[Cite as *Birr v. Birr*, 2012-Ohio-187.]

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

Dianna Birr	Court of Appeals No. F-10-021
Appellee	Trial Court No. 09DV000074
v.	
William L. Birr	**DECISION AND JUDGMENT**
Appellant	Decided: January 20, 2012

* * * * *

Gregory L. VanGunten, for appellee.

Eric Allen Marks, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal from a final decree of divorce ordered by the Fulton County Court of Common Pleas, Domestic Relations Division. Defendant-appellant William Birr contends that the decree of divorce does not equitably divide the marital

assets. For the reasons that follow, we affirm in part and reverse in part, and remand for further proceedings.

{¶ 2} Appellant and plaintiff-appellee Diana Birr were married on July 10, 1993. The parties had no children together. On January 29, 2008, appellant and appellee entered into a separation agreement that provides in pertinent part:

{¶ 3} "DIVISION OF MARITAL ASSETS

{¶ 4} "Wife shall receive exclusive possession of the real estate located at 9820 County Road 4, Delta, Ohio and further described on Exhibit A attached hereto and incorporated herein,[1] the Dodge Neon automobile, all of the living room and dining room and upstairs bedroom furniture, the china, the linens, the riding lawn mower, her jewelry, the color television, 2 horses, 4 cats, $10,000.00 in savings and her retirement benefits.

{¶ 5} "Husband shall receive exclusive possession of his work van, his pickup truck, all of the family room furniture, the color television with CD player, the DVD player and the VCR, the downstairs bedroom outfit, one-half of the dishes and cookware, all electrical tools, the push lawn mower, the snow blower, the computer, the camera, his baseball card collection, his jewelry, $10,000.00 in savings, his life insurance contract and his retirement benefits (including without limitation his IRA).

[1]In fact, appellant had already transferred title to the residence to appellee via quitclaim deed on July 24, 2007.

{¶ 6} "DIVISION OF MARITAL DEBTS

{¶ 7} "Wife agrees to pay and save and hold husband harmless on the debts and obligations owed to Key Bank (secured by the real estate).

{¶ 8} "Husband agrees to pay and save and hold wife harmless on the debts and obligations incurred by his business, including without limitation the Key Bank credit card, and all other debt incurred by him.

{¶ 9} "* * *

{¶ 10} "CONSTRUCTION

{¶ 11} "* * * It is the intention of the parties hereto that in the event of a divorce or dissolution of marriage, all property rights, obligations and duties of whatsoever kind and nature are fully, completely and finally determined and fixed by the parties hereto by the terms of this Agreement, and the provisions of this Agreement shall not be questioned by the parties hereto in such action or proceeding but shall continue to bind the parties and shall be deemed to survive any order, judgment, or decree of divorce without merger therein whether or not incorporated in any such order, judgment or decree.

{¶ 12} "* * *

{¶ 13} "MODIFICATION AND WAIVERS

{¶ 14} "This Agreement shall not be modified or rescinded by the parties hereto except by written instrument, executed in the same manner as this instrument. Omission of either party to insist upon strict performance of that, or of

any other provision of this Agreement, shall not be deemed a waiver of the right to insist upon strict performance of that, or of any provision of this Agreement at any time."

{¶ 15} Shortly after entering into this agreement, appellee filed a complaint for legal separation. On April 2, 2008, the trial court granted the legal separation and incorporated the parties' agreement into the order.

{¶ 16} The motivation behind obtaining the legal separation is disputed. At the time, appellant was considering filing a lawsuit against his former employer and union for wrongful termination. However, appellant was advised that he could be subject to a countersuit stemming from his actions surrounding the termination. Appellant contends that the legal separation was done solely as an attempt to shield his assets from any potential liability resulting from this countersuit. He has consistently argued that the parties never actually intended to separate. Appellee, on the other hand, has stated that she has always desired to separate.

{¶ 17} In either event, following the legal separation, the parties continued to act as husband and wife by residing together, maintaining a physical relationship, and commingling assets. In May 2008, appellant began serving a five-month prison sentence for the aggravated menacing of his former union steward. Upon his release at the end of October 2008, appellant returned to the marital residence, and he and appellee resumed living together as husband and wife.

{¶ 18} During their time together, the record indicates that while both parties possessed individual banking accounts, they paid the majority of their bills out of a joint checking account. Appellant would periodically transfer money from his retirement accounts into this joint checking account. Appellee also contributed money to this account from her income as a school bus driver.

