

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

Mary Ann Westhoven

Court of Appeals No. OT-08-056

Appellee

Trial Court No. 03DRB170

v.

Thomas Westhoven

DECISION AND JUDGMENT

Appellant

Decided: January 22, 2010

* * * * *

Donna M. Engwert-Loyd, for appellee.

David F. Wiley, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Thomas Westhoven, appeals the October 20, 2008 judgment of the Ottawa County Court of Common Pleas in this action for divorce. Mary Ann Westhoven is appellee.

{¶ 2} The original trial court judgment granting the parties a divorce, dividing their assets, and awarding Mary Ann Westhoven spousal support was issued on January 4, 2007. Both parties appealed that judgment. In a judgment issued on June 13, 2008, we affirmed the trial court's judgment in part and reversed it in part. *Westhoven v. Westhoven*, 6th Dist. No. OT-07-003, 2008-Ohio-2875 ("*Westhoven I*"). We remanded the case to the trial court for further proceedings. This appeal concerns claimed error by the trial court in its judgment on remand.

{¶ 3} Thomas Westhoven asserts five assignments of error on appeal:

"Assignments of Error

{¶ 4} "1. The trial court erred in failing to determine what constitutes marital property and what constitutes separate property.

{¶ 5} "2. The trial court erred in failing to make an equal division of the marital property.

{¶ 6} "3. The trial court erred in failing to require wife to reimburse appellant the increase in the equity in the marital residence and for what appellant paid on wife's long term care insurance, car insurance and life insurance all post December 31, 2003.

{¶ 7} "4. The trial court failed to order into effect the stipulations of the parties.

{¶ 8} "5. The failure of the trial court to conduct further hearings and take additional testimony after the court of appeals issued its decision and judgment entry dated June 13, 2008, remanding it back to the trial court for further proceedings, constituted an abuse of discretion."

Failure to Classify Personal Property

{¶ 9} Under Assignment of Error No. 1, appellant contends that the trial court erred by failing to classify personal property assets as either marital or separate property.¹ "In dividing property in divorce proceedings, the trial court is required to classify assets as marital or nonmarital and then award each spouse his or her separate, nonmarital property." *Peck v. Peck* (1984), 96 Ohio App.3d 731, 734; R.C. 3105.171(B). Appellant claims he has been harmed by the failure because personal property that should have been awarded to him as separate, nonmarital property was subject to division as marital property instead.

{¶ 10} In response, appellee argues that appellant failed to assert this claimed error in the prior appeal of this case and, therefore, is barred from asserting it now. We agree.

{¶ 11} Treatment of the claimed separate property as marital property, and thereby subjecting it to division between the parties on that basis, was first ordered in the court below in an amended magistrate's decision of November 7, 2006, and was included in the trial court's judgment of January 4, 2007. We considered an appeal from the January 4, 2007 judgment in *Westhoven I*. Appellant did not raise the issue of claimed trial court error in failing to classify the concerned personal property as separate property or in failing to award the property to appellant as separate property in that appeal.

¹In the initial appeal, we affirmed the trial court's determination that the equity in the parties' marital home was entirely marital property. *Westhoven I* at ¶ 33 and 34.

{¶ 12} After remand, the trial court issued its judgment of October 20, 2008.

While the judgment on remand included rulings on division of property, the trial court specifically noted that, in making the judgment on division of personal property, it was doing no more than following the prior division of personal property as outlined in the November 7, 2007 amended magistrate's decision.

{¶ 13} "Not only have Ohio courts held that res judicata applies to issues which were actually litigated and adjudicated in a divorce action, but also that the doctrine is applicable to matters which could have been litigated and adjudicated." *Bean v. Bean* (1983), 14 Ohio App.3d 358, 361. Appellant did not raise objections to the trial court's treatment of claimed separate personal property in the original appeal. Having failed to raise the issue in the original appeal, appellant is barred under the doctrine of res judicata from raising it now. *Wiczynski v. Wiczynski* (Feb. 26, 1999), 6th Dist. No. L-98-1123; *Hatfield v. Hatfield* (Mar. 18, 1996), 4th Dist. No. 95CA2112. Accordingly, we find that Assignment of Error No. 1 is not well-taken.

Division of Marital Property

{¶ 14} Under Assignment of Error No. 2, appellant contends that the trial court erred by failing to make an equal division of marital property. Appellant has limited this argument to the treatment of his IRA account and of the parties' future Social Security benefits. Appellant claims that, when the court calculated the division of marital property, the value of his IRA should have been reduced by the amount of future taxes owing against it. He also claims that the court should have treated Social Security

benefits as assets. To the extent the value of appellee's Social Security benefits exceeds his, appellant claims that he is entitled to a dollar for dollar set-off as against the value of his IRA account in determining the division of marital property.

