

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Lee A. Schober

Court of Appeals No. OT-08-061

Appellee

Trial Court No. 07DR176B

v.

Carolyn J. Schober

DECISION AND JUDGMENT

Appellant

Decided: August 28, 2009

* * * * *

Stephen E. Cottrell, for appellee.

Daniel L. Brudzinski, for appellant.

* * * * *

SHERCK, J.

{¶ 1} Appellant, Carolyn J. Schober, appeals: (1) a decision and final judgment entry of divorce entered by the Ottawa County Court of Common Pleas, Domestic Relations Division; and (2) a decision entered by the same court granting a motion to restrain appellant from withdrawing funds from Sun Federal Credit Union. For the

reasons that follow, we affirm in part and reverse in part the decision and final judgment entry of divorce, and we reverse the decision granting the restraining order.

{¶ 2} Appellant and appellee were married on September 30, 2000. There are no minor children born of this marriage. On September 5, 2007, after nearly seven years of marriage, appellee filed his complaint for divorce.

{¶ 3} The final hearing in this matter was heard by the magistrate on June 23, 2008. The evidence adduced at the hearing demonstrated the following. When appellee entered into the marriage to appellant, he owned a home on Hellwig Road that he had purchased with his first wife. After he married appellant, appellee obtained a \$35,000 home equity loan on the Hellwig Road property. According to testimony by appellee, the \$35,000 taken from the Hellwig Road property was used as a down payment on the marital residence that he purchased with appellant. The marital residence, located on Nissen Road, was purchased in January 2001, for \$175,000. On October 23, 2001, appellee sold his Hellwig Road home for \$111,000.

{¶ 4} Upon the sale of the Hellwig Road property, appellee received cash proceeds in the amount of \$66,572.90. Appellee testified that these proceeds were placed in the joint checking account that he shared with appellant and were used to make improvements or mortgage payments on the Nissen Road property.

{¶ 5} When appellee was specifically asked (both on direct examination and again on redirect examination) what happened to the totality of the \$111,000 from the sale of the Hellwig Road property, he answered that it all went into the Nissen Road

property, either in the form of renovations to the property or in the form of payments against the principal.

{¶ 6} At the time of trial, the Nissen Road property had an appraised value of \$185,000 and a mortgage indebtedness of \$75,000, leaving an equity balance of \$110,000.

{¶ 7} Prior to his marriage to appellant, appellee became a one-half owner of a business known as DZ Barn. At some point after the marriage, the business was liquidated, leaving appellant with approximately \$44,000 in cash and a snowmobile that he later sold for \$6,500. Appellee testified that all \$50,500 in DZ Barn proceeds were deposited into the parties' joint savings account at Huntington Bank.

{¶ 8} Although the evidence was undisputed that appellee eventually liquidated the Huntington Bank joint savings account, the evidence was conflicting with respect to what happened to the \$50,196.27 that was withdrawn at that time. Of the total monies withdrawn, \$25,196.27 was in cash and \$25,000 was in the form of a check. Appellee testified that he gave all of the money to appellant as a result of appellant's statement that she would leave if she received the money. Disputing this account, appellant stated that although she took and deposited the \$25,000 check, she rejected the cash and returned it to appellee. Appellee testified that he wanted half of the joint savings account monies returned to him.

{¶ 9} Additional testimony by appellee indicated that he entered the marriage to appellee with \$20,104 in a checking account.¹ He also testified that his joint checking account with appellant (which began as a Sky Bank account that was later converted to a Huntington Bank account) had a balance of \$21,637.72 in May 2007, but by June 2008, had a balance of just \$426.01.

{¶ 10} Finally, appellee testified that after filing for the divorce he opened a separate checking account, using \$10,972.72 in funds from his joint account with appellant.

{¶ 11} On October 13, 2008, the magistrate issued his findings of fact and conclusions of law. In that document, he concluded that "the [appellee] will retain the marital residence as his sole property and shall refinance, holding [appellant] harmless on the mortgage on the Nissen Road home. There is a mortgage indebtedness of \$75,000, leaving an equity balance of \$110,000. However, [appellee] is entitled to \$110,000 as his separate property. As such there is no equity to be distributed to [appellant]."

