

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

James E. Jones

Court of Appeals No. L-10-1044

Appellee

Trial Court No. DR2007-1176

v.

Carrie L. Jones

DECISION AND JUDGMENT

Appellant

Decided: May 18, 2012

* * * * *

Henry B. Herschel, for appellee.

Keithley B. Sparrow, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which granted the parties, plaintiff-appellee, James E. Jones, and defendant-appellant, Carrie L. Jones, a divorce from each other, designated appellee the residential parent and legal custodian of the parties' two minor children,

awarded appellant parenting time with the minor children, divided the parties' marital assets and liabilities, denied appellee's request for spousal support, and denied both parties' request for attorney fees. From that judgment, appellant raises the following assignments of error:

A. The trial court committed reversible error in its determination of parental rights and responsibilities.

B. The trial court abused its discretion by failing to disentangle the economic partnership of the parties so as to bring conclusion and finality to the marriage.

{¶ 2} The facts of this case are as follows. Carrie and James were married in August 1983. Two children were born of the marriage, Lucas, a.k.a. Luke, in 1993, and Levi, a.k.a. Lee, in 2000. Carrie is employed as an elementary school teacher and James is self-employed, owning his own construction business. In May 2006, Carrie filed a complaint for divorce. During those proceedings, Carrie had initially been named the residential parent and James was granted visitation and companionship with the boys that generally followed the standard court schedule. The relationship between the parties and their ability to cooperate, however, deteriorated rapidly. A domestic violence civil protection order had previously been issued against James because of inappropriate discipline he had inflicted on Lucas. Thereafter, Carrie regularly called Lucas County Children Services ("CSB") to initiate investigations of James, all of which CSB ultimately found to be unsubstantiated. She also called the police to have James arrested

if James got within 500 feet of her, all in front of the boys. In the opinion of Alan Mikesell, the guardian ad litem appointed in that first case, Carrie's actions and attitude toward James created a very high level of stress in her home which was having a very negative effect on the boys. Subsequently, the court named James the residential parent and legal custodian of the boys, granting Carrie visitation and companionship. By that time, Carrie and the boys had moved to a new home and James had been living in the marital home, so the boys moved back into the home in which they had been raised.

{¶ 3} That case was ultimately dismissed, and on November 9, 2007, James filed a complaint for divorce, the action that is now before us on appeal. Carrie responded with an answer and counterclaim for divorce. Both parties sought to be named the residential parent and legal custodian of Lucas and Lee, as well as an equitable division of the parties' marital property. In its Civ.R. 75(N) order, the lower court designated James the temporary residential parent and legal custodian of the boys and awarded Carrie parenting time with them pursuant to the court's local schedule. The parties subsequently consented to the appointment of a new guardian ad litem, Martha Riewaldt, to protect the interests of the boys during the divorce proceedings.

{¶ 4} The case proceeded to a four-day trial at which the issues of the allocation of parental rights and responsibilities, the division of marital assets and liabilities, spousal support and attorney fees were tried to the court. On the issue of the allocation of parental rights and responsibilities, the court heard from both parties as well as from four experts: Dr. Wayne Graves, a clinical forensic psychologist, who was originally

appointed in the 2006 case to conduct a psychological evaluation of the parties and the two boys and to make a custody recommendation and who was asked to update his report and recommendation in this case; Alan Mikesell, the guardian ad litem appointed in the original case; Miriam Reeves, a court counselor assigned to the case; and Martha Riewaldt, the guardian ad litem assigned in the present case. In addition, the court heard from Dr. Kerry Buhk, a psychologist who had been treating Lucas since March 2006 and Lee since August 2008. All of these witnesses described the family dynamic as strained, with Carrie and James being completely unable to communicate, even on issues relating to the health care of the boys. Of the experts, Dr. Graves and Alan Mikesell recommended that James be named the sole residential parent and legal custodian of both boys, Miriam Reeves recommended a shared parenting plan with the boys residing primarily with James, and Martha Riewaldt recommended a split custody arrangement with Carrie named the residential parent of Lee and James named the residential parent of Lucas.

