

[Cite as *Osting v. Osting*, 2004-Ohio-4159.]

IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

KAY ANN OSTING

PLAINTIFF-APPELLEE

CASE NO. 1-03-88

v.

RICHARD A. OSTING

O P I N I O N

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas
Court, Domestic Relations Division

JUDGMENT: Judgment Affirmed

DATE OF JUDGMENT ENTRY: August 9, 2004

ATTORNEYS:

STEVEN L. DILLER
Attorney at Law
Reg. #0023320
124 East Main street
Van Wert, Ohio 45891
For Appellant

JUERGEN WALDICK
Attorney for Appellee
Reg. #0030399
214 West Second Street
P. O. Box 304
Delphos, Ohio 45833
For Appellee

BRYANT, J.

{¶1} Appellant, Richard Osting (“Richard”), appeals the October 24, 2003 final decree of divorce of the Common Pleas Court of Allen County determining, in part, that the real estate in which the parties resided and operated their businesses was marital property and ordering certain personal property to be placed with a nonparty.

{¶2} Richard and Kay Ann Osting (“Kay”) were married on July 10, 1971. There are no minor children born as issue of the marriage. Kay Osting filed a complaint for divorce on January 10, 2002. Richard filed his answer on January 24, 2002 and his counterclaim for divorce on January 3, 2003.

{¶3} The facts relevant to this appeal are as follows. In approximately the year 1980, Richard and his brother Ben Osting (“Ben”) became involved in business activities together, which included operating a campground facility, a canoe livery, a swimming area, a camp store, a sporting goods store, a petting zoo and an exotic animal auction. The business activities took place on property that was owned by Richard’s and Ben’s mother, who is referred to as Peg Osting (“Peg”). The businesses had several names and some of the businesses were corporations while others were not. During their business relationship, Richard and Ben made improvements to the land. At no time did Richard pay rent to Peg for the use of the land, nor did Richard pay a percentage of profits to Peg.

{¶4} Richard and Ben began experiencing problems in the business relationship in approximately 1992, which resulted in Ben filing a lawsuit against Richard to terminate the business relationship. The business relationship between Richard and Ben was eventually terminated. The business entities were not appraised at the time the business relationship between Richard and Ben ended. The businesses did have assets which included equipment and inventory and money in bank accounts, but the businesses did not own any real estate or structures. The businesses also had liabilities, including a loan with Fort Jennings State Bank in an amount over \$88,000.00. The loan was co-signed by Peg and she allowed the bank to place a mortgage on her real estate to secure the loan. At the time Richard and Ben terminated their business relationship, a business debt was also owed to Peg in the amount of \$9,610.00 for Peg's satisfaction of a loan on which Richard and Ben defaulted.

{¶5} In terminating the business relationship, Ben wanted to close the businesses, sell the assets and pay the debts. Richard, on the other hand, wanted to continue operating the businesses. Since Richard and Ben were unable to reach an agreement as to how the business interests should be divided, Peg became involved in the negotiations. Around the same time as the dispute between Richard and Ben, Peg decided to deed real estate to each of her sons. Richard received four parcels of land, totaling approximately thirty-eight acres. Ben also

received real estate. Some of the business activities operated by Richard and Ben were located on the property deeded to Richard, while other business activities were located on the property deeded to Ben. An agreement was also entered into by Peg, Richard, Kay, Ben and his wife, Kim, that outlined the provisions of the termination of the business relationship between Richard and Ben and ownership of the parcels of real estate by Richard. Richard received all of the assets and liabilities from the businesses he and Ben had operated, which included the loan to Fort Jennings State Bank and the debt owed to Peg.

{¶6} Richard and Kay then incorporated the Woods and Waters Auction Association business and continued its operation. Richard and Kay also began a business named Northeast Wildlife, which was not a corporation. Richard and Kay proceeded to make improvements upon the property as well. The parties also resided on the property.

{¶7} A hearing was held before the court on May 5, 2003. Richard argued at the hearing that the real estate was his separate property and asked that it be awarded to him. However, Richard believed the improvements made on the property after 1993 should be treated as marital property. Kay argued that the entire property was marital property since it was purchased from Peg and used by Richard and Kay to operate their businesses. The trial court filed its decision and judgment entry decree of divorce on October 24, 2003. In its decision, the trial

court determined that the real estate was marital property and equitably distributed the marital assets and debts. Richard now appeals the court's October 24, 2003 decree of divorce, asserting the following three assignments of error.

The trial Court erred in finding that the real property was marital property.

The trial Court erred in the alternative of permitting the voluntary payment of the marital award or of not voluntarily paid (sic), then the sale of the marital property based on the appraisal value of real property, as opposed to simply including the net proceeds from the sale of the real property.

The Court lacked jurisdiction to compel the return of personal property determined not to be marital property to a nonparty.

{¶8} In his first assignment of error, Richard argues that the trial court erred in finding that all of the parcels of real property were subject to being commingled, and thus converted to marital property. Richard contends that there was insufficient evidence to permit the court to conclude that all the parcels were commingled and Richard did not maintain a separate property interest in the real property.

