

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
VAN WERT COUNTY**

CHERYL ANN WINBERG

CASE NUMBER 15-04-15

PLAINTIFF-APPELLEE

v.

OPINION

MARK R. WINBERG

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: May 16, 2005

ATTORNEYS:

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For Appellee.**

CUPP, P.J.

{¶1} Defendant-appellant, Mark Winberg (hereinafter “Mark”), appeals the decision of the Van Wert County Court of Common Pleas, awarding spousal support to plaintiff-appellee, Cheryl Winberg (hereinafter “Cheryl”), in the form of a mortgage assignment and awarding Cheryl a one-half interest in Mark’s retirement benefits.

{¶2} Cheryl and Mark were married on December 13, 1979. On June 10, 2003, after twenty three years of marriage, Cheryl filed a Complaint for Divorce. During the pendency of the divorce, the parties stipulated to the division of motor vehicles and personal property, the present values of pension and retirement benefits and the fair market value of the marital residence as well as the outstanding mortgage balance.

{¶3} On March 12, 2004, a hearing was held in front of the magistrate. The magistrate entered a decision on April 29, 2004, determining that Cheryl should be paid spousal support, but that Mark was unable to pay due to his lack of gainful employment despite two college degrees, several post college degrees and computer certifications. The magistrate, therefore, ordered that the marital residence be sold and ordered Mark to hold Cheryl harmless on and defend her against further liability on the \$60,420 balance of the mortgage obligation in lieu

of the support Mark would have otherwise been ordered to pay but for his voluntary unemployment.

{¶4} The magistrate further ordered that Cheryl be awarded a one-half interest in the total present value of Mark's retirement benefits, equaling \$30,279 and a credit of one-half of the funds depleted from the marital retirement account by Mark during the pendency of the divorce, equaling \$7,666.

{¶5} Mark subsequently filed objections to the magistrate's decision, which were overruled on August 24, 2004. The trial court entered its Divorce Decree and Domestic Relations Orders on September 22, 2004.

{¶6} It is from this decision that Mark now appeals and sets forth three assignments of error for our review.

ASSIGNMENT OF ERROR NO. I

The trial court erred in awarding spousal support to the Appellee-Wife.

{¶7} Mark argues, in this assignment of error, that Cheryl's circumstances did not warrant the award of spousal support. Mark asserts that Cheryl has a full-time job and has few living expenses. Mark's last full time employment, on the other hand, was June 2002. Mark asserts that the conclusion he voluntarily failed to obtain and maintain employment is erroneous. Rather, Mark contends that during periods of unemployment, he was retraining or obtaining additional

education in order to make a career change. Recently, he states that his employment prospects have been limited due to his rehabilitation following two hip surgeries. Considering the respective financial situations of the parties, Mark asserts that it was error for the trial court to order him to pay spousal support.

{¶8} A trial court has broad discretion in formulating spousal support awards and a reviewing court should not alter an award absent a finding that the trial court abused its discretion. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. An appellate court cannot substitute its judgment on factual or discretionary issues for that of the trial court. *Id.* at 218-219. An abuse of discretion must indicate that the trial court's attitude is unreasonable, unconscionable or arbitrary. *Id.* at 219.

{¶9} The nature, amount and duration of spousal support is determined on the basis of the trial court's evaluation of the evidence under the relevant factors of R.C. 3105.18. Those factors include: the income of the parties; their relative earning abilities; their ages and physical conditions; the retirement benefits of the parties; the duration of the marriage; the standard of living established during the marriage; the relative extent of education of the parties; relative assets and liabilities; the contribution of each party to the education, training, or earning ability of the other party; the time and expense necessary for the spouse seeking support to acquire education, training, or job experience so that they may obtain appropriate employment; the tax consequences of an award of spousal support; the

lost income production capacity of either party that resulted from marital responsibilities; and any other factor that the court finds to be relevant.