{¶ 5} Following the evidence on the issue of custody, the court took evidence by way of stipulations and testimony, on the financial issues. On October 27, 2009, the court issued a lengthy decision on all of the issues before it.

{¶ 6} The court first addressed the issue of the allocation of parental rights and responsibilities. First, the court expressly rejected Carrie's request for split custody or shared custody. On the issue of shared custody, the court found that the parties' inability to communicate made joint decision-making very difficult, if not impossible. The court

noted that both parents had, to varying degrees, worked to alienate the boys from the other parent, and that Carrie had made numerous allegations of spousal abuse against James and had filed domestic violence charges against both James and Lucas. It is noteworthy that the charge of domestic violence that Carrie filed against Lucas occurred on an occasion when she tried to take his cell phone from him. In the struggle, Lucas evidently elbowed Carrie and she called the police, resulting in domestic violence charges being filed against him. The filing of those charges created a rift in Carrie and Lucas' relationship that took months to improve. Finally, in rejecting Carrie's request for shared parenting, the court pointed to Dr. Graves' testimony in concluding that shared parenting between these parties would increase their conflict.

{¶ 7} With regard to Carrie's request for split custody, under which she requested to be the residential parent of Lee with James as the residential parent of Lucas, the court determined that the disadvantages of such an arrangement would outweigh the advantages. First, the court again noted the parties' inability to cooperate in joint decision making. More importantly, however, the court stated that the one constant noted by each of the experts who testified in this case was the close and loving relationship between Lucas and Lee. The court continued: "To interfere with that relationship on the chance that separating them might result in some level of cooperation between their parents, which might result in fruitful joint decision-making, is not a risk this Court is willing to take at this time"

{¶ 8} The court then set forth to determine which parent should be designated the residential parent and legal custodian of the boys, by evaluating the relevant factors in R.C. 3109.04. In evaluating the best interests of the boys, the court made factual findings relative to all of the R.C. 3109.04(F)(1) factors and concluded, after balancing the relative values of each factor, that the best interest of the boys would be served by designating James as their residential parent and legal custodian. In reaching this conclusion, the court noted that while both parents love the boys, James, quoting from Dr. Graves' testimony, is "more focused on loving and connecting with his sons, rather than order and structure." In addition, the court noted that it was not ignoring the history of abuse involving James, but further recognized that there had been no instances of James acting out aggressively since the parties separated in 2006. Having balanced all of the relevant factors, the court concluded that at this stage of the boys' development, their best interest was served by designating James as their residential parent and legal custodian and awarding Carrie parenting time as previously set forth in the magistrate's order of January 9, 2008.

{¶ 9} After addressing child support and other issues, the court set forth its findings regarding the financial issues of the parties. Relevant to the issues before us on appeal, the court first determined the parties' separate property and awarded those items accordingly. The court then made an itemized evaluation of the parties' marital property and ultimately awarded James assets totaling \$331,277 and Carrie assets totaling \$108,657. Of these awards, the court awarded James the marital home with an equity of

\$125,060, a 5.3 acre lot adjacent to the marital home with a fair market value of \$32,270, and the parties' Michigan cottage with an equity of \$13,622. The court awarded Carrie her residence which, although having a fair market value of \$240,000, had no equity. Because of the unequal distribution of assets, the court determined that Carrie was entitled to a distributive award of \$111,310. Given that Carrie had withdrawn \$7,744 in marital funds from a credit union account at an earlier time in the trial court proceedings, the court offset that amount from the distributive award, granting Carrie a net distributive award of \$103,566. With regard to the distributive award, the court further held:

At the time of the filing of the Judgment Entry of Divorce Plaintiff shall execute a note and three (3) mortgages (one for each real property awarded to Plaintiff) in favor of Defendant in the amount of the net distributive award. Those documents shall be held by Defendant's attorney. If the note is paid in full within one hundred twenty (120) days, and the Defendant is removed from the Michigan mortgage, the note shall be marked "paid" and returned to Plaintiff's counsel. If not paid as stated, the mortgages shall be recorded. The note shall bear interest at the statutory rate of four percent (4%) effective as of the recording of mortgages, and shall be payable upon the Plaintiff's death, the sale of any of the properties, or the former marital residence no longer being the primary residence of either child prior to their reaching the age of majority, whichever occurs first. During the one hundred twenty (120) day grace

period, Plaintiff shall be prohibited from further encumbering any of the three (3) properties covered by the mortgages.

