

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

Joyce Winters

Court of Appeals No. OT-09-025

Appellee

Trial Court No. 05DR179B

v.

David Z. Winters, et al.

DECISION AND JUDGMENT

Appellant

Decided: September 10, 2010

* * * * *

Jude T. Aubry, for appellee.

John L. Straub and Rebecca E. Shope, for appellant.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, in which the trial court granted a divorce to appellee, Joyce Winters, from appellant, David Z. Winters. For the reasons that follow, we affirm.

{¶ 2} The parties were married on September 9, 1995. Although they each had children from their prior marriages, they had no children together. Appellee filed for divorce on September 6, 2005. The divorce was not finalized until August 7, 2009. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. The trial court abused its discretion in finding that David committed financial misconduct.

{¶ 4} "II. The trial court abused its discretion in appointing a receiver.

{¶ 5} "III. The trial court abused its discretion in awarding spousal support for three years."

{¶ 6} In the divorce decree, the trial court found that appellant had engaged in numerous instances of financial misconduct. Appellant, in his first assignment of error, disputes the trial court's conclusion.

{¶ 7} R.C. 3105.171(E)(3) provides: "[I]f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property." The burden of proving financial misconduct is on the complaining party. *Gallo v. Gallo*, 11th Dist. No. 2000-L-208, 2002-Ohio-2815, ¶ 43. When determining whether to make a distributive award on the grounds of financial misconduct, the court must consider all of the factors identified in R.C. 3105.171(F) and any other factors it deems relevant. Because R.C. 3105.171(E)(3) states that the court "may" compensate the offended spouse for the

financial misconduct of the other spouse, the trial court's decision to make or not make a distributive award to compensate for financial misconduct is reviewed under an abuse of discretion standard. *Huener v. Huener* (1996), 110 Ohio App.3d 322.

{¶ 8} "The financial misconduct statute should apply only if the spouse engaged in some type of wrongdoing. *Hammond v. Brown* (Sept. 14, 1995), 8th Dist. No. 67268. 'Typically, the offending spouse will either profit from the misconduct or intentionally defeat the other spouse's distribution of marital assets.' *Id.* The time frame in which the alleged misconduct occurs may often demonstrate wrongful scienter, i.e., use of marital assets or funds during the pendency of or immediately prior to filing for divorce. See *Babka v. Babka* (1992), 83 Ohio App.3d 428, (account liquidated 'just prior to the parties' divorce'); *Gray v. Gray* (Dec. 8, 1994), 8th Dist. No. 66565, unreported (transferring or withdrawing funds during separation period in order to secret them from the other spouse); *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10, (dissipation of wrongful death settlement obtained while parties divorce complaint was pending)." *Jump v. Jump* (Nov. 30, 2000), 6th Dist. No. L-00-1040.

{¶ 9} First, appellant contends that the trial court erred in finding that he had fraudulently conveyed one-half of his 75 percent interest in Harwin Development LLC ("Harwin") to his son from a prior marriage, Matthew Winters.

{¶ 10} Harwin, a real estate development company, was formed in April 2004 by appellant, who owned 75 percent of the company and Judith B. Gerhart, who owned 25 percent of the company. On July 31, 2004, appellant executed a document transferring

37 1/2 percent of his interest in Harwin to Matthew. The document labeled "assignment of membership interest in Harwin Development, LLC", specifically stated that the assignment was a gift.

{¶ 11} Appellee contends that appellant's transfer of half his interest in Harwin to Matthew constituted financial misconduct. We agree. The record shows that the transfer occurred before appellee filed for divorce but after the parties were living physically apart. Appellant claimed that he made the transfer because at the time, his son was the only developer he could count on to ensure the viability of Harwin's projects. We agree with the trial court that appellant's claims lack credibility in that appellant's son had just graduated high school and he had no formal training in the construction trades. Moreover, during the time Matthew was supposedly indispensable to Harwin, he was attending college in New York and briefly lived in Florida.

{¶ 12} Appellant also contends that the court erred in finding that appellant committed financial misconduct when he withdrew \$50,000 from the parties' joint line of credit and gave the money to Matthew.

{¶ 13} In his depositional testimony, appellant testified that he gave the money to his son "to hold" because he was afraid his checking account would be frozen once his wife filed for divorce. He acknowledged that at the time he gave the money to Matthew, there was no divorce pending but he made it clear that he fully anticipated there soon would be a divorce filed and that is why he gave the money to his son. Appellant contends that there was no misconduct because his son paid the money back before the

divorce was filed. To support his claim, appellant offered into evidence a check from Matthew written to appellant in the amount of \$23,964. Appellant claims he immediately deposited the check into the parties' account. As for the remaining money due, appellant claims this was repaid when Matthew used the rest of the money to purchase a truck which was titled in the name of Storage Condominiums, Inc. ("SCI"), a company in which the parties were equal shareholders. Appellant contends that appellee was essentially reimbursed for the remaining money when SCI's equity was calculated into the division of marital property. Despite appellant's dubious claim that the money was repaid, we find that the fact that he withdrew the money, without appellee's knowledge, and in full anticipation of appellee filing for divorce, to be sufficient evidence to establish the presumption of wrongful intent necessary for a finding of financial misconduct.