{¶10} At the final hearing, the following evidence was adduced with regard to these factors: Cheryl is employed full-time as a respiratory therapist at Paulding County Hospital; just before the final divorce hearing, she quit a second part-time job at Van Wert County Hospital; in 2003, her gross income was approximately \$45,000 from the two jobs; during the marriage, Mark earned up to \$66,000 in one tax year, but has not earned more than \$7500 since 1997; Mark has not been steadily employed since 1997; Cheryl is forty-eight years old, Mark is forty-nine years old; Mark had two hip replacement surgeries in July 2003, Cheryl suffers from diabetes and high blood pressure; Mark has retirement benefits totaling approximately \$60,000, Cheryl has retirement benefits totaling approximately \$18,000; the parties were married for twenty-three years and were relatively financially comfortable.

{¶11} The evidence also established that Mark has a master's degree in business from Indiana University, which he obtained during the marriage, a bachelor's degree in mechanical engineering from the Indiana Institute of Technology, and several computer certifications; Cheryl obtained her respiratory therapist degree during the parties marriage; and that Cheryl was working two or

three jobs during the time Mark was retraining and obtaining additional education in order to make a career change.

{¶12} Based on the consideration of this evidence, we can not find that the trial court's determination that Cheryl was entitled to spousal support was unreasonable, unconscionable or arbitrary. Due to the education and training Mark received, he has significant earning ability. Despite this, the trial court found that he remained voluntarily unemployed while Cheryl worked multiple jobs during the marriage to support the family. Because the trial court is in a better position to observe the demeanor of the witnesses and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trial court, the trier of fact in this case. See *State v. DeHass* (1967), 10 Ohio St.2d 230. Considering the facts as found by the trial court, we hold that the trial court did not abuse its discretion.

{¶13} Mark's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. II

The trial court erred in awarding spousal support to the Appellee-Wife and in apportioning that spousal support in the form of the mortgage obligation assignment to Appellant-Husband in lieu of spousal support.

{¶14} As stated herein, the trial court ordered the marital residence to be sold, with any net proceeds or deficiencies being Mark's responsibility. Mark was ordered to maintain all the costs and expenses of the house until its sale or its

offering to public auction. The trial court ordered Mark to hold Cheryl harmless and defend her against further liability on the balance of the mortgage, approximately \$60,000, in lieu of spousal support.

{¶15} In this assignment of error, Mark incorporates his previous argument that the award of spousal support was in error and, in addition, argues that the trial court erred in awarding said support in the form of a mortgage obligation assignment. Mark asserts that the marital residence was in poor condition when it was jointly purchased and while the parties were cohabitating. Therefore, Mark contends that the trial court erred in ordering that he be responsible for the balance on the mortgage. Because we have already determined that the trial court did not abuse its discretion in finding Cheryl was entitled to spousal support, the remaining issue, in this assignment of error, is whether it was error for the trial court to order Mark to assume the mortgage instead of making traditional support payments.

{¶16} Cheryl testified that she left the marital residence because Mark would not work and she could not “live like a pig” anymore. She stated that the marital residence was in extremely poor condition, despite that fact that Mark was unemployed and had the time and skill to fix the home. For example, she stated there were holes in the roof where water would leak through; a new well had been drilled, but Mark never hooked it up; the septic tank did not function properly; and

the lawn was unkempt. Cheryl testified that while she and Mark were married, she was working approximately seventy-two hours a week and did not have the energy to take full responsibility of the house in addition to work.

{¶17} After Cheryl moved out of the residence, the house continued to deteriorate. Mark failed to let the parties' dogs out of the house, resulting in canine waste and an accompanying odor throughout the house. The realtor testified that despite the parties' stipulation that the house was worth \$60,000, she did not believe it could be sold for more than approximately \$50,000 due to the offending odor, the repairs necessary to the exterior of the home and to an upstairs bedroom, which had been gutted down to the wood lath during the parties' marriage but had never been remodeled.

