[Cite as *Byers v. Byers* , 2010-Ohio-4424.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

JILL L. BYERS,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA3124
	:	
vs.	:	**September 16, 2010**
	:	
WILLIAM E. BYERS,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Matthew S. Schmidt, Ater, Schmidt & Wissler, L.L.P., Chillicothe, Ohio, for Appellant.

J. Jeffrey Benson, Benson & Schmidt, L.L.P., Chillicothe, Ohio, for Appellee.

McFarland, P.J.:

{¶1} Appellant, William E. Byers, appeals from a decision of the Ross County Court of Common Pleas granting a divorce between himself and Appellee, Jill L. Byers, and also awarding Appellee spousal support. On appeal, Appellant contends that the trial court erred in 1) awarding spousal support; and 2) ordering Appellant to pay Appellee $13,375.00 for tax savings. Because we conclude that the trial court did not abuse its discretion or impermissibly divide Appellant's Social Security benefits to effectuate spousal support, we overrule Appellant's first assignment of error.

However, because we conclude that the trial court abused its discretion in ordering Appellant to pay Appellee the amount of the couple's tax savings realized as a result of filing a joint tax return, we sustain Appellant's second assignment of error. Accordingly, we affirm in part and reverse in part the decision of the trial court and remand this matter for further proceedings consistent with this opinion.

FACTS

{¶2} Appellant, William Byers, and Appellee, Jill Byers, were married on March 4, 1966, and two children, now emancipated, were born of the marriage. Appellant retired from Aurora Healthcare Unlimited and although Appellee was a homemaker for most of the marriage, she has worked for the past few years as a real estate agent in Arizona, where the parties own several properties. Aside from their ownership of several properties, the parties also own substantial assets in the form of various different retirement and investment accounts.

{¶3} Appellee filed for divorce on March 13, 2007, and Appellant counter filed on April 24, 2007. A hearing was held before the Magistrate on October 15, 2007, and a Magistrate's decision was issued on November 16, 2007. The Magistrate divided the marital property and debts and denied Appellee's request for spousal support, basing his decision on his reasoning

that such an award would "in essence be a division of Defendant's Social Security benefits to effectuate spousal support." The Magistrate's Decision contained nothing related to the filing of tax returns by the parties.

{¶4} Appellee filed first and second objections to the Magistrate's Decision. Of relevance here is Appellee's second objection, which challenged the Magistrate's denial of her request for spousal support. For some reason, a substantial amount of time elapsed before a hearing on Appellee's objections was held by the trial court. However, on April 2, 2009,[1] the trial court apparently held another hearing and then issued a decree of divorce.

{¶5} After equitably dividing substantial marital assets in the form of real property and retirement and investment accounts, the trial court ordered Appellant to pay to Appellee spousal support sufficient to cover her health insurance costs until she attains the age of 65. The trial court further ordered Appellant to pay to Appellee $13,375.00, which the trial court determined was the amount of joint tax savings realized by the parties as a result of filing a joint tax return for tax year 2008. These orders were included in the trial court's Judgment Entry Decree of Divorce filed on July 2, 2009. It is

[1] We were unable to locate a copy of transcript from this hearing in the record before us.

from this judgment entry that Appellant brings his appeal, assigning the following errors for our review.

ASSIGNMENTS OF ERROR

"I. THE TRIAL COURT ERRED IN AWARDING SPOUSAL SUPPORT TO APPELLEE.

II. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO PAY APPELLEE $13,375.00 FOR TAX SAVINGS."

ASSIGNMENT OF ERROR I

{¶6} In his first assignment of error, Appellant contends that the trial court erred in awarding spousal support to Appellee. In support of this contention, Appellant argues that the only income he receives, aside from his defined benefit plan and investments accounts which were already divided equally between the parties, is from his social security benefits. Appellant contends that social security benefits are not subject to division in a divorce proceeding, citing this Court's previous reasoning in *Bishman v. Bishman*, Washington App. No. 03CA54, 2005-Ohio-4379, and argues that the award of spousal support to Appellee in essence "divided that benefit to effectuate spousal support." Appellee, on the other hand, contends that the award of spousal support was reasonable and appropriate. Appellee further argues that the trial court properly considered Appellant's social security benefits as

part of his total income, along with his inheritance assets, in making the award.

{¶7} A trial court enjoys broad discretion in awarding spousal support under R.C. 3105.18(C)(1). *Gordon v. Gordon*, Trumbull App. No.2004-T-0153, 2006-Ohio-51, at ¶ 13. The trial court must consider the factors enumerated under R.C. 3105.18(C)(1) in making the award. *Stafinsky v. Stafinsky* (1996), 116 Ohio App.3d 781, 784, 689 N.E.2d 112. It then must set forth the basis for its award in sufficient detail for adequate appellate review. Id. The trial court's award is reviewed for abuse of discretion. *Gordon* at ¶ 13. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶8} R.C. 3105.18(C)(1) lists fourteen factors a trial court shall consider when making an award of spousal support:

"(a) The income of the parties, from all sources* * *;

(b) The relative earning abilities of the parties;

(c) The ages and the physical, mental and emotional conditions of the parties;

(d) The retirement benefits of the parties;

(e) The duration of the marriage

(f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;

(g) The standard of living of the parties established during the marriage;

(h) The relative extent of education of the parties;

(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

(j) The contribution of each party to the education, training, or earning ability of the other party* * *;

(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

(l) The tax consequences, for each party, of an award of spousal support;

(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

(n) Any other factor that the court expressly finds to be relevant and equitable."

