

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

Marcia Speck

Court of Appeals No. WD-09-005

Appellee

Trial Court No. 2007DR0191

v.

Tim Speck

DECISION AND JUDGMENT

Appellant

Decided: December 18, 2009

* * * * *

James A. Hammer, for appellee.

Beverly J. Cox, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} Appellant, Tim Speck, appeals the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, which granted appellee, Marcia Speck, a judgment on her complaint for divorce. Appellant raises the following two assignments of error for review:

{¶ 2} "I. The trial court abused its discretion finding that appellant had delayed court proceedings and in ordering appellant to pay \$5,181.25 to appellee as attorney fees.

{¶ 3} "II. The trial court abused its discretion in identifying and dividing the parties' marital assets."

{¶ 4} The magistrate found, and the trial court adopted, the following relevant findings of fact. Tim and Marcia Speck were married on April 25, 1981. By the time of trial, one child of their marriage remained a minor. By Tim's request, genetic testing was performed and confirmed Tim's paternity of the child.

{¶ 5} The magistrate identified the marital assets of the parties as follows:

{¶ 6} The marital residence, valued at \$379,000;

{¶ 7} A rental property, outbuildings, and approximately 48.16 acres of land, valued at \$387,000;

{¶ 8} 20 acres of land (separate from the other real property), valued at approximately \$80,000 - \$300,000;

{¶ 9} A 2004 Harley Davidson titled to Tim, valued at \$8,500;

{¶ 10} A 2005 Harley Davidson titled to Marcia, valued at \$7,000;

{¶ 11} A 2005 Scion titled to Tim, valued at \$10,000;

{¶ 12} A 1999 Ford Explorer titled to Marcia, valued at \$3,500;

{¶ 13} A "E350 Cube" truck, unvalued;

{¶ 14} Two John Deer lawn tractors, unvalued;

{¶ 15} Tools, appliances, furniture and miscellaneous personal property located at the marital residence and Marcia's residence;

{¶ 16} Tim's life insurance policy, approximately valued at \$11,000.

{¶ 17} The marital debts included a mortgage encumbering the marital residence, a line of credit, and a bank loan. Tim and Marcia each had a personal credit card.

{¶ 18} The magistrate issued, and the trial court adopted, the following orders relevant to this appeal:

{¶ 19} Marcia was designated residential parent and legal custodian of the minor child, with Tim to have parenting time. Tim was ordered to pay child support via wage withholding. Tim does not challenge these orders on appeal.

{¶ 20} Both Tim and Marcia were ordered to pay their respective, individual credit cards, and any other debts held individually in their names.

{¶ 21} Tim was awarded the 2004 Harley Davidson and the 2005 Scion, values assigned as listed, supra, his life insurance policy, and his interest in a business. Marcia was awarded the 2005 Harley Davidson and the 1999 Ford Explorer, values assigned as listed, supra.

{¶ 22} The marital residence, including all appliances and furnishings, was ordered sold. The proceeds were ordered to be paid first to the marital debt for the mortgage, the line of credit, and the bank loan. Then, of the remaining proceeds, \$5,181.25 was ordered paid to Marcia for a lump sum award of attorney's fees. A separate lump sum award of \$29,345 was ordered paid to Marcia from the proceeds to

facilitate a replacement of the 1999 Ford Explorer vehicle, in order for her to have adequate transportation for the minor child. After these awards, the remaining proceeds were ordered to be split equally between Tim and Marcia.

{¶ 23} The second parcel of real property was ordered sold. From the proceeds, the court awarded Marcia a lump sum payment of \$5,000 as spousal support. No other spousal support was ordered, and the order was made non-modifiable. The court ordered an amount necessary to pay both parties' capital gains taxes set aside from the proceeds, with the remainder of the proceeds to be split equally between Tim and Marcia.

{¶ 24} The third parcel of real estate was ordered sold. The proceeds were ordered divided in the same manner as ordered with respect to the second parcel, *supra*.

{¶ 25} With respect to personal property, Marcia and the adult children were granted a period of 30 days to retrieve personal property other than major items of furnishings and appliances.

{¶ 26} Relevant to this appeal is the trial court's award to Tim of "his Sky Bank IRA, which is hereby assigned a value of \$14,489.17." This property was not listed together with the marital assets, but was awarded separately, with no explicit designation as marital or pre-marital property.

{¶ 27} The trial court found that "the unequal division of property favoring Wife by approximately \$6,000 is equitable due to Wife's contribution to the family assets during the marriage and her inability to accrue assets in the future due to her lesser earning capability."

Attorney Fees

{¶ 28} In his first assignment of error, Tim challenges the award of attorney fees. He points to the magistrate's decision, which justified the award by finding that Tim "has caused the pending litigation to be protracted by demanding paternity testing, not allowing access to the home and other behavior which shall result in him assisting with [Marcia's] attorney fees."

