

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

Dennis P. Bils

Court of Appeals No. WD-09-026

Appellant/Cross-Appellee

Trial Court No. 2004 DR 0098

v.

Beth A. Bils

DECISION AND JUDGMENT

Appellee/Cross-Appellant

Decided: December 18, 2009

* * * * *

James A. Hammer, for appellant/cross-appellee.

Max E. Rayle, for appellee/cross-appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} Appellant, Dennis Bils, appeals the judgment of the Wood County Court of Common Pleas, Domestic Relations Division. Beth A. Bils, appellee, has filed a cross-appeal. For the following reasons, we affirm the trial court's judgment.

{¶ 2} This is the parties' second appeal. In *Bils v. Bils*, 6th Dist. No. WD-07-043, 2008-Ohio-4125 ("*Bils I*"), this court partially affirmed a judgment granting the parties a divorce and dividing marital property. However, because we found the calculation of appellant's income from self-employment to be in error, the judgment was reversed with

respect to the calculations of spousal support and child support. Specifically, our judgment stated:

{¶ 3} "The trial court must deduct ordinary and necessary expenses from a parent's gross receipts when calculating the gross income of that self-employed parent. Ordinary and necessary expenses [do] not include depreciation expenses and other noncash items that are allowed as deductions on any federal tax return of the parent or the parent's business, except as specifically included in ordinary and necessary expenses incurred in generating gross receipts * * *. R.C. 3119.01(C)(9)(b). R.C. 3119.01(C)(9)(a) defines ordinary and necessary expenses as 'actual cash items expended * * * and includes depreciation expenses of business equipment[.]' * * * Because there was evidence before the court that portions of appellant's depreciation deductions for the relevant three years included actual cash expenditures, we conclude that the court abused its discretion in including those amounts when computing appellant's income for purposes of support." *Bils*, 2008-Ohio-4125, ¶ 30-33.

{¶ 4} Accordingly, on remand, the trial court re-examined the issue of appellant's income for purposes of child support and spousal support. The trial court's initial judgment calculated the three-year average of appellant's self-employment income to be \$117,433.33. Also, the initial judgment awarded appellee spousal support for a period of seven years, with appellant ordered to pay \$4,000 per month for the first two years, and \$2,500 per month for the following five years.

{¶ 5} On remand, after calculating appellant's depreciation expenses versus his self-employment income, the parties stipulated to a revised three-year average income figure for appellant of \$87,013. Despite this lower figure, the trial court left the amount of spousal support unchanged.

{¶ 6} In this appeal, both parties challenge the trial court's judgment with respect to spousal support only. In its judgment entry, the trial court stated:

{¶ 7} "The court further finds that the above recalculation of Dennis's gross income from farming does not impact upon [sic] the court's decision on spousal support. First, the above calculation is required by R.C. 3119.01, a section that deals exclusively with child support. Second, there are thirteen individual factors and one catch-all factor to be considered when determining whether there should be spousal support and its amount. Only one of those factors involves the parties' income. After a reconsideration of all the factors, the court will not modify the previously established spousal support obligation." (Footnote omitted.)

{¶ 8} Appellant submits the following assignment of error for review:

{¶ 9} "The trial court erred and abused its discretion in refusing to reduce the amount of appellant's spousal support obligation on remand."

{¶ 10} Appellee has filed a cross-appeal, also challenging the award of spousal support. She has submitted two cross-assignments of error for review:

{¶ 11} "The trial court abused its discretion and thus committed error in setting spousal support in an inadequate amount and for a short, fixed period of time."

{¶ 12} "The trial court erred when it awarded appellee/cross-appellant only partial attorney fees and then declaring such to be 'spousal support.'"