{¶18} R.C. 3105.18(B) provides that "an award of spousal support may be allowed in real or personal property, or both, or by decreeing a sum of money, payable either in gross or by installments, from future income or otherwise, as the court considers equitable." After reviewing the record, we do not find it was error for the trial court to order Mark to assume the mortgage on the marital residence. As we have found the award of support was not in error, the trial court had to find a way for Mark to pay spousal support in light of his unemployment, which the trial court determined was voluntary. We do not find it was inequitable for the trial court to conclude that the most effective means of ensuring Cheryl would

receive the equivalent of the support she was entitled to would be to assign Mark the responsibility of the marital residence, which was one of the only assets he possessed. Accordingly, we do not find the trial court abused its discretion.

{¶19} Mark's second assignment of error is overruled.

ASSIGNMENT OF ERROR NO. III

The trial court erred in granting Appellee one-half the interest in the total present value of the Appellant's retirement benefits based on attributing "depletion" of assets to Appellant.

{¶20} In his final assignment of error, Mark argues that the trial court erred in awarding Cheryl a one-half interest in the total value of his retirement benefits, plus a credit of one-half of the sum that the trial court found Mark had depleted from the Vanguard marital retirement account during the pendency of the divorce. Mark contends that the trial court's finding he had depleted the account by more than \$15,000 was in error, as he was permitted to withdraw necessary sums from the account for living expenses and mortgage payments because he was unemployed during the divorce proceedings.

{¶21} According to the temporary orders, Mark was restrained from withdrawing or transferring any sums from his Vanguard retirement account, with the exception that he could "withdraw all necessary sums to pay his living expenses and mortgage payments." In addition, Mark was to provide Cheryl's

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counsel with an itemized monthly accounting of all the expenditures from the retirement account.

{¶22} Following the final hearing, the magistrate made findings of fact and conclusions of law which were subsequently adopted by the trial court. Among these findings the magistrate found the following:

The Defendant's retirement benefits include a Vanguard Account which account balance as of 06-30-03 was thirty five thousand seven hundred and forty-five dollars (\$35,745.00). Consistent with the Temporary Orders previously issued herein that account balance was drawn down to twenty thousand four hundred and thirteen dollars (\$20,413.00) as of 12-31-03 by the Defendant. Emphasis added.

{¶23} In consideration of this fact, the trial court ordered that Cheryl was to receive one half of the total present value of Mark's retirement benefits, plus a credit equaling one-half of the monies depleted from the Vanguard account, amounting to \$7,666.00.

{¶24} After reviewing the record, we can find no evidence to support Mark's contention that the trial court determined his "depletion" was improper because there is no indication that the trial court found the withdrawals were unauthorized or unnecessary. On the contrary, it was determined that the depletion was "consistent with the temporary orders." Therefore, we will only consider whether the trial court erred in awarding Cheryl a sum equal to one half

of the depleted funds from the Vanguard marital account in addition to the one-half interest in the account to which she was entitled.

{¶25} “When considering a fair and equitable distribution of pension or retirement benefits in a divorce, the trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan, and the reasonableness of the result.” *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, paragraph one of the syllabus.

{¶26} From the facts before us, we cannot find that the court abused its discretion in dividing the parties’ retirement benefits. With regard to the Vanguard marital retirement account, the trial court awarded each party a one-half credit of the amount remaining at the time of the divorce decree and awarded Cheryl a credit equal to one-half of the sum that Mark drew down to keep up the marital property and for his own living expenses. Although Mark disputes this credit, the record indicates that he received the benefit of the sum expended, as he was living in the marital residence and was paying personal debts and obligations with funds from the marital account. Although Mark was authorized to make such payments, the trial court determined that Cheryl’s interest should not be affected and, in essence, awarded her a one-half interest in the original value of the account. We do not find the trial court erred in doing so.

{¶27} Accordingly, Mark’s third assignment of error is overruled.

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{¶28} Having found no error prejudicial to appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment affirmed.

BRYANT and ROGERS, JJ., concur.

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