

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CONNIE S. CARNES
Plaintiff-Appellee

-vs-

JEFFREY N. CARNES
Defendant-Appellant

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JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. Sheila G. Farmer, J.
Hon. Craig R. Baldwin, J.

Case No. 2014CA00138

O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Court of Common
Pleas, Domestic Relations Division,
Case No. 2013 DR 00861

JUDGMENT:

Affirmed

DATE OF JUDGMENT:

April 6, 2015

APPEARANCES:

For Plaintiff-Appellee

ROSEMARY G. RUBIN
1435 Market Avenue North
Canton, OH 44714

For Defendant-Appellant

MICHAEL A. BOSKE
122 Central Plaza North
Canton, OH 44702

Farmer, J.

{¶1} On October 26, 1990, appellant, Jeffrey Carnes, and appellee, Connie Carnes, were married. On July 25, 2013, appellee filed a complaint for divorce. Hearings before a magistrate were held on March 5, and May 1, 2014. By decision filed May 13, 2014, the magistrate recommended a division of property and a spousal support award to appellant in the amount of \$800.00 per month for seven years. Both parties filed objections. A hearing before the trial court was held on July 2, 2014. By judgment entry filed July 8, 2014, the trial court adopted the spousal support award, adjusted the division of property, and found appellant in contempt and sentenced him to three days in jail and ordered him to pay partial attorney's fees incurred by appellee.

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

I

{¶3} "THE TRIAL COURT ERRED IN AWARDING SPOUSAL SUPPORT OF ONLY \$800.00 PER MONTH FOR A PERIOD OF SEVEN YEARS TO APPELLANT."

II

{¶4} "THE TRIAL COURT'S AWARD OF \$14,000.00 TO APPELLEE AS SEPARATE PROPERTY WAS AN ABUSE OF DISCRETION."

III

{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN HOLDING APPELLANT IN CONTEMPT OF COURT BASED SOLELY ON A TRANSCRIPT."

I

{¶6} Appellant claims the trial court erred in awarding him spousal support in the amount of \$800.00 per month for seven years as the long term marriage of twenty-three years warranted \$1,333.00 per month for eight years. We disagree.

{¶7} A trial court has broad discretion in determining a spousal support award. *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624; *Stevens v. Stevens*, 23 Ohio St.3d 115 (1986). 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*, 5 Ohio St.3d 217 (1983).

{¶8} R.C. 3105.18 governs spousal support. Subsection (C) states the following:

(C)(1) 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:

(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;

(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, including, but not limited to, any party's contribution to the acquisition of a professional degree 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} At the time of the hearing, appellant was fifty-five years old and employed full-time as a laborer earning in excess of \$36,000.00 a year, not counting overtime pay, holiday pay (approximately \$1,249.00), vacation pay (approximately \$2,776.00), and bonus/profit sharing pay (approximately \$300.00), and an approximate deduction of \$1,800.00 for his retirement plan. May 1, 2014 T. at 32-33, 51-56; Defendant's Exhibit E; Plaintiff's Exhibit 35. In his affidavit of income and expenses filed August 14, 2013, appellant listed his base income at \$34,000.00 with average yearly overtime, commissions, and/or bonuses of \$500.00.

{¶10} In seven years, appellant will reach social security retirement age. Appellant requested spousal support in the amount of \$1,333.00 per month. *Id.* at 34-35. In his decision filed May 13, 2014, the magistrate listed appellant's monthly expenses at \$2,200.00, despite the fact that at the time of the hearing, appellant was living with his sister. *Id.* at 35; Finding of Fact No. 8. In his affidavit of income and expenses, appellant listed an estimate of \$1,900.00 per month for housing and utilities if he was living on his own and \$1,300.00 per month for living expenses for a total of \$3,200.00 per month.

{¶11} In its judgment entry filed July 8, 2014, the trial court reviewed the objection on this issue and did a complete analysis of the R.C. 3105.18(C)(1) factors as follows:

10. Father is requesting spousal support from Mother. Section 3105.18(C)(1) indicates that spousal support must be both appropriate and reasonable and instruct the court to consider the factors that follows:

a) **Income of the parties from all sources.** The incomes of the parties have been discussed above.

b) **Relative earning abilities of the parties and whether they are underemployed.** In general, neither party is underemployed. Father sometimes takes voluntary layoffs, but Mother never actually quantified the effect on his annual income. Mother alleged that her income from her as-needed home health care position might be less in the future. However, her employer testified and could not make a prediction.

c) **Age, physical, mental and emotional health of the parties.** Father is 55 years of age and is in good physical, mental and emotional health. Mother is 48 and is also in good health.

d) **Retirement benefits of the parties** have been divided as part of the property division herein.

e) **The duration of the marriage** is 23 years and 4 months.

f) **Whether the custodian of the children should seek employment outside the home.** The remaining child is old enough that this is not an issue.

g) **Standard of living.** There was little testimony about the parties' standard of living.

h) **The parties' education.** Father is a high school graduate. Mother has a BSN in Nursing.

i) **Assets and liabilities of the parties including court-ordered payments.** The major assets of the parties are tied up in retirement accounts, so neither will have significant interest or dividend income. By the same token, the debt is not extensive.

j) **Contribution to education, training, earning ability of the other party.** This is not an issue in the case.

k) **Time and expense necessary for the spouse seeking spousal support to acquire a new skill.** This is not an issue in the case.

l) **Tax consequences.** Spousal support will be deductible to the Payor and income to the Payee. The Court has analyzed the tax effects using FinPlan.

m) **Lost income production capacity of either spouse resulting from marital responsibility.** Even though both parties worked full-time, Wife was the primary care taker of the children.