{¶9} In this case, the parties owned substantial amounts of real property, investment accounts and also retirement accounts, all of which were equitably divided by the trial court before making the award of spousal support. The record reveals that apart from the assets already divided between the parties, Appellee does have some current income from her employment as a real estate agent in Arizona, though it has been sporadic

with the exception of one "boom" year where she earned $32,000. Appellant is retired now and receives social security, in addition to his other retirement which had already been divided. Appellant was also awarded additional assets in the divorce, consisting of certain investment accounts, which were awarded to him as his separate property because he inherited them from his aunt.

{¶10} A review of the record reveals the following exchange between counsel and Appellant regarding Appellant's inheritance during the October 15, 2007, hearing before the Magistrate:

"Q. Your attorney mentioned that you have two CMA accounts at Merrill Lynch with you and your sister?

A. That's correct.

Q. And you've – I think your attorney told us there was a hundred and forty-five thousand in one and a hundred twenty thousand in the other, correct?

A. Close, correct.

Q. Do you draw money off of those accounts?

A. No.

Q. You inherited those monies?

A. Yes."

{¶11} Further, the following exchange took place between counsel and Appellee regarding Appellee's request for spousal support:

"Q. You're asking this Court for half of Bill's social security until you get social security so you can pay for health insurance. Is that right?

A. I'm not – I can't get that until I'm – but I'm asking --

Q. But as spousal support, you're asking the Court to order that he pay you half of that?

A. -- Oh, okay

Q. Are you or aren't you?

A. Yes.

Q. All right. You need help paying for your health insurance?

A. I do."

{¶12} When the Magistrate issued his decision on November 16, 2007, he denied Appellee's request for spousal support, noting the prohibition against dividing Social Security, reasoning that "[t]he awarding of spousal support to Plaintiff in essence would be a division of Defendant's Social Security benefits to effectuate spousal support." Nothwithstanding the above-cited testimony, in her second objection to the Magistrate's Order, Appellee claimed that she was not seeking a division of Social Security benefits, arguing that the trial court was "permitted to consider the payment of Social Security Benefits when determining spousal support pursuant to R.C. 3105.18." In the trial court's final decree of divorce, the court found spousal support to be reasonable and appropriate and ordered Appellant to

pay to Appellee "an amount equal to her monthly health insurance premium" until Appellee attains the age of 65.

{¶13} As set forth in *Mulliken v. Mulliken*, "It is well-recognized that Social Security benefits may be considered by a trial court in making an equitable distribution of marital assets in a divorce, pursuant to R.C. 3105.171. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791 N.E.2d 434, at the syllabus. Equally well-recognized is the fact that federal law prohibits the division of Social Security benefits in divorce. Id. at ¶ 7. [See also, Section 407(a), Title 42, U.S. Code which "forbids any transfer or assignment of Social Security benefits and, in general, protects these benefits from 'execution, levy, attachment, garnishment, or other legal process."] Effectively, under Ohio domestic relations law, Social Security benefits are an asset, not a source of support. If one party to a divorce has Social Security benefits greatly exceeding those of the other party, and 'equalization' is sought, then the 'equalization' must be achieved either through a lump sum payment, or from some source of income apart from the Social Security itself." Geauga App. No. 2005-G-2615, 2006-Ohio-4178 at ¶31.

{¶14} Further, as this Court has previously noted, "[w]hile a trial court may consider a party's Social Security benefit in relation to all marital

assets when making an equitable division, it simply cannot actually divide that benefit to effectuate spousal support." *Bishman*, supra, at ¶13; see also, *Bishman v. Bishman*, Washington App. No. 07CA30, 2008-Ohio-1394 (recognizing our prior holding that "both federal and state law prohibit the division of Social Security benefits in divorce proceedings.").

{¶15} In this case, the trial court did not overtly order the division of Appellant's Social Security benefits: it ordered him to pay money, from whatever source, to cover Appellee's health insurance. Taking into consideration the duration of the parties' marriage, Appellee's sporadic current income, and Appellant's inheritance assets, we cannot conclude that the trial court abused its discretion in awarding spousal support, or that it impermissibly divided Appellant's Social Security benefits to effectuate spousal support. As such, Appellant's first assignment of error is overruled and the trial court's decision with respect to the award of spousal support is affirmed.

