnership. Such policies add value to the partnership by providing security in the event of the death of a partner, but the value of that security is reflected in the value of the partnership as a whole. The trial court's conclusions were supported by the evidence, and it did not abuse its discretion in refusing to attribute additional value to the partnership due to the insurance policies.

{¶ 12} Linda's fifth assignment of error is overruled.

{¶ 13} "II. "THE TRIAL COURT ERRED IN NOT AWARDING PLAINTIFF-APPELLANT, LINDA MALONEY, INTEREST ON FUNDS, AWARDED TO HER BUT HELD BY HUSBAND PENDING JUDGMENT ON REMAND."

{¶ 14} Linda contends that she was entitled to interest on the amounts owed to her by Joseph from the Brower partnership and the Touchstone account, beginning on April 29, 2003. The trial court refused to award such interest. According to the trial court's judgment, interest would begin to accrue only if Joseph failed to pay the "complete property division" within 30 days of its final judgment on remand.

{¶ 15} The judgment that the trial court issued on April 29, 2003, and from which Linda sought to have interest calculated, was not a final appealable order. As such, the trial court properly refused to calculate interest from that date.

{¶ 16} The final judgment from which the initial appeal emanated was rendered on June 10, 2003. The trial court also refused to calculate interest from this date, explaining that the division of the Touchstone account and Brower interest was under a stay of execution, for which

Joseph had posted a supersedeas bond. The court also observed that the money had not been “due and payable,” as contemplated by R.C. 1343.03, after the prior appeal because of the numerous remanded issues. The court concluded that interest had not been warranted pursuant to R.C. 1343.03 because Linda had not received a “definite” judgment prior to its most recent judgment.

{¶ 17} In our view, Linda’s request for interest is premature. Linda will be entitled to interest dating back to the date of the trial court’s initial judgment once all of the issues in the case have been resolved, and the amount of payment owed to Linda by Joseph is fixed. Until such time as the amount of the award has been determined, we cannot find that the trial court erred in refusing to award interest.

{¶ 18} The second assignment of error is overruled.

{¶ 19} We will address Linda’s third assignment of error and Joseph’s first cross-assignment of error together.

{¶ 20} “III. “THE TRIAL COURT ERRED IN ONLY AWARDING PLAINTIFF-APPELLANT, LINDA MALONEY, \$130,115.26 FOR HER HALF OF THE MARITAL INTEREST IN THE TOUCHSTONE ACCOUNT.”

{¶ 21} “I. “THE TRIAL COURT ERRED IN NOT CREDITING MR. MALONEY HIS PREMARITAL INTEREST IN CITIZENS UTILITIES AND HIS INHERITANCES FROM HIS AUNT AND FATHER AS WELL AS INTEREST EARNED ON PREMARITAL FUNDS.”

{¶ 22} The parties contend that the trial court *undervalued* Joseph’s separate property in the Touchstone account and point out a typographical error in the court’s calculations. The

court concluded that the parties' Touchstone account was valued at \$386,856 at the end of the marriage. The parties agree, and our prior opinions states, that the balance at the end of the marriage was actually \$387,856. Thus, we note a typographical error of \$1,000.

{¶ 23} The parties also agree that the trial court failed to credit Joseph for some of his separate property. They agree that Joseph had deposited \$115,196 in non-marital assets into the Touchstone account, which came from a gift from his aunt (\$10,000), an inheritance from his father (\$25,890), the sale of non-marital stock (\$67,306), and repayment of a premarital loan (\$12,000). The trial court accounted for the repayment of the loan, but not for the other funds that should have been excluded from the marital assets. Thus, the trial court overvalued the marital share of the Touchstone account. Of the \$387,856 in the account, the parties agree that no more than \$272,660 (\$387,856-115,196) should be treated as marital assets.

{¶ 24} Linda contends that \$272,660 is the correct amount of marital assets in the Touchstone account, and that she should therefore have been awarded \$136,330 as her half of the marital share. Joseph raises an additional argument, however, to which Linda does not reply in her Response/Reply Brief. Joseph claims that he earned interest on his premarital share of the Touchstone account in the early months of the marriage, before the premarital funds were used to repay loans from his Brower partners. He asserts that the interest he earned on this separate property was also separate property, and that he should have received credit for it when the trial court determined the marital share of the Touchstone account.

{¶ 25} Joseph is correct that interest on separate funds is also treated as separate property. R.C. 3105.171(A)(6)(a)(iii). However, Joseph did not raise this argument in the initial trial court proceedings or in *Maloney I*. In the interest of bringing an end to these

proceedings, we cannot allow the parties to interject new issues at this point. As such, we will not consider Joseph's argument that he should have been awarded interest on his separate property until it was used to repay the loan from his partners.

