

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

Gary A. Kovacs

Court of Appeals No. S-09-039

Appellant

Trial Court No. 07DR000843

v.

Sandra F. Kovacs

DECISION AND JUDGMENT

Appellee

Decided: January 14, 2011

* * * * *

Eric R. Weisenburger, for appellant.

Lisa M. Snyder, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, in a divorce action. Plaintiff-appellant, Gary A. Kovacs, now challenges that judgment through the following assignments of error:

{¶ 2} "1. The trial court abused its discretion in finding that appellant's separate property had been converted into an inter vivos gift, as this was not proven by clear and convincing evidence.

{¶ 3} "2. The trial court abused its discretion in finding that appellant owed \$8,633.30 for her 'expenses,' as such a finding was against the manifest weight of the evidence."

{¶ 4} Appellant and defendant-appellee, Sandra F. Kovacs, were married in November 1979 in Fremont, Ohio. No children were born of the marriage. In June 2000, appellant was involved in a car accident that left him permanently injured. Prior to the accident, appellant worked in the construction trade and made between \$20,000 and \$30,000 per year. Following the accident, he was unable to work and, at the time of the trial below, his only source of income was \$1,000 per month in social security disability payments. Appellee's only source of income was also social security disability payments of approximately \$1,000 per month, which she had been receiving since 1996. As compensation for his injuries, appellant received two checks to settle a lawsuit. The first check for \$161,610.81 was dated May 21, 2002. Upon receipt of that check, appellant used \$47,099 to pay off the existing mortgage on the marital home in Republic, Ohio. In November 2002, that marital home was destroyed by a tornado. In January 2003, the parties received an insurance check for \$272,483 as compensation for the loss of their home and its contents. Also in January 2003, appellant received the second check in the personal injury lawsuit. That check was for \$98,700. Throughout the parties' marriage,

they maintained joint accounts into which they both deposited income and from which appellee paid the parties' living expenses. Consistent with this practice, all of the settlement checks were deposited into the parties' joint accounts.

{¶ 5} During the course of their marriage, the parties had vacationed in North Carolina and had purchased a time share property there. After the loss of their home in Ohio, the parties decided to use the proceeds from the insurance settlement (\$272,483), along with the second check from the accident lawsuit (\$98,700), to purchase a retirement home in North Carolina. In April 2003, they purchased a home in Mars Hill, North Carolina for \$375,000.¹ They paid cash for the home, writing one check out of their bank account at Fifth Third Bank. Accordingly, their new marital home carried no mortgage. They lived in the home together until January 2007, when they separated and appellant returned to live in Ohio. Appellee continued to live in the North Carolina home throughout the proceedings below.

{¶ 6} On July 31, 2007, appellant filed a complaint for divorce. Prior to the final hearing, the parties filed stipulations which settled the majority of the issues between them. The only issues remaining to be tried by the court were whether the proceeds from appellant's personal injury lawsuit could be traced to the North Carolina property, what portion of that property was marital and/or separate property, or mixed, and whether appellee was entitled to reimbursement for expenses paid to maintain the North Carolina

¹The lower court stated the purchase price for the home as \$370,302. This amount, however, does not include the earnest money paid by the parties. The contract sales price listed on the settlement statement is \$375,000.

property. At the trial on those issues, appellant and appellee testified, as well as a bank employee who authenticated bank documents, and appellant's personal injury lawyer, who testified regarding appellant's personal injury lawsuit.

{¶ 7} On August 27, 2009, the lower court issued a decision on the tried issues. The court first determined that appellant had established by a preponderance of the evidence that the proceeds from the personal injury lawsuit, namely the two checks for \$161,610 and \$98,700 respectively, were his separate property pursuant to R.C. 3105.171(A)(6)(a)(vi). The court then found that despite the fact that the injury proceeds had been commingled with other marital property, they did not lose their identity as appellant's separate property and were still traceable. That is, the court found that the \$47,099, taken from the first settlement check to pay off the mortgage on the marital home in Republic, Ohio, and the second settlement check of \$98,700, that was used toward payment for the North Carolina home, were both still traceable as appellant's separate property. Then, however, the court found that through the joint purchase of the parties' retirement "dream home" in North Carolina, appellant had made an inter vivos gift to his wife and converted his separate property into marital property. That purchase allowed the parties to live in their home mortgage free, which, the court determined, was in their best interest since they both received only disability income. The court further determined that even if appellant's testimony, that he bought the property as an investment, was to be believed, there was no evidence that the investment was set aside to be designated the sole property of appellant.