{¶ 12} The magistrate determined the following to be appellee's separate property: "the checking account at Sky Bank (nka Huntington Bank) containing \$20,000," "the checking account at Sky Bank (nka Huntington Bank) containing \$12,000," the "\$50,500 from the sale of [appellee's] one-half interest in the DZ Barn business," and "the \$50,196.27 which was withdrawn by [appellee] from the savings account at Sky Bank

¹He testified to this figure after refreshing his memory with a copy of an old, handwritten check register.

and given to [appellant]." Having found that appellant had, in fact, received the entirety of the monies withdrawn from the Sky Bank savings account, the magistrate ordered appellant to pay appellee \$25,000 of that sum as appellee's separate property.

{¶ 13} Appellant filed objections to the magistrate's findings of fact and conclusions of law. Among her complaints was a claim that the magistrate erred in "ordering that [appellee] solely retain the marital residence at Nissen Road, Martin, Ohio and awarding him the entire \$110,000 in equity as his separate property." Appellant also complained that the magistrate erred in awarding "all bank accounts" to appellee.

{¶ 14} The trial court, after independently reviewing the record, overruled appellant's objection concerning the marital residence and, to a very limited extent, sustained her objection as to the bank accounts, finding that "the checking account at The Huntington Bank containing \$426.01 is marital." All of the other accounts, the trial court agreed, were appellee's separate property.

{¶ 15} Specifically, the judge stated: (1) that the checking account at Sky Bank (nka Huntington Bank) originally containing \$21,637.72 is appellee's separate property, but that he is only entitled to what remains in that account; (2) that the checking account at Sky Bank (nka Huntington Bank) containing \$10,972.72 is appellee's separate property, but that he is only entitled to what remains in that account; and (3) that the checking account at Sky Bank (nka Huntington Bank) containing \$426.01 is marital property and that appellant shall receive the entire amount.

{¶ 16} The trial court additionally found that the \$50,000 that was received as appellee's one-half share of the sale proceeds for the DZ Barn business is appellee's separate property, and that the savings account at Sky Bank containing \$50,107.75² but which was liquidated on August 30, 2007, is appellee's separate property, "although [appellant] has not returned the cash she was given by [appellee]."

{¶ 17} Finally, the trial court found that a portion of an IRA that belonged to appellee was marital property and that appellant's share of that asset amounted to \$16,600. However, the court additionally found that "the \$25,000 cash that [appellant] has failed to return to [appellee] consumes this \$16,600. Retaining the \$25,000 means that [appellant] would receive an additional \$8,400; nevertheless, she will be awarded the \$25,000 that she did not return, to effectuate an equitable division of the marital estate."

{¶ 18} In this appeal, appellant raises the following assignments of error:

{¶ 19} I. "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAKE AN EQUITABLE DIVISION OF THE MARITAL REAL PROPERTY BY AWARDED APPELLEE THE ENTIRE \$110,000 IN EQUITY IN THE MARITAL REAL ESTATE AS HIS SEPARATE PROPERTY."

²In using this figure, the trial court apparently looked to an exhibit showing that on June 30, 2007, the relevant account had a balance of \$50,107.75. The magistrate, in his findings of fact and conclusions of law apparently looked to appellee's testimony to reach the slightly higher figure of \$50,196.27.

{¶ 20} II. "THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO MAKE AN EQUITABLE DIVISION OF THE MARITAL BANK ACCOUNTS."

{¶ 21} III. "THE TRIAL COURT ABUSED ITS DISCRETION BY EX-PARTE GRANTING APPELLEE['S] POST TRIAL MOTION WITHOUT ANY EVIDENCE OR HEARING WHICH RESTRAINED APPELLANT FROM WITHDRAWING ANY FUNDS FROM SUN FEDERAL CREDIT UNION."

{¶ 22} As appellant's first and second assignments of error both involve challenges concerning the equitable division of property, they will be considered together in this analysis. In a divorce proceeding, "the court shall divide the marital and separate property equitably between the spouses." R.C. 3105.171(B). In general, this means that the court should award each spouse his or her separate property and then distribute the marital estate equally, unless an equal division would be inequitable. See R.C. 3105.171(C) and (D); *Jones v. Jones*, 4th Dist. No. 07CA25, 2008-Ohio-2476, ¶ 19. If the court does not award a spouse his or her separate property, the court must issue findings of fact that explain the factors that it considered in determining that the spouse should not receive the separate property. See R.C. 3105.171(D); and *Jones*, *supra*.