{¶ 14} Next, appellant contends that the court erred in finding that appellant's sale of a backhoe in August 2004 for \$7,500 and his subsequent retention of the funds constituted misconduct. Appellant claims that appellee never established that the backhoe was marital property though he acknowledged that the backhoe was used by SCI. Appellant claimed that he did not know who owned the backhoe, however, plaintiff's exhibit 26 shows a check written out to appellant on August 19, 2004, for a backhoe and a deposit slip from appellant's bank showing that appellant deposited a check in the amount of \$7,500 into his personal bank account on August 19, 2004. Once again, appellant claims that he cannot be guilty of misconduct because this transaction

took place before the divorce was filed. However, it is clear from the record in this case that appellant knew a divorce complaint was forthcoming.

{¶ 15} Finally, appellant contends that the court erred in finding that he committed financial misconduct when he used \$1,500 from SCI to purchase a Christmas gift for his girlfriend. Appellant contends that a one-time use of marital funds to purchase a personal gift does not rise to the level of misconduct. While that may be true, we cannot help but look at this gift in the context of the transactions detailed above. As such, we agree with the trial court's conclusion. Appellant's first assignment of error is found not well-taken.

{¶ 16} In his second assignment of error, appellant contends that the trial court erred in appointing a receiver.

{¶ 17} It has long been recognized that the trial court is vested with sound discretion to appoint a receiver. *State ex rel. Celebrezze v. Gibbs* (1991), 60 Ohio St.3d 69, 73, 573 N.E.2d 62. The Ohio Supreme Court has recently stated:

{¶ 18} "A court in exercising its discretion to appoint or refuse to appoint a receiver must take into account all the circumstances and facts of the case, the presence of conditions and grounds justifying the relief, the ends of justice, the rights of all the parties interested in the controversy and subject matter, and the adequacy and effectiveness of other remedies." *Id.* at 73.

{¶ 19} Given the contentious nature of this case, appellant's complicated holdings, and evidence that appellant had engaged in financial misconduct with regard to the marital estate, we conclude that the appointment of a receiver was warranted to protect

appellee's interest. Finding no abuse of discretion, appellant's second assignment of error is not well-taken.

{¶ 20} In his third assignment of error, appellant contends that the court erred in awarding appellee spousal support for three years.

{¶ 21} Appellate review of a court's decision to grant or deny requested spousal support is limited to a determination of whether the court abused its discretion. *Bowen v. Bowen* (1999), 132 Ohio App.3d 616, 626. A trial court's broad discretion in awarding spousal support is controlled by the R.C. 3105.18(C)(1) factors. *Carmony v. Carmony*, 6th Dist. No. L-02-1354, 2004-Ohio-1035, ¶ 10. The trial court is not required to comment on each factor; instead, the record need only show that the court considered each factor in making its spousal support award. *Tallman v. Tallman*, 6th Dist. No. F-03-008, 2004-Ohio-895; *Stockman v. Stockman* (Dec. 15, 2000), 6th Dist. No. L-00-1053.

{¶ 22} R.C. 3105.18(C)(1) provides:

{¶ 23} "(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:

{¶ 24} "(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;

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

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

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

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

{¶ 29} "(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;

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

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

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

{¶ 33} "(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;

{¶ 34} "(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;

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

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

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

{¶ 38} Appellant contends that given the short duration of the marriage, the court erred in awarding appellee spousal support in the amount of \$1,200 for three years. At the very least, appellant contends that he should not have to pay for three more years since he has already paid appellee \$1,200 in temporary monthly spousal support since this action was filed.

{¶ 39} The parties were married for approximately nine years. In making the award, the court focused on the disparity of income between the parties. Appellee, employed as a teacher at a local community college, makes \$50,000 per year and her monthly expenses are approximately \$3,600 a month. Appellee has a college degree and appellant has a master's degree in engineering. Appellant uses funds from SCI to pay his personal living expenses, the amount is unclear. However, he did claim he was contributing \$2,500 to his current live-in girlfriend for living expenses. In addition, he earns a year-end bonus from SCI. In 2004, his bonus was \$30,000. He also receives a substantial interest income. The court found that appellant's income as shown on his tax return did not truly represent his income because of substantial paper losses regarding the sale of the parties' marital sailboat and the use of SCI's checking account to pay his expenses. In determining the length of the support, the court also took into consideration

appellant's financial misconduct. Upon review, we find that the trial court was well within its discretion in awarding spousal support in the amount of \$1,200 per month for 36 months. Accordingly, appellant's third assignment of error is found not well-taken.

{¶ 40} The judgment of the Ottawa 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

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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