Based on analysis of the above factors, the Court finds that the Magistrate's spousal support order of \$800 per month for seven years is appropriate and reasonable. The Court will retain jurisdiction over spousal support.

{¶12} All of this analysis is substantiated by our review of the record. The trial court awarded appellant spousal support in the amount of \$9,600.00 per year. This

amount, coupled with appellant's lowest base income of \$34,000.00 per year, amounts to \$43,600.00 or approximately \$3,600.00 per month.

{¶13} Upon review, we concur with the trial court that the magistrate's decision on spousal support was reasonable and did not disregard the factors of R.C. 3105.18(C)(1). We do not find an abuse of discretion in the spousal support award.

{¶14} Assignment of Error I is denied.

II

{¶15} Appellant claims the trial court erred in determining \$14,000.00 of the marital residence was appellee's premarital separate property as there was insufficient evidence to support the traceability of the amount. We disagree.

{¶16} R.C. 3105.171(A)(6)(a)(ii) defines "separate property" as "all real and personal property and any interest in real or personal property" that "was acquired by one spouse prior to the date of the marriage." R.C. 3105.171(A)(6)(b) states: "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." "Thus, traceability has become the focus when determining whether separate property has lost its separate character after being commingled with marital property." *Peck v. Peck*, 96 Ohio App.3d 731, 734 (12th Dist.1994).

{¶17} As explained by this court in *Oliver v. Oliver*, 5th Dist. Tuscarawas No. 2012 AP 11 0067, 2013-Ohio-4389, ¶ 80:

The characterization of property as separate or marital is a mixed question of law and fact, and the trial court's ruling must be supported by

sufficient credible evidence. *Globokar v. Globokar*, 5th Dist. No. 2009CA00138, 2010-Ohio-1737. We will not reverse the trial court's judgment as being against the manifest weight of the evidence if some competent, credible evidence supports the court's judgment. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578. "Trial court decisions on what is presently separate and marital property are not reversed unless there is a showing of an abuse of discretion." *Vonderhaar-Ketron v. Ketron*, 5th Dist. No. 10CA22, 2010-Ohio-6593.

{¶18} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison*, 49 Ohio St.3d 182 (1990). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶19} Appellant presented two deeds, one deed represented the residence she held solely in her name prior to the marriage in 1989 and the other deed represented the purchase of the marital residence in 1993. March 5, 2014 T. at 49, 51-53; May 1, 2014 T. at 17-18; Plaintiff's Exhibits 24 and 27. No other evidence was presented. May 1, 2014 T. at 13. Appellee testified she applied the profits from the 1989 home sale (\$14,000.00) to the down payment on the 1993 marital residence. March 5, 2014 T. at 53; May 1, 2014 T. at 18. Appellant did not refute this claim during his testimony.

{¶20} In his decision filed May 13, 2014, the magistrate found on the issue of the premarital equity toward the marital evidence: "Although the best evidence was not produced, there appeared to be no serious dispute on this issue." In its judgment entry filed July 8, 2014, the trial court agreed, stating the following:

The marital residence is worth \$135,200. Mother contributed \$14,100 of premarital funds to the purchase of that residence. Father asserted that Mother failed to trace her separate funds to the down payment on the house. The tracing documentation was not perfect, but it is undisputed that Mother sold her premarital home in North Canton at the same time that the parties purchased the marital home. Mother testified that she used \$14,100 of the proceeds to make a down payment on the marital home, and Father did not refute that assertion. The Court finds \$14,100 of the value of the marital residence is Mother's premarital property. When Mother's \$14,100 contribution is deducted from the gross value of \$135,200, the marital value is \$121,100. There is currently \$92,351 of debt, leaving a net marital equity of \$28,749.

{¶21} Upon review, we find sufficient testimonial evidence on the issue of the premarital separate property, and appellee's claim was not sufficiently challenged.

{¶22} Assignment of Error II is denied.

III

{¶23} Appellant claims the trial court erred in finding him guilty of contempt because the magistrate did not enter a ruling on appellee's contempt motion and therefore the trial court should not have entered a finding based solely on the transcript. We disagree.

{¶24} The divorce complaint was filed on July 25, 2013. On August 21, 2013, the trial court entered the following order:

1. All forms of income from whatever source must be deposited in the parties' joint checking account within three (3) banking days of receipt of the check. No check shall be cashed prior to being deposited.