{¶ 10} The remaining issues addressed in the trial court's decision are not relevant to the issues before us on appeal. On January 8, 2010, the lower court issued a final judgment entry of divorce that was consistent with its earlier decision. It is from that judgment that Carrie now appeals.

{¶ 11} In her first assignment of error, Carrie asserts that the lower court committed reversible error in its determination that James should be named the residential parent and legal custodian of the boys. Specifically, Carrie contends that the court gave undue weight to the opinions of Dr. Graves and Alan Mikesell, did not give enough weight to the opinions of Martha Riewaldt and Miriam Reeves, failed to give proper weight to James' history of domestic violence, failed to give proper weight to the fact that Carrie had been the primary caretaker of the boys for the majority of their lives, and failed to weigh all of the R.C. 3109.04(F) evidence.

{¶ 12} R.C. 3109.04(A) provides that in any divorce proceeding, the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage. R.C. 3109.04(B)(1) then requires that in making that allocation, the court shall consider the best interest of the children. In considering the best interest of the children, R.C. 3109.04(F) requires a court to consider all relevant factors, including, but not limited to:

(a) The wishes of the child's parents regarding the child's care;

(b) If the court has interviewed the child in chambers pursuant to division (B) of this section regarding the child's wishes and concerns as to the allocation of parental rights and responsibilities concerning the child, the wishes and concerns of the child, as expressed to the court;

(c) The child's interaction and interrelationship with the child's parents, siblings, and any other person who may significantly affect the child's best interest;

(d) The child's adjustment to the child's home, school, and community;

(e) The mental and physical health of all persons involved in the situation;

(f) The parent more likely to honor and facilitate court-approved parenting time rights or visitation and companionship rights;

(g) Whether either parent has failed to make all child support payments, including all arrearages, that are required of that parent pursuant to a child support order under which that parent is an obligor;

(h) Whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any criminal offense involving any act that resulted in a child being an abused child or a neglected child; whether either parent, in a case in which a child has been adjudicated an abused child or a neglected child, previously has been

determined to be the perpetrator of the abusive or neglectful act that is the basis of an adjudication; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to a violation of section 2919.25 of the Revised Code or a sexually oriented offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding; whether either parent or any member of the household of either parent previously has been convicted of or pleaded guilty to any offense involving a victim who at the time of the commission of the offense was a member of the family or household that is the subject of the current proceeding and caused physical harm to the victim in the commission of the offense; and whether there is reason to believe that either parent has acted in a manner resulting in a child being an abused child or a neglected child;

(i) Whether the residential parent or one of the parents subject to a shared parenting decree has continuously and willfully denied the other parent's rights to parenting time in accordance with an order of the court;

(j) Whether either parent has established a residence, or is planning to establish a residence, outside this state.

{¶ 13} A trial court is given broad discretion in custody determination matters.

Trickey v. Trickey, 158 Ohio St. 9, 14, 106 N.E.2d 772 (1952). In reviewing a trial

court's custody determination, an appellate court must uphold the decision absent an abuse of discretion. *Sayre v. Hoelzle-Sayer*, 100 Ohio App.3d 203, 210, 653 N.E.2d 712 (3d Dist.1994). Accordingly, absent a showing that the trial court's attitude in reaching its decision was unreasonable, arbitrary or unconscionable, this court will affirm the trial court's custody determination. *Id.* Moreover, it is the trial court that must determine factual disputes and "weigh the testimony and credibility of witnesses," *Gardini v. Moyer*, 61 Ohio St.3d 479, 484, 575 N.E.2d 423 (1991), and this court will not entertain those tasks on appeal.

