

COURT OF APPEALS
PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CYNTHIA L. DOWNS
Plaintiff-Appellee

-vs-

RICHARD L. DOWNS
Defendant-Appellant

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JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 08CA10

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common Pleas,
Case No. 07-DV-00014

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

May 28, 2009

APPEARANCES:

For Plaintiff-Appellee

RANDY L. HAPPENEY
144 East Main Street
P.O. Box 667
Lancaster, OH 43130

For Defendant-Appellant

SCOTT T. HILLIS
825 Adair Avenue
Zanesville, OH 43701

Farmer, P.J.

{¶1} On July 25, 1981, appellant, Richard Downs, and appellee, Cynthia Downs, were married. Appellee filed a complaint for divorce on January 12, 2007.

{¶2} A hearing was held on January 16, 2008. Findings of fact and conclusions of law were filed on May 5, 2008. By judgment entry decree of divorce filed June 4, 2008, the trial court granted the parties a divorce, and divided the parties' property and awarded spousal support to appellee.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DIVIDING MARITAL PROPERTY AS IT ERRED IN COMPUTING THE VALUE OF PROPERTY IT AWARDED TO THE PLAINTIFF-APPELLEE BY \$3,000.00, THE VALUE OF THE 2004 HONDA RANCHER ATV."

II

{¶5} "THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS AWARD OF SPOUSAL SUPPORT TO THE PLAINTIFF-APPELLEE AS IT APPLIED AN INCORRECT BUDGET FOR THE PLAINTIFF-APPELLEE, AS IT INCORRECTLY CALCULATED THE PARTIES EARNINGS, AS IT FAILED TO PROVIDE A (SIC) ENDING DATE FOR THE OBLIGATION, AND AS THE AMOUNT AWARDED WAS UNREASONABLE."

I

{¶6} Appellant claims the trial court erred in dividing the marital property. We disagree.

{¶7} In dividing property, the trial court is provided with broad discretion in deciding what is equitable upon the facts and circumstances of each case. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶8} In its judgment entry decree of divorce filed June 4, 2008, the trial court awarded the following to each party:

{¶9} **"3. Household Goods, Furnishings and Farm Equipment:** The household goods, furnishings and farm equipment are divided with the Plaintiff receiving the following items of personal property which are currently at the marital residence:

{¶10} "The fruit press;

{¶11} "Sausage presser;

{¶12} "2 Ohio stadium benches;

{¶13} "Oak Victorian end table;

{¶14} "Wood stove;

{¶15} "Sun Quest Pro 24 RS tanning bed;

{¶16} "2004 Honda Rancher ATV.

{¶17} "Defendant shall receive the following:

{¶18} "Troybilt 5.5 push mower;

{¶19} "2004 Appalachian goose neck trailer;

{¶20} "Lincoln welder;

{¶21} "Husqavarna 272 xp chain saw;

{¶22} "Misc. hand tools;

{¶23} "20 – 4x6x14 treated posts;

{¶24} "GE refrigerator;

{¶25} "Whirlpool electric washer and dryer;

{¶26} "Remington 788 Model 22-250 with Weaver scope."

{¶27} Appellant argues the trial court's valuation of the items it awarded to appellee was in error, as the trial court valued the items at \$1,200.00. See, Conclusion of Law (B) filed May 5, 2008. Appellant challenges the value because the 2004 Honda Rancher ATV alone was valued at \$3,000.00.

{¶28} The values for each of the listed items are included in Plaintiff's Exhibits 4 and 6. By using these valuations, we find the value of the personal goods awarded to appellee to be \$4,200.00 and the value of the personal goods awarded to appellant to be \$3,995.00. We also find in dividing the motor vehicles between the parties, appellant received a value of \$8,800.00 and appellee received a value of \$3,325.00. Appellant agreed appellee could have the 1997 Toyota Tacoma valued at \$3,325.00 as long as he received the 2005 Chevy Dually valued at \$2,300.00. T. at 107. Appellant also received a 1970 "pulling truck" valued at \$6,500.00.

{¶29} Upon review, we find the difference in the valuation of personal goods, \$205.00, to be de minimus in light of the difference awarded to appellant on the motor vehicles (\$5,475.00).

{¶30} Assignment of Error I is denied.

II

{¶31} Appellant claims the trial court erred in determining spousal support. Specifically, appellant challenges appellee's estimated budget, the calculation of earnings, and the lack of an ending date for spousal support. We disagree.

{¶32} R.C. 3105.08 governs spousal support. Under subsection (B), an award of spousal support is discretionary. Subsection (C)(1) states the following:

{¶33} "In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

{¶34} "(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

{¶35} "(b) The relative earning abilities of the parties;

{¶36} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶37} "(d) The retirement benefits of the parties;

{¶38} "(e) The duration of the marriage;

{¶39} "(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;

{¶40} "(g) The standard of living of the parties established during the marriage;

{¶41} "(h) The relative extent of education of the parties;

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

{¶43} "(j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;

{¶44} "(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;

{¶45} "(l) The tax consequences, for each party, of an award of spousal support;

{¶46} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

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

{¶48} The trial court awarded appellee spousal support, but retained jurisdiction on the issue as it took into account appellee's desire to earn a degree in thirty-six months (T. at 34, 39-40):

{¶49} **"9. Spousal Support:** Commencing January 16, 2008, the Defendant shall pay to the Plaintiff spousal support in the amount of \$2,500.00 per month for thirty-six (36) months, while she is attending school and then \$1,500.00 per month from that time forward. The spousal support issue will remain subject to the continuing jurisdiction of the Court. Spousal support shall terminate on the death of the Plaintiff, the death of Defendant or the remarriage of the Plaintiff. Spousal support shall be taxable to the Plaintiff and deductible to the Defendant."

{¶50} Appellee provided the trial court with her estimated living expenses including tuition and books. See, Plaintiff's Exhibits 14 and 16. Her monthly expenses include a COBRA payment of \$595.00 (T. at 19, 21-22); an estimated rent of \$500.00 to upgrade from the substandard unit she now rents (T. at 40); and necessary utility expenses of \$262.00.

{¶51} Appellee has a severe back condition that necessitates monthly shots. T. at 18. She makes approximately \$11,250.00 a year as a home health care aid, averaging forty-eight hours per week. T. at 17. Appellee desires to continue working while attending school. T. at 40. Her main reason for attaining a degree is to secure a job which would provide her with benefits to defray her health care premiums. T. at 50. Appellee testified she was unable to return to her previous places of employment where she made more than minimum wage because "I couldn't be on my feet that long" due to her back issues. T. at 47-48.

{¶52} Upon review, we find the trial court's award to be established by the evidence given that this was a twenty-seven year marriage and appellee needs to maintain health insurance to provide coverage for her medical expenses.

{¶53} By retaining jurisdiction, if appellee does not go to college and pursue a degree, the trial court has the ability to reconsider the spousal support award.

{¶54} Assignment of Error II is denied.

{¶55} The judgment of the Court of Common Pleas of Perry County, Ohio is hereby affirmed.

By Farmer, P.J.

Gwin, J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 0429

IN THE COURT OF APPEALS FOR PERRY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CYNTHIA L. DOWNS

Plaintiff-Appellee

-vs-

RICHARD L. DOWNS

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 08CA10

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Perry County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer_____

s/ W. Scott Gwin_____

s/ John W. Wise_____

JUDGES