ASSIGNMENT OF ERROR II

{¶16} In his second assignment of error, Appellant contends that the trial court erred in ordering him to pay Appellee $13,375.00 for tax savings. Appellant initially notes that during the hearing held on April 2, 2009, the trial court ordered him to pay to Appellee one-half of the tax savings

realized by the parties as a result of filing a joint tax return for tax year 2008. However, in its Judgment Entry Decree of Divorce, the trial court ordered him to pay Appellee $13,375.00, which represents the full amount of the tax savings. Appellee concedes on appeal that the language in the divorce decree is incorrect, but contends that she is entitled $6,687.50, or one- half of the tax savings amount, which she claims the trial court correctly determined was marital property.

{¶17} The transcript from the April 2, 2009, hearing on objections was not included in the record on appeal. However, because both parties agree that the trial court verbally ordered Appellant to pay one-half of the tax savings amount to Appellee, we will accept that fact as true. Nonetheless, in light of Appellee's concession that although she is not entitled to the full $13,375.00, she is still entitled to one-half of that amount, or $6,687.50, we must determine whether the trial court abused its discretion in ordering Appellant to reimburse Appellee for any of the tax savings.

{¶18} As we have previously recognized, a trial court enjoys broad discretion in crafting an equitable division of marital property in a divorce proceeding. *Elliott v. Elliott*, Ross App. No. 05CA2823, 2005-Ohio-5405 at ¶ 16, citing *Elliott v. Elliott*, Ross App. No. 03CA2737, 2004-Ohio-3625 at

¶12 (“ Elliott II ”), relying on R.C. 3105.171(C)(1); *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597; *Worthington v. Worthington* (1986), 21 Ohio St.3d 73, 76, 488 N.E .2d 150; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295, 480 N.E.2d 1112; *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293. Despite the trial court's broad discretion, Ohio law requires the court to divide marital and separate property equitably between the parties. Id., citing R.C. 3105.171(B). In most cases, this requires the court to divide the marital property equally. Id., citing R.C. 3105.171(C)(1). However, if equal division would produce an inequitable result, the court must divide the property equitably. Id. Because the court must consider both the assets and liabilities, an equitable division of marital property necessarily implicates an equitable division of marital debt. Id., citing R.C. 3105.171(F)(2).

{¶19} We will not reverse a trial court's allocation of marital property and debt absent an abuse of discretion. *Elliott v. Elliott* at ¶ 17, citing *Holcomb* at 131, 541 N.E.2d 597. An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable or unconscionable. Id., citing *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483, 630 N.E.2d 665; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. When applying this

standard of review, we may not freely substitute our judgment for that of the trial court. Id., citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. Instead, we must view property division in its entirety, consider the totality of the circumstances, and determine whether the trial court abused its discretion when dividing the parties' marital assets and liabilities. Id., citing *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222, 459 N.E.2d 896. It is with these principles in mind that we consider Appellant's assigned error.

{¶20} We first note that the purported marital asset at issue is not a tax refund, but rather a tax savings, realized as a result of the parties filing a joint income tax return for tax year 2008 during their pending divorce action. In *Dunham v. Dunham*, 171 Ohio App.3d 147, 2007-Ohio-1167, 870 N.E.2d 168 at ¶ 102, the trial court ordered that the parties file a joint tax return during the pendency of their divorce, because filing jointly would result in a net tax liability savings. The trial court also found that the couple's tax liability was a "joint marital liability," ordering each to pay one-half. Id. at ¶104. Applying this reasoning to the facts sub judice, the parties' tax liability here was a joint marital debt. "[J]oint debts are not property or interests in property that the trial court must equally divide between the

parties." Id. at ¶66, citing *Maloney v. Maloney*, 160 Ohio App.3d 209, 222, 2005-Ohio-1368, 826 N.E. 864 at ¶48.

{¶21} Taking into consideration the foregoing reasoning, we conclude that the tax savings at issue is just that, a tax savings, not a marital asset subject to division between the parties, or a joint debt to be divided by the parties, but rather, the avoidance of such a debt. As such, we conclude that the trial court erred and abused its discretion in apparently categorizing this sum as a marital asset, and in ordering Appellant to pay any amount of the parties' joint tax savings over to Appellee. In the absence of the transcript from the hearing or any other argument by Appellee on appeal, we presume that both parties benefitted from the joint tax filing and resultant reduction in joint tax liability which ultimately yielded a joint tax savings. We can find no authority which supports the trial court's order that Appellant owes Appellee one-half of the tax savings enjoyed by both parties as a result of the filing. Accordingly, Appellant's second assignment of error is sustained and the decision of the trial court is reversed with respect this issue.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED IN PART, REVERSED IN PART, AND CAUSE REMANDED and that the Appellant and Appellee split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion as to Assignment of Error I and Concur in Judgment Only as to Assignment of Error II.

For the Court,

BY: _____
Matthew W. McFarland
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.