[Cite as *Eoff v. Eoff*, 2011-Ohio-151.]

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

Brett C. Eoff

Appellant

v.

Vanida L. Eoff

Appellee

Court of Appeals No. L-09-1306

Trial Court No. DR2008-0188

DECISION AND JUDGMENT

Decided: January 14, 2011

* * * * *

Walter J. Skotynsky, for appellant.

Kaser S. Bhatti, for appellee.

* * * * *

SINGER, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, in which the trial court granted a divorce to appellant, Brett C. Eoff, and appellee, Vanida Eoff. For the reasons that follow, we affirm.

{¶ 2} The parties were married on August 14, 2004. One child was born of the marriage on March 14, 2006. Appellant filed for divorce on February 20, 2008. The divorce was finalized on October 30, 2009. In the divorce decree, the court found appellant guilty of financial misconduct. Specifically, the court found that appellant wrongfully depleted $50,000 of appellee's separate property. Appellant now appeals setting forth the following assignments of error:

{¶ 3} "I. Trial court erred in rendering judgment against the appellant due to the ineffective assistance of the appellant's counsel.

{¶ 4} "II. Trial court erred in applying section 3105.171 of the Ohio Revised Code because in doing so the court ignored the testimony of the plaintiff-appellant which was supported by the actions of the defendant-appellee.

{¶ 5} "III. Trial court erred by entering a decision which was against the manifest weight of the evidence."

{¶ 6} Appellant's second and third assignments of error will be addressed together. Appellant contends that the court erred in determining that appellee's $50,000 inheritance was her separate property. Appellant contends that appellee gave him the money as an inter vivos gift for the purpose of paying debts.

{¶ 7} Pursuant to R.C. 3105.171(A)(3)(a)(i), marital property consists of "real and personal property that currently is owned by either or both of the spouses * * * and that was acquired by either or both * * * during the marriage." Property acquired during a marriage is presumed to be marital property unless it can be shown to be separate.

Barkley v. Barkley (1997), 119 Ohio App.3d 155, 160. With respect to this case, separate property, which is defined under R.C. 3105.171(A)(6)(a), among other things, specifically includes: "[a]n inheritance by one spouse by bequest, devise, or descent during the course of the marriage." R.C. 3105.171(A)(6)(a)(i).

{¶ 8} "'Spouses can change separate property to marital property based on actions during the marriage.' *Moore v. Moore* (1992), 83 Ohio App.3d 75, 77. The primary method for effecting this change is through an inter vivos gift of the property from the donor spouse to the donee spouse. *Helton v. Helton* (1996), 114 Ohio App.3d 683. 'An inter vivos gift is an immediate, voluntary, gratuitous and irrevocable transfer of property by a competent donor to another.' *Smith v. Shafer* (1993), 89 Ohio App.3d 181, 183. The essential elements of an inter vivos gift are: '(1) [the] intent of the donor to make an immediate gift; (2) delivery of the property to the donee; [and] (3) acceptance of the gift by the donee.' *Barkley v. Barkley* (1997), 119 Ohio App.3d 155. Generally, the donee has the burden of showing, by clear and convincing evidence, that the donor made an inter vivos gift. *Smith* at 183." *Smith v. Emery-Smith*, 11th Dist. No. 2009-G-2941, 2010-Ohio-5302, citing *Osborn v. Osborn*, 11th Dist. No. 2003-T-0111, 2004-Ohio-6476.

{¶ 9} The existence of an inter vivos gift is ordinarily a question of fact. *Wheeler v. Martin*, 4th Dist. No. 04CA15, 2004-Ohio-6936, ¶ 16. We give deference to the trial court as the trier of fact because it is best able to observe the witnesses and weigh the credibility of their testimony. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. If some competent, credible evidence going to all of the essential elements of the

case supports a decision, we will not reverse it as being against the manifest weight of the evidence. *Masitto v. Masitto* (1986), 22 Ohio St.3d 63, 66.