{¶ 8} The court therefore determined that the property should be sold and the proceeds divided equally between the parties. Finally, the court determined that appellant should share equally in the expenses claimed by appellee for the maintenance of the North Carolina home, and should reimburse appellee for money that he removed from the parties' joint bank account at the time of the parties' separation. The court therefore determined that appellant should reimburse appellee from his share of the proceeds from the sale of the North Carolina home in the amount of \$8,633.30. On November 5, 2009, the lower court filed a judgment decree of divorce with findings of fact and conclusions of law that reflected its August decision. It is from that judgment that appellant now appeals.

{¶ 9} In his first assignment of error, appellant asserts that the lower court's finding that his separate property had been converted to marital property through an inter vivos gift was not supported by clear and convincing evidence.

{¶ 10} In a divorce proceeding, a trial court shall determine "what constitutes marital property and what constitutes separate property" and then "shall divide the marital and separate property equitably between the spouses * * *." R.C. 3105.171(B). Generally, this means that the court should award each spouse his or her separate property and then distribute the marital estate equally, unless an equal division would be inequitable. R.C. 3105.171(C) and (D). "Marital property" is that "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." R.C. 3015.171(A)(3)(a)(i).

Marital property does not include separate property. R.C. 3015.171(A)(3)(b). Relevant to the issue before this court, "separate property" includes "[c]ompensation to a spouse for the spouse's personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets." R.C. 3105.171(A)(6)(a)(vi).

{¶ 11} In the present case, appellant established in the proceedings below, and the court found, that the insurance proceeds from the settlement of his personal injury lawsuit were his separate property and, despite having been commingled with marital property, were still traceable as his separate property. Appellee concedes that this finding was correct. The dispute, however, is whether appellant then converted his separate property into marital property through an inter vivos gift.

{¶ 12} It is well-settled that parties can transmute separate property into marital property by means of an inter vivos gift. *Helton v. Helton* (1996), 114 Ohio App.3d 683, 685. "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, at fn. 2, citing *Bolles v. Toledo Trust Co.* (1936), 132 Ohio St. 21. "The donee has the burden of showing by clear and convincing evidence that the donor made an inter vivos gift." *Helton*, supra at 686, citing *In re Fife's Estate* (1956), 164 Ohio St. 449, 456. Clear and convincing evidence is that proof which establishes in the mind of the trier of fact a firm

conviction as to the allegations sought to be proven. *Cross v. Ledford* (1954), 161 Ohio St. 469. However, "[w]hen a transaction is made that benefits a family member, there is a presumption that the transaction was intended as a gift." *Osborn v. Osborn*, 11th Dist. No. 2003-T-0111, 2004-Ohio-6476, ¶ 33, quoting *Davis v. Davis*, 5th Dist. No. 2003CA00243, 2004-Ohio-820, ¶ 8.

{¶ 13} The factual findings of the trial court relating to its classification of property as marital or separate are reviewed under a manifest weight standard. *Barkley*, supra at 159. Thus, an appellate court may not independently weigh the evidence but should presume that the trial court's findings are correct where they are supported by some competent and credible evidence. *Myers v. Garson* (1993), 66 Ohio St.3d 610, 614; *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74.

{¶ 14} R.C. 3105.171(H) states: "Except as otherwise provided in this section, the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." This statute has been interpreted as embracing "a flexible totality-of-the-circumstances test to determine whether transmutation of the separate property has occurred." *Hippely v. Hippely*, 7th Dist. No. 01 CO 14, 2002-Ohio-3015, ¶ 18. Accordingly, "the form of title is relevant to, but not conclusive of, the classification of property as being either marital or separate." *Barkley*, supra at 161. The determinative issue is whether, when appellant paid off the mortgage on the parties' Ohio home and put \$98,700 toward the purchase of the North Carolina home, he had the donative intent to

transfer to appellee a present possessory interest in his separate property. *Helton*, supra at 686.