{¶ 14} All of appellant's arguments under this assignment of error challenge the weight that the trial court assigned to various matters in evidence. As we noted, the weight to be assigned to any item of evidence is a matter entirely within the province of the trial court. This court has thoroughly reviewed the entire record of the trial court proceedings. From our review, it is clear that the court considered all of the R.C. 3109.04(F)(1) factors relevant to this case in determining the best interest of the boys and granting James custody. The court clearly stated that while it considered the opinions of all of the experts who testified, it was most influenced by Dr. Graves' opinion and recommendation because of his experience, education, and the thoroughness of his evaluation of all the members of this family. Moreover, and contrary to appellant's assertion, the court directly addressed James' history of domestic violence, but determined that no such instances had occurred since the parties separated in 2006, that Lucas has a positive relationship with his father notwithstanding the prior incidences of

abuse, and that Lucas had not expressed any fear of his father to any of the professionals with whom he dealt. Based on all of the factors, the court concluded that at this stage of the boys' development, it was in their best interest that James be designated their residential parent and legal custodian. We cannot find that the court abused its discretion in its custody determination and the first assignment of error is not well-taken.

{¶ 15} In her second assignment of error, appellant challenges a particular aspect of the trial court's property distribution. While she does not contest the award of any individual item of marital property or contend that the distribution is inequitable, appellant asserts that the trial court erred in granting her a distributive award in the nature of a note and three mortgages on the real property awarded to James. She asserts that through this award, the court failed to disentangle the parties' economic relationship and thus failed to bring finality to the marriage.

{¶ 16} The Supreme Court of Ohio has long recognized that a trial court is vested with broad discretion in fashioning its division of marital property. *Bisker v. Bisker*, 69 Ohio St.3d 608, 609, 635 N.E.2d 308 (1994). 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, then marital property is to be divided in an equitable manner. Moreover, R.C. 3105.171(E)(2) provides that in order to achieve equity between the spouses, the court may make a distributive award in lieu of a division of marital property, "if the court determines that division of the marital property in kind or in money would be impractical or

burdensome.” In making a distributive award, the court may require the award “to be secured by a lien on the payor’s specific marital property or separate property.” R.C. 3105.171(E)(1). Finally, in making a distributive award, the trial court is required to consider all ten factors listed in R.C. 3105.171(F) and make written findings of fact to support its determination. R.C. 3105.171(G). The factors the court is required to consider are (1) the duration of the marriage, (2) the assets and liabilities of the spouses, (3) the desirability of awarding the family 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, (9) any retirement benefits of a spouse, excluding social security benefits, and (10) any other factor the court expressly finds to be relevant and equitable.

{¶ 17} In its decision, the trial court expressly stated that it had considered the statutory factors set forth in R.C. 3105.171(F) in making its distribution of the marital property and the distributive award. R.C. 3105.171(E)(1) allows a court to require any distributive award to be secured by a lien on the payor’s specific marital or separate property. The decision requires James to execute a note and three mortgages (one for each parcel of real property he was awarded) in favor of Carrie in the amount of the net distributive award. If the note is not paid in 120 days, the mortgages are to be recorded,

with the note bearing an interest rate of four percent upon the recording of the mortgages. The decision also provides that the former marital home and adjacent property are unencumbered assets which may be pledged as collateral for a loan to satisfy James' financial obligation and prohibits James from further encumbering any of the three parcels covered by the mortgages during the 120-day grace period.

{¶ 18} To fully and immediately disentangle the economic partnership of parties who have maintained a lengthy marriage, upon the filing of a judgment entry of divorce, is not always possible. Hence the provision under R.C. 3105.171(E)(1) that allows the court to require a distributive award to be secured by a lien on the payor spouse's property. That is precisely what the court did in this case, and we fail to see how the court abused its discretion in fashioning the distributive award as it did. The second assignment of error is not well-taken.

{¶ 19} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division is affirmed. Costs of this appeal are assessed to appellant 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, P.J.

JUDGE

Thomas J. Osowik, 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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