{¶ 10} Appellee testified that in 2006, she worked as a caretaker for elderly people. On March 30, 2006, one of her clients died. Appellee testified that she had worked for the man for 12 years. In his will, the man left appellee $50,000. Defendant's Exhibit J was a copy of the check from the man's estate payable to appellee and dated December 14, 2006. Also part of defendant's Exhibit J was a deposit slip showing that the check was deposited into appellant's bank account, minus $500, on December 14, 2006. Appellee testified that she received the $500 from appellant that day. Appellee testified that at the time that she received the inheritance, she was planning to move out of appellant's house and seek a divorce. She planned to use the inheritance to get an apartment. Appellee testified that appellant knew this and agreed to hold the money for her in his account.

{¶ 11} Appellant testified that appellee gave him her inheritance check and that appellee knew he was going to use the money to support their family. Appellant described the inheritance as a "general family fund to pay off expenses and bills." He deposited it into his checking account because appellee did not have a checking account, although, appellee testified that she had one that she did not use. Appellant testified that appellee was aware that his business was in trouble. According to appellant, he and appellee "sat down and talked about" what they were going to do with the money. He testified that they agreed to give some of the money to appellee's adult daughters and that

they agreed to pay their past due income taxes. The inheritance check was spent in approximately one month's time. Regarding the inheritance money, appellant stated "* * * I didn't do anything without her permission."

{¶ 12} Appellee testified that she did not authorize payment of a check from appellant's account, dated December 15, 2006, and payable to Cameron Heating and Cooling, the business appellant owned. The check amount was $2,000.

{¶ 13} Appellee testified that she did not authorize the payment of several checks from appellant's account, all dated December 22, 2006. One check was made payable to Cameron Heating and Cooling in the amount of $9,000. Another check, in the amount of $1,000, was issued to appellant. A check for $1,000 was issued to Sam's Club. Appellee testified that she did not authorize payment of these checks.

{¶ 14} Appellee testified that she did not authorize payment of a check to appellant's mother, Lillian Eoff, in the amount of $5,000. Appellant contended that the check represented payment for a loan appellant's mother had previously made to the couple. Appellee testified that she was unaware of any such loan.

{¶ 15} Five of the December 22, 2006 checks represented tax payments. One was made payable to the Toledo City Tax Commissioner in the amount of $1,147. One check was made payable to the United States Treasury in the amount of $5,164. Three checks were made out to the Ohio Treasurer of State in the amounts of $300, $900 and $984, respectively. Appellee denied authorizing any of these checks.

{¶ 16} Another check, made payable to appellant's business, was issued on December 27, 2006, in the amount of $4,000. Appellee denied authorizing the check. She also denied authorizing payment of a check, dated December 29, 2006, to Gerdenick Realty in the amount of $399.

{¶ 17} Finally, two checks were issued on January 9, 2007, and were made payable to appellant. One check was in the amount of $4,000 and one check was in the amount of $1,000. Appellee denied authorizing these payments to appellant. Appellant claimed that all checks written to him were for the couple's living expenses.

{¶ 18} Appellee testified that she did authorize checks made payable to her adult daughters. In the end, she testified, she only received a total of $3,300 from her inheritance.

{¶ 19} In finding that appellee's inheritance was her separate property, the court stated: "[T]his court did not find Husband's testimony regarding his finances to be credible and found his self-generated computer reports to be confusing and often inconsistent with his testimony." The court took note of the fact that appellant spent the inheritance within 30 days. Ultimately, the trial court found one of the parties more believable than the other. Based upon the foregoing, we cannot say that the trial court's determination that appellee's inheritance was not given as a gift to appellant is against the manifest weight of the evidence. Appellant's second and third assignments of error are found not well-taken.

{¶ 20} In his first assignment of error, appellant argues that his counsel was ineffective. As this proceeding is a civil matter, "[a] complaint of ineffective assistance of counsel is not a proper ground on which to reverse the judgment of a lower court in a civil case that does not result in incarceration in its application when the attorney was employed by a civil litigant." *Phillis v. Phillis*, 164 Ohio App.3d 364, 2005-Ohio-6200. "In a civil action, a party needs to resolve a complaint of the ineffective assistance of counsel by a malpractice action." *Dantzig v. Biron*, 4th Dist. No. 07CA1, 2008-Ohio-209, ¶ 9. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 21} The judgment of the Lucas 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(A).

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

Keila D. Cosme, J. _____
CONCUR.
JUDGE