{¶ 15} The record contains very little direct evidence on the issue of donative intent. We therefore must look to the totality of the circumstances. While the parties' real estate was titled in both of their names, appellant specifically testified that in using the proceeds from his personal injury action toward the purchase of the North Carolina home, he never intended to gift that money to his wife. Rather, he believed that the money from the settlement was to compensate him for his pain and suffering and for the pain and suffering he would continue to endure for the rest of his life. Nevertheless, the evidence established that by paying off the mortgage on the Ohio marital home, appellant eased the burden of a mortgage payment on both he and appellee. The evidence further established that the parties then made the joint decision to pool their resources in buying the North Carolina home. That home was titled in both of their names. Appellant contributed funds to that purchase which allowed the parties again to own a home without a mortgage. Accordingly, none of appellee's monthly income was needed to put toward a mortgage payment. The court concluded that this was in both of their best interest given their limited income.

{¶ 16} Given these factors, we must conclude that there was some evidence from which the lower court could find that in using his separate property to pay off the mortgage on the marital home and then to buy a retirement home in North Carolina, appellant intended to convey a present possessory interest in his separate property to

appellee and, therefore, that appellant's separate property had been converted to marital property through an inter vivos gift. The first assignment of error is not well-taken.

{¶ 17} In his second assignment of error, appellant challenges the trial court's order that he reimburse appellee for \$8,633 in expenses. Appellant contends that the order was against the manifest weight of the evidence where the only evidence of the expenses was appellee's own handwritten list. He also claims that the order was inequitable because some of the claimed expenses were for costs associated with the North Carolina home where appellee lived rent free during the pendency of the lower court proceedings.

{¶ 18} When making a property award in a divorce action, a trial court has broad discretion. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. Therefore, a trial court's distribution in such cases will not be reversed on appeal absent an abuse of discretion. *Huener v. Huener* (1996), 110 Ohio App.3d 322, 324. An abuse of discretion implies that the court's attitude in reaching its judgment was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. When reviewing a trial court's property distribution, an appellate court must ascertain whether the disposition, as a whole, amounted to an abuse of discretion. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222.

{¶ 19} R.C. 3105.171(B) and (C)(1) provide that in a divorce proceeding, all marital property is to be divided equally unless an equal division would be inequitable. If an equal division would be inequitable, marital property is to be divided in an equitable

manner. "Because the court must consider both assets and liabilities, an equitable division of marital property necessarily implicates an equitable division of marital debt."

Elliott v. Elliott, 4th Dist. No. 03CA2737, 2004-Ohio-3625, ¶ 12, citing R.C.

3105.171(F)(2). In making a division of marital property, the trial court is required to consider all relevant factors, including those listed in R.C. 3105.171(F). The factors the court is to consider are: (1) the duration of the marriage, (2) the assets and liabilities of the parties, (3) the desirability of awarding the marital home to the spouse with custody of the children, (4) the liquidity of the property to be distributed, (5) the economic desirability of retaining intact an asset or an interest in an asset, (6) the tax consequences of the property division, (7) the costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property, (8) any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses, and (9) any other factor that the court expressly finds to be relevant and equitable.

{¶ 20} In addressing the issue of appellee's claimed expenses, the lower court determined that the list represented the remainder of the money that appellant removed from the parties' joint bank account at the time of their separation plus taxes due on the Ohio and North Carolina properties. The court then found that it was fair and equitable for the parties to be equally responsible for these expenses.

{¶ 21} At the hearing below, appellee testified as to each of the expenses listed on her exhibit. Appellant did not challenge her claim on cross-examination or testify himself regarding the expenses. The parties have few assets, nearly equal monthly

income, and neither is seeking spousal support from the other. Given the overall property distribution we cannot find that the lower court abused its discretion in dividing the property as it did. The second assignment of error is not well-taken.

{¶ 22} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Sandusky 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, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

<p>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.</p>