{¶ 29} The decision to award attorney fees in divorce proceedings rests in the trial court's sound discretion. Therefore, an appellate court will only reverse such an award if the trial court's judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 30} "In an action for divorce * * * a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, 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." R.C. 3105.73(A).

{¶ 31} Tim argues that he had a statutory right, pursuant to R.C. 3111.04, to challenge his paternity, and that the trial court's award punished him, in effect, for exercising that right. We disagree. A trial court may make any award that is "equitable" and "may" consider "the conduct of the parties." Unlike R.C. 3105.18, the predecessor statute to R.C. 3105.73, the applicable statute does not require a showing that the award

is linked to a need to fully litigate a party's rights or protecting a party's interest. *Moore v. Moore*, 175 Ohio App.3d 1, 2008-Ohio-255, ¶ 81-82.

{¶ 32} The record shows that, due to Tim's refusals, Marcia had to file several motions to gain access to the marital residence to preserve and retrieve personal property items. The trial court had discretion to consider Tim's conduct in this regard. Further, the attorney fees were awarded out of the proceeds of the sale of the marital residence; since the majority of the proceeds were to be divided equally between the parties, the attorney fee award also impacted Marcia's one-half of the proceeds. Considering the circumstances, we find the award to be equitable pursuant to R.C. 3105.73. The first assignment of error is not well-taken.

Marital Assets

{¶ 33} Tim advances several arguments in support of his second assignment of error. All relate solely to the allocation of the Sky Bank IRA. First, he argues that the Sky Bank IRA was his pre-marital property and, therefore, should not have been considered in the division of marital assets. "'Separate property' is defined in R.C. 3105.171(A)(6)(a)(ii) as '[a]ny real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage.' A trial court assumes that any property acquired during marriage is marital, unless evidence is offered to rebut that presumption. *Barkley v. Barkley* (1997), 119 Ohio App.3d 155." *Moore v. Moore*, 2008-Ohio-255, ¶ 60.

{¶ 34} Tim testified at trial that the IRA was his pre-marital property, and that he contributed approximately \$14,000 over a seven year period prior to the marriage. The Sky Bank IRA was not listed under the section listing the marital assets; therefore, it appears that the trial court did not consider it to be marital property. Tim's testimony was not rebutted at trial; Marcia, in her brief, does not contest Tim's assertion.

{¶ 35} However, Tim continues to argue that, because the IRA was his separate, pre-marital property, the overall property division which resulted was inequitable. The trial court noted that the division of marital property favored Marcia by approximately \$6,000. Tim argues that, after eliminating the value of the IRA from marital property, the division of marital property favors Marcia by over \$20,000. This inequity, he argues, is an "extreme difference."

{¶ 36} Marcia acknowledges that the division of property was not equal; however, she contends that the marital property division favors her by approximately \$10,000, not the higher figure Tim claims. She then argues that, based on the circumstances and the overall assets of the marriage, the difference in the division of marital assets is equitable.

{¶ 37} R.C. 3105.171(C)(1) requires the division of marital property to be "equal." "If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section."

{¶ 38} R.C. 3105.171(F) states that the court "shall consider all of the following factors:

{¶ 39} "(1) The duration of the marriage;

{¶ 40} "(2) The assets and liabilities of the spouses;

{¶ 41} "(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

{¶ 42} "(4) The liquidity of the property to be distributed;

{¶ 43} "(5) The economic desirability of retaining intact an asset or an interest in an asset;

{¶ 44} "(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

{¶ 45} "(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

{¶ 46} "(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

{¶ 47} "(9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;

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

{¶ 49} "A Court of Common Pleas has broad discretion to determine what property division is equitable in a divorce proceeding. The mere fact that a property division is unequal, does not, standing alone, amount to an abuse of discretion." *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, paragraph two of the syllabus. "The equitable division of marital property is within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. * * * An abuse of discretion is more than an error of law or mistake of fact; the term connotes an attitude by the court that is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219." *Loeffler v. Loeffler*, 167 Ohio App.3d 737, 2006-Ohio-3060, ¶ 22.

{¶ 50} Assuming that the Sky Bank IRA was Tim's pre-marital property, and assuming that the higher figure of \$20,000 more accurately reflects the extent to which the division of marital property favors Marcia, the overall property division was equitable and was not the result of an abuse of discretion. The trial court found the division equitable due to Marcia's "contribution to the family assets during the marriage and her inability to accrue assets in the future due to her lesser earning capability."

{¶ 51} The same justifications which applied to the unequal distribution of \$6,000 apply to the unequal distribution of approximately \$20,000. Marcia testified that during the marriage she suspended her pursuit of higher education to obtain a real estate license and work in the family business in order to contribute to the marriage. Considering the amount in relation to the total combined marital assets and the length of the marriage, the

unequal distribution is not inequitable, even discounting the Sky Bank IRA as marital property. "Equitable need not mean equal." *Cherry*, 66 Ohio St.2d at 355. Because we find no abuse of discretion in the division of marital property, the second assignment of error is not well-taken.

{¶ 52} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay 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.