{¶ 23} "Marital property" includes: (1) all real or personal property, or interest in real or personal property, that was acquired by either or both of the spouses during the marriage; and (2) all income and appreciation on separate property due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage. R.C. 3105.171(A)(3). "Separate property," on the other hand, includes:

(1) any real or personal property, or interest in real or personal property, that was acquired by one spouse prior to the date of the marriage; and (2) any passive income and appreciation acquired from separate property by one spouse during the marriage. R.C. 3105.171(A)(6).

{¶ 24} "Traceability becomes an issue in making a separate property determination when commingling of assets has muddled the identity of the separate property." *Gosser v. Gosser*, 11th Dist. No. 2006-T-0029, 2007-Ohio-3201, ¶ 14. R.C. 3105.171(A)(6)(b) provides that "[t]he 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."

{¶ 25} "The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. Ohio courts have held that oral testimony without documentary corroboration may or may not satisfy the burden. See *Vertrees v. Vertrees*, 2d Dist. No. 06-CA-48, 2007-Ohio-2604, ¶ 18; *Gosser*, *supra*, at ¶ 15.

{¶ 26} An appellate court reviews a trial court's judgment in a divorce action under an abuse of discretion standard. *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, ¶ 17, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. A trial court's characterization of property as separate or marital, however, is a mixed question of law and fact, and not a discretionary matter. *Murphy v. Murphy*, 4th Dist. No. 07CA35,

2008-Ohio-6699, ¶ 17. As a result, we review the determination regarding the proper characterization of property, including determinations of traceability, under the manifest weight of the evidence standard. See *id.*; *Vertrees*, *supra*.

{¶ 27} An appellate court will not reverse a trial court's judgment as being against the manifest weight of the evidence if the judgment is supported by some competent, credible evidence. *Ervin v. Ervin*, 4th Dist. No. 06CA822, 2006-Ohio-5460, ¶ 9. This standard of review is highly deferential; even "some" evidence is sufficient to sustain the judgment and prevent a reversal. *Id.* "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." *Id.*, citing *In re Jane Doe I* (1991), 57 Ohio St.3d 135 and *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77.

{¶ 28} Once the trial court has made the determination of whether property is marital or separate property, we review the actual distribution of the asset under the more deferential abuse of discretion standard. *Kelly v. Kelly* (1996), 111 Ohio App.3d 641, 642-643, citing R.C. 3105.171(D). Abuse of discretion connotes more than a mere error of judgment; rather, it implies that the court's attitude is arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When applying this standard of review, we may not freely substitute our judgment for that of the trial court; instead, we must view a 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. *Murphy*, supra, at ¶ 18.

{¶ 29} Appellant argues in her first assignment of error that the trial court abused its discretion and failed to make an equitable division of the marital real property by awarding appellee the entire \$110,000 of equity in the marital real estate as his separate property. We disagree.

{¶ 30} In the instant case, there is no question that the real estate that appellee owned on Hellwig Road was owned prior to appellee's marriage to appellant. There is likewise no dispute that this real estate was sold for \$111,000, as demonstrated by the closing statement that was properly admitted into evidence at the final hearing. In addition, the closing statement showed that appellee received \$66,572.90 in cash from the sale of the house. Testimony by appellee indicated that the \$66,572.90 in cash, plus an additional \$35,000 that had been taken out on the Hellwig Road property in the form of a home equity loan, all went into the Nissen Road property. Upon further questioning, appellee specifically testified that the entirety of the \$111,000 that was received as a result of appellee's ownership and sale of the Hellwig Road property all went into the Nissen Road property, either in the form of renovations to the property or in the form of payments against the principal.

{¶ 31} We note, in our examination of this assignment of error, that appellant provided no evidence at the trial as to the source of the funds for the purchase of the marital property other than the Hellwig Road property. In addition, appellant failed to

contradict any of appellee's statements regarding the Hellwig Road property or the distribution of its proceeds.

{¶ 32} In light of all of the foregoing, we find that the weight of the evidence amply supports the trial court's decision that the source of funds used to acquire the Nissen Road property was appellee's separate property. See *Murphy*, supra, at ¶ 17.