{¶ 13} Because appellant's assignment of error and appellee's first cross-assignment of error both address spousal support, we first address these jointly. Both parties re-visit facts and circumstances which could support either a higher or lower award pursuant to the factors of R.C. 3105.18(C), which provides:

{¶ 14} "(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:

{¶ 15} "(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;

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

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

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

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

{¶ 20} "(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;

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

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

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

{¶ 24} "(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;

{¶ 25} "(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;

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

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

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

{¶ 29} "(2) In determining whether spousal support is reasonable and in determining the amount and terms of payment of spousal support, each party shall be considered to have contributed equally to the production of marital income."

{¶ 30} Because the trial court, in its judgment entry after remand, stated that it reconsidered the R.C. 3105.18(C) factors, but left the amount of support unchanged, we

look to the reasons stated in its earlier judgment entry setting the amount of support. In an entry dated August 29, 2006, the magistrate stated the following in his findings of fact:

{¶ 31} "In consideration of all of the factors listed in R.C. 3105.18, an award of permanent spousal support is reasonable and appropriate. Particular support for this award is the length of the marriage; the earning abilities of the parties; the factor that the [appellee] gave up a potentially high income career to assume the raising of the parties' minor children; the factor that such an award of spousal support would be deductible to the [appellant] for income tax purposes and includable for income tax purposes in the [appellee's] income; and the [appellee's] need for significant training or updating to secure employment which would result in an income above the minimum wage."

{¶ 32} The magistrate then proceeded to award spousal support to appellee for seven years, with appellant ordered to pay \$3,500 per month for the first year, \$3,000 per month for the second year, and \$2,500 per month for the next five years. The award was made non-modifiable and terminated on the death of either party or appellee's remarriage or cohabitation. Both parties filed objections to the magistrate's findings and award.

{¶ 33} The trial court adopted the magistrate's findings of fact. With respect to the award of spousal support, it additionally stated, "The Court further finds that in consideration of all factors listed in Ohio Revised Code 3105.18, an award of permanent support is reasonable and appropriate." The trial court adjusted the award of spousal support upward from the magistrate's recommendation; appellee was awarded support for

seven years, but appellant was ordered to pay \$4,000 per month for the first two years, and \$2,500 per month for the remaining five years.

{¶ 34} "Any grant of spousal support is dependent upon the trial court's determination that support is reasonable and appropriate. R.C. 3105.18(C)(1). '[I]n determining the nature, amount, and terms of payment and the duration of spousal support * * *,' the trial court must consider a number of relevant factors. The court is not, however, required to state findings of fact related to each and every factor. Rather, trial courts are required to consider the statutory factors 'and indicate in the final decree of divorce the underlying basis for the award in sufficient detail to enable an appellate court to determine whether the award was appropriate.' *Schneider v. Schneider* (1996), 110 Ohio App.3d 487, 494, citing *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 96-97." *Beran v. Beran*, 6th Dist. No. WD-03-070, 2004-Ohio-2456, ¶ 35. See, also, *Rowe v. Rowe* (1990), 69 Ohio App.3d 607.

{¶ 35} We are mindful that a trial court's distribution of marital property will not be disturbed on appeal unless the trial court abused its discretion. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. An abuse of discretion is more than a mere error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 36} Appellant argues that the trial court abused its discretion by not *lowering* the amount of spousal support, since this court remanded the issue due to an improper calculation of income. However, the trial court correctly stated that the parties' income is

only one of several factors that must be considered when setting the amount of support. Our remand of the issue for a re-calculation of appellant's income did not require the trial court to lower the amount of spousal support.

{¶ 37} Appellee, in response and in her first assignment of error, argues that the trial court abused its discretion in awarding support for a period of seven years, instead of making the award permanent. True, both the magistrate and the trial court found a permanent award to be "reasonable and appropriate," but then awarded support for a period of seven years.