{¶ 26} Linda's third assignment of error is sustained. Joseph's first cross-assignment of error is sustained in part and overruled in part.

{¶ 27} We will address Linda's fourth and sixth assignments together.

{¶ 28} "IV. "THE TRIAL COURT ERRED IN ONLY AWARDING PLAINTIFF-APPELLANT, LINDA MALONEY, \$94,795.00 FOR HER SHARE OF THE MARITAL INTEREST IN THE BROWER INSURANCE COMPANY."

{¶ 29} "VI. "THE TRIAL COURT ERRED IN GRANTING A PROTECTIVE ORDER PREVENTING PLAINTIFF/APPELLANT, LINDA MALONEY, FROM DISCOVERING INCOME PRODUCED BY UNDIVIDED ASSETS AND UNDISTRIBUTED MARITAL EARNINGS OWED TO DEFENDANT/APPELLEE AT THE END OF THE MARRIAGE."

{¶ 30} In her fourth assignment of error, Linda argues that the trial court erred in concluding that \$35,000 that was deposited in the Touchstone account shortly after the marriage was separate property traceable to Joseph's premarital earnings. She asserts that our instruction on remand was for the court to determine the balance on the date of the marriage or to explain its use of a different date. She contends that taking evidence about separate property was beyond the scope of the remand and that Joseph had the burden to present such evidence in the first instance.

{¶ 31} The parties married on September 20, 1991. In our prior opinion, we noted that

the trial court used a statement dated December 29, 1991, which showed a balance of \$101,210, to determine the premarital value of the Touchstone account. Linda pointed out, however, that the account balance at the beginning of December had been \$79,396, and she suggested that marital funds might be included in the December 29 total. In remanding for further consideration of this issue, we observed:

{¶ 32} “The court made no finding that determining the premarital balance of the Touchstone Account as of the date of the marriage, September 10, 1991, [sic] would be inequitable, or that December 29, 1991, would be a more equitable date for the determination. Neither does the record portray a reason for such a choice that reasonably may be inferred. It may be that the court adopted the December 29, 1991 date as a matter of convenience, absent evidence of the balance in the account on September 10, 1991. However, such a choice could deprive Linda of her right to share in marital property added to the account between the two dates and reward Joseph for any failure on his part to produce more relevant proof of the account’s premarital balance, which was his burden as the proponent of the separate property claim.”

{¶ 33} On remand, the parties acknowledged that there was no money in the Touchstone account on the date of their marriage and that Joseph had deposited \$79,334.47 to open the account in October. Linda stipulated that the \$79,334.47 was premarital property from a stock sale.

{¶ 34} The trial court considered whether the additional funds that had been deposited in the Touchstone account should be treated as marital assets or separate assets. It concluded that the total pre-marital funds in the Touchstone account was \$126,624.26. Part of this total was a

\$35,000 deposit after the marriage; Joseph claimed that this sum represented money earned prior to the marriage but paid to him by the partnership after the marriage. Linda contends that the trial court exceeded the scope of the remand in reaching this conclusion. She asserts that the court was charged with determining the amount in the account at the time of the marriage, and not with determining the nature of the funds in the account. She claims that “Joseph did not attempt to trace premarital undistributed Brower earnings at the original proceedings” and that, accordingly, she had not “attempt[ed] to prove that Joseph held undistributed marital earnings at the end of the marriage.”

{¶ 35} Although we do not view the scope of our remand as narrowly as Linda does, we do find it problematic that the trial court permitted Joseph to present evidence for the first time on remand that funds tied to his Brower earnings and deposited in the Touchstone account during the parties’ marriage were non-marital assets because of a substantial delay in receiving his income from the business. As Linda points out, if Joseph is routinely paid several months after income is earned, then money was presumably owed to him on the date of separation that had been earned during the marriage. It would be inequitable to credit Joseph for income earned before the marriage but deposited into the Touchstone account after marriage without also accounting for income earned during the marriage that would have been deposited into the account after the parties’ separation.

{¶ 36} In her sixth assignment of error, Linda also claims that a protective order issued from the trial court prevented her from discovering the amount of undistributed earnings to which Joseph was entitled at the time of their separation.

{¶ 37} The trial court heard evidence that Joseph regularly receives his partnership

earnings 90 to 120 days after the period in which the money is earned. Thus, he asserted that \$35,000 deposited in the Touchstone account on December 10, 1991, had actually been earned prior to the marriage and was separate property. Although Joseph's testimony about Brower's practice of distributing earnings several months after the period in which they were earned was credible and unrefuted, it did invite the question of how much money he earned during the marriage that was not reflected in his accounts on the date of the parties' separation.