{¶ 33} In reaching this conclusion, we remain mindful that regardless of the characterization assigned to a property, the actual distribution of the asset may be properly reviewed under the more deferential abuse of discretion standard. See *Okos v. Okos* (2000), 137 Ohio App.3d 563, 570. Here, the evidence showed that appellee put into the Nissen Road home funds amounting to as much as \$111,000 (the amount that the Hellwig Road home eventually sold for). It is undisputed that at the time of trial, the Nissen Road property had an equity balance of \$110,000. Even assuming that the marital real estate was mischaracterized as separate, appellant has failed to provide the necessary information to show an abuse of discretion in the property distribution. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 34} Appellant argues in her second assignment of error that the trial court abused its discretion by failing to make an equitable division of the marital bank accounts. In reviewing this assignment of error, we focus first on the trial court's separate findings that: (1) the checking account at Sky Bank (nka Huntington Bank) originally containing \$21,637.72 is appellee's separate property and that appellee is entitled to what

remains in the account; and (2) the checking account at Sky Bank (nka Huntington Bank) containing \$426.01 is marital property and that appellant shall receive the entire amount.

{¶ 35} Our review of the record reveals that the two accounts are really one and the same. The only testimony on the matter was given by appellee, who stated that he and appellant had only one joint checking account, and that the Sky Bank account showing a balance of \$21,637.72 in May 2007, was the same account as the Huntington Bank account showing a balance of \$426.01 in June 2008. The inconsistencies resulting from the trial court's having construed the one account as two, its characterization of that account as separate on the one hand and marital on the other, plus the distribution of the funds to appellee on the one hand and appellant on the other are simply irreconcilable and, therefore, constitute an abuse of discretion in the property distribution.

{¶ 36} Next, we consider appellee's checking account containing \$10,972.72. Again, the only testimony on this matter was given by appellee, who stated that he funded this account with monies taken not from the parties' joint savings account (as was found by the trial court), but rather from the couple's joint checking account. As there was no evidence suggesting that the \$10,972.72 could be traced to appellee's separate property, the trial court's finding that the \$10,972.72 was appellee's separate property was clearly against the manifest weight of the evidence.

{¶ 37} Finally, we consider appellant's claim that the trial court erred in dividing the savings account at Sky Bank, "which contained \$50,107.75," and "which was liquidated by appellee on August 30, 2007." As indicated above, the account to which

appellant is referring is the joint savings account, into which appellee's DZ Barn proceeds were deposited, and which the trial court properly found to be traceable as appellee's separate property.

{¶ 38} To the extent that appellant challenges the characterization of the money as appellee's separate property, we note that appellee's uncontroverted testimony was that he received \$50,500 from the sale of his non-marital business and that all of this money was deposited into the Huntington Bank savings account. Not only did appellant fail to contest this testimony, she had no alternative explanation regarding the source of the funds in the joint savings account.

{¶ 39} Beyond the fact that the money was properly characterized as appellee's separate property, the trial court's finding that appellant actually received all of the money from the account was amply supported by the evidence. For the foregoing reasons, we find that appellant's argument concerning the joint savings account is without merit.

{¶ 40} To the extent that appellant's arguments concerning the various bank accounts do have merit, we find appellant's second assignment of error to be well-taken.

{¶ 41} Appellant argues in her third assignment of error that the trial court abused its discretion by granting ex parte appellee's post-trial motion seeking to join Sun Federal Credit Union as a party defendant and to restrain appellant from withdrawing funds from Sun Federal Credit Union.

{¶ 42} Civ.R. 75(I)(2) relevantly provides:

{¶ 43} "** * * When it is made to appear to the court by affidavit of a party sworn to absolutely that a party is about to dispose of or encumber property, or any part thereof of property, so as to defeat another party in obtaining an equitable division of marital property, a distributive award, or spousal or other support, or that a party to the action or a child of any party is about to suffer physical abuse, annoyance, or bodily injury by the other party, the court may allow a temporary restraining order, with or without bond, to prevent the action. A temporary restraining order may be issued without notice and shall remain in force during the pendency of the action unless the court or magistrate otherwise orders.*" (Emphasis added.)

{¶ 44} In the instant case, the motion for a restraining order was granted without a supporting affidavit, in contravention of the requirement set forth at Civ.R. 75(I)(2). Accordingly, we find that the restraining order was improperly granted. Appellant's third assignment of error is found well-taken.

{¶ 45} The judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This case is remanded to the trial court for additional proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

James R. Sherck, J.
CONCUR.

JUDGE

Judge James R. Sherck, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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