{¶ 38} However, upon review of the statutory factors, the findings of fact, and the division of marital property, we cannot find an abuse of discretion occurred. While a permanent award may have been appropriate, neither the magistrate nor the trial court stated in what amount the permanent award would have been. It may have been equally likely that any potential permanent award would have been for a much lower monthly amount. Given all of the facts and circumstances, the spousal support award was not unreasonable, arbitrary, or unconscionable. Appellant's assignment of error and appellee's first cross-assignment of error are not well-taken.

{¶ 39} Appellee's second cross-assignment of error challenges the award of attorney fees. The trial court's judgment awarded appellee attorney fees, but stated in its judgment entry that appellant was to pay appellee "the further additional sum of Ten Thousand Dollars \$10,000, *deemed as spousal support*, for partial attorney fees" incurred by appellee. The award was ordered paid in one lump sum within 30 days from the date

of judgment. In this appeal, appellee argues that she should have been awarded the full amount of attorney fees; she further requests that we order the trial court to give an additional award to cover fees generated after the original trial court's judgment, to include the initial appeal and this second appeal.

{¶ 40} In *Bils I*, we addressed appellant's assignment of error relating to attorney fees and found the award to be reasonable and within the trial court's discretion. *Bils*, 2008-Ohio- ¶ 41-43. To the extent, therefore, that appellee's cross-assignment of error argues that the trial court should have awarded appellee the full amount of her attorney fees, this argument is res judicata and not well-taken. *Bils I* specifically found the award of attorney fees reasonable and we may not revisit the issue. However, to the extent that appellee's cross-assignment of error argues that the trial court should not have labeled the award of attorney fees "spousal support," we may address the issue, since *Bils I* is not res judicata as to spousal support.

{¶ 41} R.C. 3105.73 governs awards of attorney fees in divorce actions, and section (D) specifically provides that an award of attorney fees may be "designated as spousal support, as defined in section 3105.18 of the Revised Code." When attorney fees are awarded as spousal support, the trial court must consider the factors of R.C. 3105.18(C). See *Forbis v. Forbis*, 6th Dist. No. ¶ 83, citing *Williams v. Williams* (1996), 116 Ohio App.3d 320, 323. "A court's decision regarding the award of attorney fees as part of an award of spousal support will not be disturbed on appeal absent a showing of a

clear abuse of that discretion. See *Rash v. Rash*, 6th Dist. No. F-04-016, 2004-Ohio-6466, at ¶ 53; *Guziak v. Guziak* (1992), 80 Ohio App.3d 805, 816." Id.

{¶ 42} Prior to April 2005, former R.C. 3105.18(H) required a trial court to consider "whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees." R.C. 3105.18(H). Fees could be awarded only if the payor spouse had the ability to pay. Id. Currently, and for purposes of this appeal, the trial court may award fees if it finds such an award "equitable" pursuant to R.C. 3105.73(A). The court may consider the parties' "marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." Id.

{¶ 43} Because the same factors which would find the award of spousal support to be within the trial court's discretion would also apply to the award of attorney fees, we likewise find the award of attorney fees to be within the trial court's discretion. As appellee acknowledges, she was awarded a significant lump sum of an equalization payment. Despite this, appellee asserts that since appellant was given the option of paying the large equalization payment over time, she had no "real source" of extra funds to pay her counsel. We find this argument not well-taken. If appellant chose the extended payment option for the equalization award, he would be obligated to pay appellee \$4,000 per month. Since these payments are marital assets, they could have been properly considered by the trial court in awarding fees as spousal support. In any event, the statute authorizes a designation of attorney fees as spousal support and nothing

precluded the trial court from designating the attorney fee award as spousal support. Since we find no abuse of discretion occurred in the award of spousal support, we likewise find no abuse of discretion occurred in designating the attorney fee award as spousal support. Appellee's second cross-assignment of error is not well-taken.

{¶ 44} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Both parties are ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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

Arlene Singer, J.

JUDGE

Mary J. Boyle, J.

CONCUR.

JUDGE

Judge Mary J. Boyle, Eighth District Court of Appeals, 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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.