{¶ 15} Under Assignment of Error No. 4, appellant contends that the trial court erred by disregarding stipulations of the parties. Appellant argued both assignments of error together in his brief.

{¶ 16} We address the tax issue first. Appellant claims that there was an "intended stipulation" that, for purposes of division of marital property, the value of his IRA should be reduced by taxes that will be owed on it. Appellee responds that "there is no such creature as an 'intended stipulation.' No evidence was presented at trial of such stipulation nor was any set forth in Appellant's Brief." Appellee has further argued that there was no basis in the record to support the calculations of tax liability provided in appellant's brief.

{¶ 17} Appellant has not explained his use of the term "intended stipulation" and has not cited the court to any portion of the record in which the issue was addressed. We can only speculate whether appellant claims there was an enforceable agreement between the parties on treatment of taxes that will owe on the IRA account, whether the issue was raised with the trial court, or whether there was simply no agreement and appellant wished there were one. Appellee denies there was any agreement.

{¶ 18} Under App.R. 16(A)(7), appellant is required to provide citations to those parts of the record on which he relies. App.R. 12(A)(2) affords this court with discretion

to disregard assignments of error where a party "fails to identify in the record the error on which the assignment of error is based." We exercise that discretion and decline to consider arguments based upon the claimed "intended stipulation." We find that Assignment of Error No. 4, claiming that the trial court failed to honor the stipulations of the parties, is not well-taken.

{¶ 19} Even if arguments of counsel in an appellate brief were evidence, which they are not, an appellate court cannot add evidence to the record and decide the appeal based upon that new material. See *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of syllabus. We decline to consider appellant's tax calculations contained in his appellate brief as they are not supported in the record.

{¶ 20} Under Assignment of Error No. 2, appellant further argues that the trial court erred both in failing to treat Social Security benefits as an asset and in refusing to offset the difference in value between the parties' Social Security benefits against the value of appellant's IRA when determining the division of marital assets.

{¶ 21} Appellant's arguments concerning treatment of Social Security benefits in determining division of marital property run directly against the Ohio Supreme Court's analysis in *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio 3624.² In *Neville*, the Ohio Supreme Court recognized that 42 U.S.C. Section 407(a) prohibits division of Social Security benefits in divorce proceedings. *Neville* at ¶ 7. The federal prohibition

²The issues in this appeal arose prior to the effective date of statutory changes to R.C. 3105.171 under House Bill 395.

"preempts state law that would authorize distribution of these assets." *Id.*, citing *Hisquierdo v. Hisquierdo* (1979), 439 U.S. 572. The Supreme Court of Ohio specifically held in *Neville* that "a party's Social Security benefits cannot be divided as a marital asset." *Neville* at ¶ 11.

{¶ 22} Under *Neville*, future Social Security benefits are not to be considered when the trial court undertakes an equal division of marital assets. Rather, a court may consider Social Security benefits, where an equal division of marital assets is determined inequitable, and division of marital assets is undertaken employing procedures set forth in R.C. 3105.171(C). "R.C. 3105.171(C) clearly provides that where an equal division would be inequitable, a trial court may not divide the marital property equally but instead must divide it in the manner that the court determines to be equitable." *Neville* at ¶ 5.

{¶ 23} The court outlined in *Neville* the R.C. 3105.171(C) procedure:

{¶ 24} "In order to equitably divide marital property, R.C. 3105.171(C)(1) directs the court to consider *all* relevant factors, including those factors listed in R.C. 3105.171(F). Among those factors listed in division (F) are the duration of the marriage (R.C. 3105.171[F][1]), the assets and liabilities of the parties (R.C. 3105.171[F][2]), and any other factor the court finds relevant and equitable (R.C. 3105.171[F][9]). Although a party's Social Security benefits cannot be divided as a marital asset, those benefits may be considered by the trial court under the catch-all category as a relevant and equitable factor in making an equitable distribution. Accordingly, we hold that a trial court, in

seeking to make an equitable distribution of marital property, may consider the parties' future Social Security benefits in relation to all marital assets." *Neville* at ¶ 11.

{¶ 25} Appellant's Assignment of Error No. 2 asserts that "[t]he trial court erred in failing to make an equal division of the marital property." As consideration of future Social Security benefits is prohibited under *Neville* in undertaking an equal division of marital property, appellant's Assignment of Error No. 2 is not well-taken.