2. All existing joint marital debts of the parties shall be paid from the joint checking account on a monthly basis.

3. In addition, all usual and customary household expenses shall be paid out of the joint account.

4. Each party shall receive \$35.00 amount of personal spending per week. A check shall be written from the account each week as personal spending.

5. Personal spending funds shall be unaccounted for by the parties and shall be used to pay for the persons clothing, entertainment, and personal items, etc.***

6. Any unusual expenses shall not be dispensed from the checking account without prior written consent of the other party or the Court.

7. The Court orders that Joint shall have the power to write checks on this account. Neither party shall remove the checkbook or register or cancelled checks from the home.

8. Neither party shall execute a check payable to cash or make any automatic cash withdrawals from the account.

9. No party shall execute a check without describing in detail its purpose on the memo line. No party shall execute a check without immediately entering the name of the recipient of the check as well as amount of the check within the register.

10. No further charges shall be made on any account (Bank card, department store card, etc.) unless by agreement of the parties or the existence of an emergency to preserve a marital asset.

FAILURE TO COMPLY TO THE TERMS AND SPIRIT OF THIS COURT ORDER COULD RESULT IN A PARTY BEING FOUND IN CONTEMPT OF COURT. SANCTIONS COULD INCLUDE FINE, COURT COSTS, ATTORNEY FEES AND/OR JAIL.

{¶25} On February 18, 2014, appellee filed a motion for contempt. The affidavit filed contemporaneously with the motion alleged in pertinent part that appellant violated the terms of the court order, spent money from the Schedule "D" account, and had hidden assets.

{¶26} During the hearing before the magistrate, appellee presented evidence of appellant's concealment of known assets, of missing proceeds from the sale of certain

marital assets by appellant, and of appellant violating the depositing and spending provisions of the "Under the Roof" joint credit union account after the August 21, 2013 order. March 5, 2014 T. at 22-23, 31-34, 35-38, 42-46, 69; Plaintiff's Exhibit 11, 15, 16, 17, 20, and 21.

{¶27} Appellant claimed he did not hide any assets because appellee always knew of their existence as she included them in her financial statement. May 1, 2014 T. at 38-39; Defendant's Exhibit J. Appellant admitted to violating the order relative to depositing and spending regarding the joint credit union account and not depositing his vacation pay into the account. *Id.* at 44-45, 47-49, 52-55, 85-86, 90-91, 93-94. There were never any specific valuations for any claimed missing vehicles.

{¶28} In her objections to the magistrate's decision, appellee specifically argued the magistrate's failure to rule on her contempt motion. The trial court heard argument on the objections (July 2, 2014) and conducted a de novo review of the transcript and exhibits. In its judgment entry filed July 8, 2014, the trial court made specific findings relative to the contempt motion:

11. Mother filed contempt against Father. The Magistrate made no decision on this issue. The Court finds that Father's conduct was in flagrant violation of the Court's order. The Court's Exhibit D requires that the parties place all income in a joint account. This is done so that all income is accounted for during the pendency of the divorce. When the case reaches final hearing, this eliminates allegations that one party has kept more of their earnings than the other. Father ignored most of the

Exhibit D requirements. On two occasions he took vacation pay in cash and did not deposit it in the joint account. After he was forced to vacate the residence because of a Civil Protection Order, he stopped depositing his paycheck in the joint account even though there was no Court order relieving him of this obligation. He deposited \$25 in his credit union account and then, unlike Mother, withdrew nearly all of it and used it for his own purposes. He also increased the balance on his Discover Card by approximately \$4,000. Father's conduct increased the length of trial significantly because all of his financial machinations had to be traced and discussed. He made it more difficult for the Magistrate and for this Court to make an equitable division of property, and, thereby, interfered with the orderly and efficient administration of justice. The Court finds Father to be in contempt for violation of the Court's Exhibit D temporary order.

{¶29} After finding appellant guilty of contempt, the trial court sentenced appellant to three days in jail and ordered a set-off of \$3,245.00 appellee was to pay appellant to equalize the division of marital assets against attorney's fees incurred by appellee. See, R.C. 3105.171(E).

{¶30} Appellant argues it was inappropriate to find him in contempt without a ruling on the issue by the magistrate.

{¶31} Civ.R. 53 governs magistrates. Subsections (D)(4)(b) and (d) state the following:

(4) Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.

(b) Action on magistrate's decision. Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(d) Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

{¶32} When reading these provisions in pari materia, we find the rule implicitly permits a trial court in its de novo review to address matters not addressed by the magistrate but included in the testimony and evidence presented during the hearing.

{¶33} Upon review, we find the trial court did not err in addressing the contempt motion.

{¶34} Assignment of Error III is denied.

{¶35} The judgment of the Court of Common Pleas of Stark County, Ohio, Domestic Relations division is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Baldwin, J. concur.

SGF/sg