{¶ 19} The record also indicates that an outstanding home equity line of credit existed on the marital home. The balance owed on this loan was $57,741.79 as of April 3, 2008, the day after the order of legal separation. Monthly payments of $840.71 were made on the loan through November 2008, at which time the outstanding balance was $53,310.02. Then, on December 11, 2008, $8,697.50 was borrowed on the loan to pay off a credit card, raising the loan balance to $62,007.52. The parties disagree as to who owned the credit card debt. However, the parties do not contest that, in January 2009, appellant withdrew $62,000 from his retirement account and paid off the home equity line of credit. Appellant contends that appellee agreed to this action. Appellee, on the other hand, stated that the loan was her responsibility, and she did not want appellant to pay it off.

{¶ 20} In February 2009, appellant was arrested again for another aggravated menacing charge. He was still in prison when appellee filed her complaint for divorce on May 6, 2009. Appellee's complaint averred that the parties had been legally separated for more than one year, and requested that the court enforce the terms of the separation agreement as incorporated into the order of legal separation. Appellant filed an answer

and a counterclaim for divorce, alleging that the parties continued to live together until appellant's most recent incarceration, that appellant removed a large amount of money from his retirement account to pay the balance of the home equity loan, and that, since February 2009, appellee had systematically removed money from all of their accounts. Appellant prayed for "an equitable division of the marital assets."

{¶ 21} Following his answer and counterclaim, appellant filed a "Motion for Relief from Judgment and Motion to Set Aside Separation Agreement," in which he sought relief pursuant to Civ.R. 60(B) from the April 2, 2008 order of legal separation. It is apparent that appellant's primary motivation in seeking this relief was to recover the $62,000 that he paid on the home equity loan. On January 19, 2010, following extensive briefing and a hearing on the motion, the trial court denied appellant's Civ.R. 60(B) motion for relief from judgment, applying the "unclean hands" doctrine.[2]

{¶ 22} Subsequently, on September 3, 2010, the trial court entered a final decree of divorce. In its entry, the court adopted the separation agreement as an equitable division of the marital assets, ordering that:

{¶ 23} "[E]ach of the Parties should and shall keep the properties that were separately allocated to him, her, or them in the Parties' Separation Agreement, free and clear of any claim by the other, save and except for the fact that the Plaintiff should deliver to the Defendant, within thirty days, the following items: the big

[2]Appellant attempted to appeal directly from the denial of his Civ.R. 60(B) motion; however, we dismissed the appeal for lack of jurisdiction as it was not a final and appealable order.

screen television, air compressor, generator, weed-wacker, sales proceeds from the AR 15 rifle, and those items of personal property delineated in the Separation Agreement that have not already delivered [sic]."

{¶ 24} Appellant now raises two assignments of error. The first assignment states:

{¶ 25} "THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR RELIEF FROM JUDGMENT AND MOTION TO SET ASIDE THE SEPARATION AGREEMENT."

{¶ 26} As an initial matter, we note that an appellate court reviews the trial court's ruling on a Civ.R. 60(B) motion for relief from judgment under an abuse of discretion standard. *Moore v. Emmanuel Family Training Ctr., Inc.*, 18 Ohio St.3d 64, 66, 479 N.E.2d 879 (1985). An abuse of discretion exists when the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). When applying this standard of review, we may not substitute our judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

{¶ 27} To prevail on a motion under Civ.R. 60(B), the moving party must demonstrate:

{¶ 28} "(1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time, and, where the grounds for relief are Civ.R. 60(B)(1), (2), or (3), not more than

one year after the judgment, order or proceeding was entered or taken." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146, 150-151, 351 N.E.2d 113 (1976).

{¶ 29} "These requirements are independent and in the conjunctive; thus the test is not fulfilled if any one of the requirements is not met." *Strack v. Pelton*, 70 Ohio St.3d 172, 174, 637 N.E.2d 914 (1994).

{¶ 30} The issue relevant to this appeal is whether appellant is entitled to relief under one of the enumerated grounds. Appellant argues that Civ.R. 60(B)(4) and (5) apply because it is no longer equitable for the trial court to enforce the 2008 separation agreement.[3] Specifically, appellant asserts that the parties' reconciliation rescinds the separation agreement, and thus the order of legal separation, which incorporated the agreement, should not have prospective application. Appellant cites *Lucas v. Lucas*, 26 Ohio Law Abs. 664 (2d Dist.1938), and *Schaum v. Schaum*, 2d Dist. No. CA 999, 1978 WL 216519 (Nov. 17, 1978) to support his proposition that where parties to a separation agreement have not performed any aspect of the agreement, but rather have continued to live together as man and wife, the separation agreement is invalid. Appellant's assertion is ostensibly one that is based in contract law—i.e., that the parties entered into the

[3]Civ.R. 60(B) provides, "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: * * * (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment."

separation agreement, but by continuing to cohabitate and live as husband and wife, they demonstrated their intent to rescind it.[4] However, the cases relied upon by appellant are distinguishable from the present situation in that, here, the agreement was incorporated into an order of legal separation. Thus, we find that *Lucas* and *Schaum* are not controlling.