Claimed Denial of Credit for Mortgage and Insurance Payments

{¶ 26} In *Westhoven I*, we directed that the issue of whether the trial court failed to credit appellant for various payments "will need to be reexamined by the trial court on remand." *Westhoven I* at ¶ 42. Under Assignment of Error No. 3, appellant argues that he is entitled to credit for mortgage payments on the marital home and for auto, extended care, and life insurance payments made on appellee's behalf. He asserts that the trial court judgment provides him credit for half the payments made through July 25, 2005, and no credit for payments after that date. Appellant contends that the trial court erred in failing to credit him the full amount of payments made.

{¶ 27} Appellee has responded asserting that appellant was credited for the full amounts of payments through July 25, 2005, and that there is no evidence in the record to show payments after July 25, 2005. Appellee also argues that appellant's claims of subsequent payments not only are not supported by evidence in the record, but are also false.

{¶ 28} We address the issue of payments through July 25, 2005, first. In the judgment on remand, the trial court considered that the balance owing on the mortgage loan on the marital home had been reduced by payments made by appellant to \$10,680.20 as of July 25, 2005. The court recognized that the payments increased the equity in the home in calculating division of marital property and also ordered that appellant "is entitled to \$1,839.25, which is half of the difference between the mortgage balance of \$14,358.70 on September 18, 2003, and the mortgage balance of \$10,680.20 on July 25, 2005." The amount credited is reflected in the court's calculations as to division of marital property in Table 6 of the judgment.

{¶ 29} The trial court also found that appellant had made insurance premium payments totaling \$2,918 and concluded that he was entitled to reimbursement for one-half the cost of the payments. The trial court considered the credit in its calculations in determining division of marital property. The court applied a credit of \$1,459. That credit is also reflected in Table 6.

{¶ 30} In the trial court judgment issued on remand, the trial court stated that it had adopted the amended magistrate's decision of November 7, 2006, in its judgment of January 4, 2007. In part, that judgment retroactively reduced temporary spousal support owed from the date first ordered in September 2003 from \$950 to \$450 per month. This resulted in a reduction in the amount of a lump sum judgment for unpaid spousal support owing for the period from September 18, 2003, until July 25, 2005, from \$23,750 to \$10,350. The judgment on remand retained the reduction in amount of monthly spousal

support and reduced the lump sum judgment for unpaid spousal support through July 25, 2005 to \$10,009.

{¶ 31} The trial court chose to consider appellant's demand for credits for mortgage and insurance payments pending litigation as part of the court's division of marital property. "In reviewing the equity of a division of property, one of the basic guidelines an appellate court is bound to follow is that the trial court's judgment cannot be disturbed on appeal absent a showing that the common pleas court abused its discretion in formulating its division of the marital assets and liabilities of the parties." (Citations omitted.) *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295. An abuse of discretion involves "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." (Citations omitted.) *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 32} Upon our review of the record, we conclude that the trial court did not abuse its discretion in limiting credits for mortgage and insurance payments by appellant that were made during the period from September 18, 2003, to July 25, 2005, to one-half of the payments made.

Evidence Proffered at Hearing on September 11, 2006

{¶ 33} This matter was tried in hearings conducted on March 9, 2005, April 18, 2005, May 6, 2005, and August 1, 2005. The magistrate issued a magistrate's decision on January 26, 2006. Appellant filed objections to the magistrate's report. In his brief asserting objections, appellant included a request that the case be remanded to the

magistrate and that "Defendant [appellant] be given credit for expenses of the Plaintiff [appellee] which were, in fact, paid by Defendant and not by Plaintiff." The trial court referred the objections back to the magistrate for further proceedings and consideration.

{¶ 34} On June 27, 2006, appellee filed a motion in limine pursuant to Civ.R. 53 to limit the type of additional evidence that could be considered at the hearing on the objections to the magistrate's decision. Appellee sought for the court to limit new evidence to evidence that appellant could not have produced for the magistrate's consideration in the final hearings conducted prior to the magistrate's decision. Those hearings concluded on August 1, 2005.

{¶ 35} At the time the hearing proceeded, Civ.R. 53(D)(4)(d) provided:

{¶ 36} "(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.*" (Emphasis added.)