{¶9} In divorce proceedings, a trial court is required to make a determination as to whether property is marital or separate. R.C. 3105.171(B). R.C. 3105.171(A)(6) provides that property is presumed to be separate when it is found by the court to be any of the following: (1) an inheritance by one spouse by bequest, devise, or descent during the marriage; (2) property acquired by one

spouse prior to the marriage; (3) passive income and appreciation acquired from separate property by one spouse during the marriage; (4) property acquired by one spouse after a decree of legal separation; (5) property excluded by a valid antenuptial agreement; (6) compensation paid to a spouse for the spouse's personal injury; and (7) any gift of property made after the date of marriage that is given to only one spouse.

{¶10} The party seeking to have property declared separate has the burden of proof by a preponderance of the evidence. *Kerchenfaut v. Kerchenfaut*, 3d Dist. No. 1-01-14, 2001-Ohio-2259, 2001 WL 1023105. The trial court's determination of whether property is marital or separate property will not be overturned unless it is against the manifest weight of the evidence. *Id.*; see also *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 694 N.E.2d 989.

{¶11} Richard had the burden of showing by a preponderance of the evidence that the real property was his separate property as defined by R.C. 3105.171(A)(6). This court will not reweigh the evidence introduced at trial; rather, we will uphold the findings of the trial court if the record contains some competent, credible evidence to support the trial court's conclusions. *Kerchenfaut*, 2001-Ohio-2259; *Fletcher v. Fletcher*, 68 Ohio St.3d 464, 1994-Ohio-434, 628 N.E.2d 1343. In addition, "[a] reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is

best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony.” *Barkley*, 119 Ohio App.3d at 159, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 566 N.E.2d 1181.

{¶12} The trial court made the following findings with respect to its determination that the real property was marital property. Richard and Ben engaged in a business relationship from approximately 1980 until 1993. Kay was actively involved in the businesses operated by Richard and Ben. When the business relationship between Richard and Ben deteriorated and the agreement regarding the conveyance of the property from Peg to Richard was entered into, Richard and Kay secured a mortgage on the property and satisfied two obligations to the Fort Jennings State Bank (in the amounts of \$70,000.86 and \$17,994.33) and a mechanic’s lien on the property. The testimony at the final divorce hearing was uncontroverted that all the parties to the agreement completed their obligations under the agreement.

{¶13} The trial court determined that the primary issue was whether the real estate was a gift to Richard or whether the real estate was a sale of property conveyed to Richard for consideration provided by both Richard and Kay. The court found that some consideration was given for the property in the form of Richard and Kay paying to Peg the amount of \$9,610.00, which Peg had

previously paid for the benefit of Richard. In addition, the court found that Richard and Kay had paid off some preexisting debts in Peg's name which were incurred by Peg in assisting the business operations of Richard and Ben. However, the court found that the consideration by Richard and Kay was inadequate to compensate Peg for the value of the property that was conveyed to Richard. Therefore, the court found that a part of the conveyance was a gift. These findings were supported by the agreement in which the parties entered into at the time of the conveyance of the property and the testimony of the witnesses. Richard and Kay both testified that such amounts were paid at the time the property was conveyed to Richard, although Richard characterized the payments in a different manner. The trial court chose to believe the testimony of Kay, which was supported by the agreement and documents indicating the satisfaction of the debts to Peg.

{¶14} Richard argues that since only his name appeared on the deed to the property, Peg intended the property to be a gift to Richard alone. R.C. 3105.171(H) states that the holding of title to property by one spouse individually does not determine whether the property is marital property or separate property. The court determined that the other evidence presented at the hearing showed that although Richard held title to the property, the property was actually marital

property. Richard asserts that he still retained a traceable separate interest in the property that the court failed to award him.

{¶15} The identity of separate property as separate property will not be destroyed when commingled with other property, as long as the separate property is traceable. R.C. 3105.171(A)(6)(b). However, if the separate property component cannot be traced to the original property, the commingled property is presumed to be marital property. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. In the case sub judice, Richard failed to present any evidence as to the value of the property at the time it was conveyed to him by Peg. Kay, on the other hand, presented the agreement between the parties regarding the conveyance of the property as well as testimony that she and Richard used the property to conduct business activities and that she contributed to improvements made on the property.

{¶16} Upon our review of the record, we find that there is competent, credible evidence to support the findings of the trial court. The trial court was in the best position to observe the witnesses and weigh the credibility of the testimony. We conclude that the trial court did not err in its finding that the real property was marital property. Accordingly, the first assignment of error is overruled.

{¶17} In his second assignment of error, Richard argues that the trial court abused its discretion in using the appraisal value of the real property to determine the total value of the parties' assets instead of using the actual sale price. Richard asserts that since the court ordered the property sold, it would have been more equitable for the court to use the selling price in calculating the value of the parties' assets rather than the appraisal value.