{¶ 31} In *Lambert v. Lambert*, 6th Dist. No. F-05-002, 2005-Ohio-6145, we encountered a similar situation. There, the parties entered into a separation agreement that was incorporated into a court order in an action for legal separation. One year later, the husband initiated new proceedings by filing a complaint for divorce. The wife subsequently filed motions for relief from the order of legal separation, alleging that she entered into the separation agreement under duress or due to fraud or coercion. The trial court analyzed the wife's motions under Civ.R. 60(B), and denied her requested relief. On appeal, the wife argued that "because issues from the legal separation carry over into the divorce, [the separation agreement] should still be voidable as any other fraudulent contract [and not subject to the requirements of Civ.R. 60(B)]." *Id.* at ¶ 11. We disagreed, recognizing that "a separation agreement of the parties loses its nature as a contract the moment it is adopted by the court and incorporated into a decree of divorce." *Id.*, citing *Wolfe v. Wolfe*, 46 Ohio St.2d 399, 350 N.E.2d 413 (1976), paragraph four of the syllabus. *See also Greiner v. Greiner*, 61 Ohio App.2d 88, 100, 399 N.E.2d 571 (8th

[4]Interestingly, appellant does not address the fact that the separation agreement specifically states that it shall not be rescinded except by written instrument.

Dist.1979) (finding distinction that where separation agreement is incorporated into a decree, "the separation agreement loses its vitality as a contract and is enforceable as part of the divorce decree," but if it is not incorporated, "it is considered a valid and binding contract between the parties").

{¶ 32} In the same way, because the April 2, 2008 order of legal separation incorporated the parties' agreement, the agreement is no longer subject to the contract-law remedy of rescission via a demonstration that the parties have reconciled. Rather, Civ.R. 60(B) controls, and the trial court must determine whether appellant is entitled to relief from its judgment. The appellate court must then determine, on review, whether the trial court abused its discretion in reaching its conclusion. Here, citing the "unclean hands" doctrine, the trial court declined to intercede in a situation where appellant "tried to fraudulently shelter his property, put it in his wife's name, claims he paid it off, and now [asks for] this Court's assistance." We find no abuse of discretion in this.

{¶ 33} The unclean hands doctrine is grounded in the maxim that "he who comes into equity must come with clean hands," and it is well settled that "the plaintiff must not be guilty of reprehensible conduct with respect to the subject-matter of his suit." *Kinner v. Lake Shore & Michigan S. Ry. Co.*, 69 Ohio St. 339, 69 N.E. 614 (1904), paragraph one of the syllabus. Here, by his own admission, appellant entered into the separation agreement in order to shelter his assets in the event his employer and union countersued him. We note that "the voluntary conveyance of property, particularly to one related by blood or marriage, and in anticipation of litigation has long been considered a badge of

fraud." *Dawson v. Gardineer*, 10th Dist. No. 86AP-91, 1986 WL 9991, *2 (Sept. 9, 1986), citing *Pride v. Andrew*, 51 Ohio St. 405, 38 N.E. 84 (1894). Therefore, appellant's unclean hands—in the form of his fraudulent conduct in creating the separation agreement—prevents him from claiming that enforcement of the agreement through the order of legal separation is inequitable.

{¶ 34} Appellant argues, however, that because he never filed his wrongful termination suit, and consequently was not exposed to potential liability in countersuit, any fraud-based motive to shelter his assets was removed. Thus, according to appellant, the unclean hands doctrine does not apply. Notwithstanding the fact that appellant's argument is contrary to his consistent position below that the only motivation behind entering the separation agreement was to protect his assets from potential creditors, we think this argument is logically untenable. While it may be true that the object of appellant's plans never came to fruition, this failure cannot alter the historical fact that appellant desired to shield his assets for a fraudulent purpose when he entered into the agreement. Therefore, appellant's argument is without merit and the doctrine of unclean hands does apply.

{¶ 35} Under the circumstances of this case, although some consideration should be given to the fact that appellant and appellee effectively ignored the terms of the separation agreement and continued to live as husband and wife, we cannot say that it is inequitable to enforce the order of legal separation prospectively. Appellant created his own predicament by entering into the separation agreement with fraudulent intentions.