{¶ 37} Pursuant to the motion in limine, the trial court issued an order, filed September 6, 2006, stating that "the Court will not consider additional evidence regarding Defendant's [Appellant's] Objection to Magistrate's Decision absent a showing that said

evidence was not available at the time of trial." The hearing proceeded on September 11, 2006.³

{¶ 38} At the September 11, 2006 hearing, appellant offered into evidence exhibits numbered 99, 98, and 97.⁴ Appellant testified at the hearing concerning the exhibits. Exhibit 98 was prepared by appellant and includes a listing of specific payments made by appellant by date, check number and amount, for long term care insurance, car insurance, mortgage payments, and spousal support paid after the August 1, 2005 hearing and prior to the September 11, 2006 hearing. Although evidence of payments made from August 1, 2005 to September 11, 2006 were not barred under the terms of the trial court's order in limine, the magistrate refused to admit these exhibits into evidence at the hearing. Appellant made a proffer of the exhibits for the record.

{¶ 39} The magistrate issued his amended magistrate's decision on November 7, 2006. Appellant did not assert objections to the magistrate's decision based upon claimed error with respect to admission of exhibits 99, 98, and 97 into evidence either in his

³A review of the transcript to the hearing on objections to the magistrate's decision discloses that the actual hearing date was September 11, 2006 and not August 11, 2006 as indicated on the face of the transcript.

⁴The original exhibits 99, 98, and 97 could not be found by the clerk of court. Replacement copies were identified and certified as true and accurate copies of the original exhibits by the trial court in an order filed on January 6, 2010. Replacement copies of exhibits 97 and 98, however, include records of payments made after the September 11, 2006 hearing date. Such information could not have been included in the original exhibits that were submitted for court consideration on September 11, 2006. Therefore, we limit consideration in this appeal to records of payments made prior to the hearing date of September 11, 2006.

post-trial brief that was filed on September 20, 2006, or at any time after the magistrate issued the amended magistrate's decision and prior to the trial court's entry of judgment on January 4, 2007. We deem the issue waived under Civ.R. 53(D)(3)(b)(iv) for failure to make objection to the trial court of the magistrate's exclusion of the evidence. See *Foos v. Foos*, 6th Dist. No. WD-08-049, 2009-Ohio-3398, ¶ 16; *Slough v. Slough*, 6th Dist. No. WM-08-017, 2009-Ohio-1746, ¶ 26.

{¶ 40} Accordingly, for this appeal, the only competent evidence in the record is of payments made by appellant between September 18, 2003 (the date of the original temporary order) and July 25, 2005. Evidence of those payments was admitted at trial during hearings conducted on March 9, 2005, April 18, 2005, May 6, 2005, and August 1, 2005. As we have determined that the trial court did not abuse its discretion with respect to credits to which appellant was entitled arising out of payment during that period, we find appellant's Assignment of Error No. 3 not well-taken.

Failure to Conduct Evidentiary Hearing on Remand

{¶ 41} Under Assignment of Error No. 5, appellant argues that the trial court erred in failing to conduct an evidentiary hearing on remand from this court's judgment in *Westhoven I* and prior to the trial court's issuing of the October 20, 2008 judgment. Appellant argues that such a hearing was necessary to introduce evidence that he ceased temporary support mortgage and insurance payments after January 4, 2007, had begun payment of court ordered spousal support of \$450 beginning in February 2007, and stopped payments when appellee remarried on June 9, 2007. Appellant claims that such a

hearing was also necessary to advise the court as to the content of prior testimony on personal property and tools.

{¶ 42} In our judgment ordering remand, we did not specify the nature of any further proceedings in the trial court on remand. Rather, we ordered the case "remanded * * * for further proceedings consistent with this decision." A remand for further proceedings does not necessarily require a trial court to conduct an evidentiary hearing on remand. *Evanich v. Bridge*, 170 Ohio App.3d 653, 2007-Ohio-1349, ¶ 21.

{¶ 43} Here appellant argues that the trial court abused its discretion in failing to conduct a hearing on remand. We cannot find that the trial court abused its discretion in proceeding to judgment without a hearing on remand. The case had been fully tried. The proposed additional evidence was not necessary to address issues on remand. Under both the January 4, 2007 and October 20, 2008 judgments, spousal support was contingent, ending upon remarriage of appellee without further order of the court. The payments allegedly made after January 4, 2007 were of the type contemplated under the January 4, 2007 judgment.

{¶ 44} Appellant's other arguments represent requests to reargue or reopen testimony and exhibits in evidence on issues that were tried and submitted for final court consideration and judgment before issuance of the January 4, 2007 judgment. We find that there was no abuse of discretion in failing to conduct a hearing on remand.

{¶ 45} Appellant's Assignment of Error No. 5 is not well-taken.

{¶ 46} On consideration whereof, this court finds that substantial justice was done the party complaining. We affirm the judgment of the Ottawa County Court of Common Pleas. Appellant is ordered to pay costs, 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.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Richard W. Knepper, J.
CONCUR.

JUDGE

Judge Richard W. Knepper, 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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