{¶18} Ohio courts have consistently held that the trial court must have discretion to determine what is equitable based upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293; *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 554 N.E.2d 83; *Booth v. Booth* (1989), 44 Ohio St.3d 142, 541 N.E.2d 1028. The trial court's distribution of assets is reviewed under an abuse of discretion standard. *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295, 480 N.E.2d 1112. An abuse of discretion is more than a mere error of judgment; it implies the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶19} The real estate at issue was appraised by several different appraisers. The trial court considered an appraisal done by Terry Sargent. Terry Sargent appraised the real estate at a value of \$526,000.00. However, the trial court found some inconsistencies in the testimony of Terry Sargent regarding his appraisal

value. The trial court also considered an appraisal done by Randy Faulder of Ron Spencer Real Estate. Randy Faulder appraised the real estate at a value of \$307,925.00. In addition, the trial court considered the testimony of Richard and Kay who indicated that the real estate was worth between \$400,000.00 and \$425,000.00. The court found that the value of the real estate had fallen since the appraisal of Terry Sargent on October 2, 2002 and the court determined that the appraisal of Randy Faulder was the appropriate value to use. The court valued the real estate at \$308,000.00.

{¶20} In its distribution of the marital assets, the trial court determined that Richard was entitled to the interest in the real estate and the liens associated with the real estate. After determining the distribution of the parties' assets and debts, the court ordered Richard to pay Kay \$94,483.00 to equalize the distribution. The court ordered Richard to pay the amount owed to Kay within ninety days of the filing of the judgment entry decree of divorce. Further, the court ordered that if Richard failed to make this payment to Kay within that time the real estate should be sold, and after the costs of the sale and the mortgages were paid, Kay should be paid the amount owed to her from the remainder.

{¶21} Richard argues that the trial court should have adjusted the amount of the value of the real estate to the actual selling price. However, the trial court assigned value to the real estate in an amount that was supported by competent,

credible evidence at trial. The trial court only ordered the sale of the real estate in the event that Richard failed to pay Kay the amount owed to her for equalization of the assets. It was within the trial court's discretion to determine this alternate means of satisfaction for the amount owed to Kay. Trial courts have the discretion to make equitable distributions based upon the facts and circumstances of the case. The record contains several allegations by Kay and findings by the court of Richard's uncooperativeness with the court's prior orders, which resulted in the trial court finding Richard in contempt on several occasions. Further, the trial court found that Richard's testimony was not credible regarding several issues and that Richard had improperly represented certain information to the court. Based on these findings, the court was within its discretion to order an alternate means of satisfaction for Richard to pay the amount owed to Kay in order to protect Kay's interests. We hold that the trial court did not abuse its discretion in this regard and overrule the second assignment of error.

{¶22} In his third assignment of error, Richard argues that the court did not have authority to order Richard or Kay to give property to a nonparty. Richard acknowledges that the court had the authority to determine whether the property at issue in the case was marital property or separate property and to make an order distributing the property accordingly. Richard accepts that such an order would be binding upon the parties to the action. However, Richard asserts that the trial

court's order that certain property be placed with a nonparty is not a binding order and that the property should be the subject of other proceedings.

{¶23} At the final divorce hearing, Richard claimed that his father-in-law, Rolland Blockberger, gave him a number of guns. This was disputed by the testimony of Kay and her family. After considering the testimony of the witnesses at the hearing, the trial court found that the guns were part of the estate of Rolland Blockberger and were not the property of either Richard or Kay. The court ordered that the guns be placed with Kay's mother, Irene Blockberger, who is the sole beneficiary under Rolland's will.

{¶24} Richard cites the case of *Moffitt v. Litteral*, 2d Dist. No. 19154, 2002-Ohio-4973, in support of his argument. However, the *Moffitt* case is readily distinguishable from the facts of the case sub judice. In *Moffitt*, the court added a party to the divorce proceedings and later dismissed the party to the suit and vacated the orders. The third party appealed the judgment of the case and the action was barred by res judicata because the appellant was not a party to the domestic relations suit. In the case sub judice, there are no third parties attempting to assert their rights in the divorce proceedings. Rather, Richard asserts that the trial court does not have the authority to order the parties to the action to deliver property to a nonparty. Richard does not cite any authority to support this argument. The trial court clearly determined in its decision that the property at

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issue did not belong to Richard or Kay. Further, the court determined the proper owner of the property and ordered that the property be delivered to that party. Since Richard and Kay are parties to the action and the court retained jurisdiction over them, the trial court's order is binding upon the parties to the action. Richard is not vested with any ownership interests in the property, and is further barred from possessing the property due to the order that he not possess any firearms, and thus Richard should relinquish such property to its rightful owner. Accordingly, Richard's third assignment of error is overruled.

{¶25} Having found no merit with the assignments of error, the judgment of the Common Pleas Court of Allen County is affirmed.

Judgment affirmed.

CUPP and ROGERS, JJ., concur.