Further, the fact that the trial court was convinced that appellee also had unclean hands in creating this situation does not alter our conclusion.[5] As appellant acknowledges, this court has held, "Equity denies relief to a suitor who comes into Court with unclean hands, and even though the defendant was in pari delicto, that is no grounds for granting relief to the plaintiff." *Fort Miami Raceways, Inc. v. Lucas Cty. Agricultural Soc.*, 72 Ohio Law Abs. 263, 133 N.E.2d 382 (6th Dist.1955). Similarly, "[e]quity is based upon what is perceived as just under the circumstances of each case and, when both parties are guilty of injustice, a court of equity will leave them as they are." *Patterson v. Blanton*, 109 Ohio App.3d 349, 354, 672 N.E.2d 208 (10th Dist.1996), quoting *Hempy v. Green*, 10th Dist. No. 89AP-1369, 1990 WL 72607, *3 (May 31, 1990). Accordingly, the trial court did not abuse its discretion in determining that appellant's own unclean hands prevented him from obtaining equitable relief from the order of legal separation. Appellant's first assignment of error is not well-taken.

{¶ 36} The second assignment of error states:

{¶ 37} "THE TRIAL COURT ERRED IN DETERMINING THAT THE DIVISION OF PROPERTY ESTABLISHED IN THE SEPARATION AGREEMENT WAS EQUITABLE."

[5]The trial court's judgment entry stated: "As the maxim goes, 'There is no honor amongst thieves.' Her complicity in the dodging of his creditors, and in assisting him to commit a fraud upon the Court, is a very reasonable indicator that she was just as capable of defrauding him."

{¶ 38} In the decree of divorce, the trial court found:

{¶ 39} "The original divisions made in the Separation Agreement itself allocated $169,500.00 in property to [appellee], and $146,400.00 in property to [appellant]. In light of the fact that [appellant] had quit a $100,000.00 job, that he had abused [appellee] in many ways, that [appellant] was not obligated to pay Spousal Support, that [appellant's] own conduct had caused a lengthy incarceration, that [appellant] had paid no rent to [appellee], and that there was only a 14.6% 'variation' in the distributions made by the Agreement, do [sic] not demonstrate an 'unconscionable' division of property, or an 'inequitable' result.

{¶ 40} "Accordingly it appears to the Court, in equity, and the Court does hereby find, that the Separation Agreement previously entered into should and ought to be ADOPTED as the ORDER of the Court and incorporated herein. Therefore each of the Parties should and shall keep the properties that were separately allocated to him, her, or them in the Parties' Separation Agreement, free and clear of any claim by the other, save and except for the fact that the [appellee] should deliver to the [appellant], within thirty days, the following items: the big screen television, air compressor, generator, weed-wacker, sales proceeds from the AR 15 rifle, and those items of personal property delineated in the Separation Agreement that have not already delivered [sic]."

{¶ 41} Appellant presents three arguments in support of his assignment of error. First, appellant argues that he "identified separate property that was properly traced to

equity in the marital residence and he is entitled to an award of $62,000 from Appellee." Second, he argues that "[a]ppellee has been unjustly enriched due to the parties' failure to separate." Specifically, appellant points to the amounts of $62,000 for the payoff of the home equity loan, and $18,065.74 for money that appellee acknowledged taking out of the parties' joint account. Finally, appellant argues that he "is entitled to an award on his claim of financial misconduct." In support of this third argument, appellant alleges three specific incidents of misconduct. First, he contends that, in 2007, appellee withdrew $29,193.15 from a joint account and placed it in her personal account. Second, he alleges that, after the legal separation, appellee took an advance of $8,687.50 on the home equity line of credit to pay off a credit card that she assumed responsibility for under the separation agreement. Third, appellant claims that appellee forged his signature to file separate tax returns in 2008, which resulted in appellee receiving a refund of $937, while appellant had a tax liability of $1,419.

{¶ 42} We begin our analysis by noting that "trial courts are vested with broad powers in determining the appropriate scope of property awards in divorce actions." *Berish v. Berish*, 69 Ohio St.2d 318, 319, 432 N.E.2d 183 (1982). Thus, "[a] reviewing court may modify or reverse a property division, [only] if it finds that the trial court abused its discretion in dividing the property as it did." *Cherry v. Cherry*, 66 Ohio St.2d 348, 355, 421 N.E.2d 1293 (1981). We cannot substitute our judgment for that of the trial court, unless we find its property division was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140

(1983). In the present case, we hold that the trial court abused its discretion because it did not divide the property in accordance with the requirements of R.C. 3105.171.