{¶ 38} Joseph asserts that the "traceability of the starting balance of premarital funds in the Touchstone account is left to the sound discretion of the trial court." Although we agree that this matter was within the trial court's discretion, we must conclude that the trial court abused its discretion when it allowed Joseph to present evidence for the first time on remand that income earned prior to the marriage had been deposited into the Touchstone account after the marriage, while at the same time denying Linda's request to discover evidence relevant to whether monies earned by Joseph during the marriage had not yet been deposited into the account at the time of their separation. In other words, the court should have allowed evidence of both or evidence of neither. Insofar as Joseph did not present the evidence of his premarital earnings in the initial proceedings, and taking into account the tortuous litigation surrounding the division of marital assets, we are of the view that the better course is to ignore this new evidence rather than to provide an opportunity to conduct additional discovery of the amounts earned, but not yet deposited, as of the date of separation. Thus, the \$35,000 claimed by Joseph as premarital should not have been treated as separate property in determining the balance of the Touchstone account at the time of the marriage.

{¶ 39} In her final argument regarding the Brower interest, Linda claims that the trial

court did not comply with our instructions on remand regarding how she should be compensated for the marital funds that were used to repay a small portion of the loans used to purchase Joseph's interest in Brower.

{¶ 40} Joseph had borrowed some money from his partners to purchase his share in the Brower partnership. These loans were repaid during the marriage, primarily from Joseph's separate funds in the Touchstone account. However, Linda argued that, at one point during the marriage, the separate funds in the Touchstone account were insufficient to cover the loan repayment, and a portion of the repayments was made from marital funds, thus increasing the marital share of Joseph's ownership interest. On remand, the trial court was charged with determining whether marital funds were used to cover the loan repayments. If so, we held that the portion of Joseph's interest in Brower that the repayment represented must be treated as marital property.

{¶ 41} When the trial court reconsidered this issue, Joseph acknowledged that his separate funds in the Touchstone account had fallen short of the amount necessary to make the loan payment. The trial court determined that the shortfall had been \$1,082.74 and awarded Linda half of this amount, or \$541.37. Linda does not dispute the amount of the shortfall, but she contends that, instead of being awarded half of the shortfall in cash, she should have been awarded a greater share of Joseph's interest in the business as marital property.

{¶ 42} We agree with Linda that, pursuant to our instructions on remand, the trial court should have treated the \$541.37 that it awarded to Linda as if those funds had been invested in Brower in 1992, when the loan was repaid, rather than awarding that cash value in 2007.

{¶ 43} Linda's fourth and sixth assignments of error are sustained.

{¶ 44} Joseph's second cross-assignment of error is as follows.

- i. "II. "THE TRIAL COURT ERRED IN NOT CREDITING MR. MALONEY HIS PREMARITAL INTEREST IN THE GRIFFIN PROCEEDS FROM THE SALE OF HIS PREMARITAL INTEREST IN 0.42% OF BROWER."

{¶ 45} Joseph claims that he was entitled to credit for the proceeds of the sale of .42% of his interest in Brower. We discussed this sale in our prior opinion, stating:

{¶ 46} "Linda argues that the court undervalued the marital property portion of Joseph's final 8.38 percent interest in Brower. After the parties married, Joseph sold 0.42 percent of his premarital seven percent interest in Brower, reducing his interest to a 6.58 percent interest in Brower. He later purchased an additional 1.8 percent in Brower during the marriage, bringing his total interest in Brower when the marriage terminated to an 8.38 percent interest. The court divided the value of the 1.38 percent difference between Joseph's premarital and final interests as marital property."

{¶ 47} Linda successfully argued in the prior appeal that the court should have divided the entire 1.8 percent that Joseph purchased during the marriage as marital property, reducing the separate property portion of his interest to 6.58 percent.

{¶ 48} In light of this holding, Joseph argues for the first time in this appeal that he should have received credit for the proceeds from the .42% interest that he sold, which was separate property and was allegedly deposited into the Touchstone account. Linda claims that Joseph's attempt to trace proceeds from this sale is beyond the scope of our remand. We agree. In our view, Joseph should have advanced this argument in response to Linda's claim that the

.42% of the Brower interest that he sold, which had been purchased with separate funds, increased her marital share of his interest in the partnership. Furthermore, even if we agreed with Joseph that he might have been entitled to credit for this separate property, we would be forced to conclude that Joseph has presented insufficient evidence to establish that these funds were deposited in the Touchstone account and remained there at the time of the divorce. In other words, Joseph has not sufficiently traced these funds to have them treated as separate property.

{¶ 49} Joseph's second cross-assignment of error is overruled.

{¶ 50} The judgment of the trial court will be affirmed in part, reversed in part, and remanded for modifications consistent with this opinion.

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FAIN, J. and DONOVAN, J., concur.

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