{¶ 43} R.C. 3105.171(B) provides:

{¶ 44} "In divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property *equitably* between the spouses, *in accordance with this section.*" (Emphasis added.)

{¶ 45} "Marital property" is defined as all real or personal property that either or both of the spouses own or have an interest in, including the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage. R.C. 3105.171(A)(3)(a)(i) and (ii). "'Marital property' does not include any separate property." R.C. 3105.171(A)(3)(b).

{¶ 46} For our purposes here, "separate property" is defined as "[a]ny real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code." R.C. 3105.171(A)(6)(a)(iv). "The commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3105.171(A)(6)(b).

{¶ 47} When dividing property in divorce proceedings, the trial court shall divide the marital property equally, unless an equal division would be inequitable, in which event the court shall divide the marital property equitably. R.C. 3105.171(C)(1). In contrast, "the court shall disburse a spouse's separate property to that spouse," "[e]xcept as otherwise provided in division (E) of this section or by another provision of this section." R.C. 3105.171(D).

{¶ 48} We do not doubt that the trial court's division of property reached what the court considered an equitable result given appellant's conduct in the preceding two years. Nevertheless, the division of property fails to comply with the requirements of R.C. 3105.171(D) in that it does not disburse appellant's separate property to him.

{¶ 49} Appellant's argument on appeal largely concerns the $62,000 that he withdrew from his retirement account to pay off the home equity loan. It is evident from the judgment entry that the trial court sought to re-impose the original divisions made in the separation agreement, thereby awarding the marital residence to appellee, and the now depleted retirement account to appellant, "free and clear of any claim by the other." This division resulted in appellee retaining the increase in equity on the marital residence. However, the order of legal separation had already divided this property between the spouses. Consequently, as of April 2, 2008, appellant's retirement account was his separate property, and the marital residence was appellee's separate property, pursuant to R.C. 3105.171(A)(6)(a)(iv). In addition, the parties do not dispute that the loan payoff is directly traceable to appellant's retirement account, thus R.C. 3105.171(D) requires that

the trial court disburse the increase in equity on the marital residence to appellant, unless an exception applies under R.C. 3105.171(E). Because the trial court failed to disburse this amount to appellant as his separate property without identifying an exception from this requirement, we therefore hold that the court's division of property constitutes an abuse of discretion.[6]

{¶ 50} Accordingly, appellant's second assignment of error is well-taken.

{¶ 51} As a final matter, appellant makes two other arguments that we will briefly address. First, appellant argues that the trial court abused its discretion by not finding that appellee was unjustly enriched in the amount of $18,065.74, which he claims appellee took out of a joint account. Appellee counters that she withdrew the funds at the request of appellant, and that she has accounted for the entire amount. Specifically, appellee points to a check for $16,551.74 that she sent to appellant's attorney at the outset of the litigation. The remaining amount, $1,514, was used to pay appellant's 2008 federal tax liability of $1,419 along with a $95 fee to the tax preparer. Second, appellant claims that he is entitled to a distributive award due to appellee's alleged financial misconduct in her withdrawing and retaining nearly $20,000 from a joint account without appellant's knowledge, her borrowing of $8,687.50 from the home equity loan to pay off

[6]We do note, however, that any disbursement to appellant should be offset by the portion of the post-legal separation increase in equity that represents appellant's own obligations, for example the $8,697.50 borrowed to pay off the credit card debt, if such debt is found to belong to him.

a credit card, and her filing of the 2008 tax returns that resulted in a $937 refund for her while appellant had a tax liability of $1,419.

{¶ 52} Our examination of the record and judgment entry indicates that although appellant raised his unjust enrichment and financial misconduct claims in the trial court, the court did not make any findings with regard to them. Thus, we have nothing to review, and, as a reviewing court, we decline to usurp the trial court's role by considering those issues for the first time on appeal. *See, e.g., Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992) ("If the trial court does not consider all the evidence before it, an appellate court does not sit as a reviewing court, but, in effect, becomes a trial court"). Moreover, our decision not to consider those issues is not to be construed as any indication of our opinion regarding their merits.

{¶ 53} For the foregoing reasons, the judgment of the Fulton County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. This cause is remanded to the trial court for a division of property in accordance with R.C. 3105.171, including a determination of appellant's claims for unjust enrichment and financial misconduct. Pursuant to App.R. 24, the parties are to share equally the costs of this appeal.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

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

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE