[Cite as *Lindsay v. Lindsay*, 2013-Ohio-3290.]

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

Angela M. Lindsay	Court of Appeals No. S-11-055
Appellant/Cross-Appellee	Trial Court No. 10-DR-512
v.	
Todd L. Lindsay	**DECISION AND JUDGMENT**
Appellee/Cross-Appellant	Decided: July 26, 2013

* * * * *

Daniel L. Brudzinski, for appellant/cross-appellee.

Joseph F. Albrechta and John A. Coble, for appellee/cross-appellant.

* * * * *

SINGER, P.J.

{¶ 1} This is an appeal and cross-appeal from the Sandusky County Court of Common Pleas, Domestic Relations Division, in which the trial court granted appellant/cross-appellee ("appellant"), Angela M. Lindsay, and appellee/cross-appellant

("appellee"), Todd L. Lindsay, a divorce from each other. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant sets forth the following assignments of error:

I. The trial court committed prejudicial error and was without authority in granting a motion for reconsideration and holding a hearing after issuing a written decision.

II. The trial court erred in determining the value of the family farm.

III. The trial court erred by deducting $123,835.00 from the marital estate as a valid marital debt.

IV. The trial court erred by failing to find the construction of the grain bin complex and expending marital funds to tile another farm during the pendency of the divorce, as fiscal misconduct.

V. The trial court abused its discretion by not granting plaintiff a reasonable continuance to hire a tax expert, when three (3) days prior to trial it received a proposed tax return which indicated a total tax liability of $151,173.00.

VI. The trial court abused its discretion by not issuing written findings of fact and conclusions of law to support it partial decision file stamped October 6, 2011, and also failed to make an equitable division of marital property.

{¶ 3} Appellee sets forth the following two cross-assignments of error:

I. The trial court erred in allocating the dependency tax exemption to be split between the parties.

II. The trial court erred in denying appellee's motion for attorney fees.

{¶ 4} In her first assignment of error, appellant contends that the court erred in granting appellee's motion for reconsideration after the divorce decree had been filed.

{¶ 5} The parties were married in 2003. They have two minor children. Appellee initially filed for divorce from appellant in 2010. On April 14, 2011, the court issued a judgment entry granting the parties a divorce and dividing their marital assets. On August 19, 2011, appellee filed a motion to reconsider that decision. The trial court granted the motion on August 30, 2011 and scheduled a hearing on the matter. Appellant now contends that the court was without jurisdiction to reconsider its April 14, 2011 decision.

{¶ 6} It is well settled that: "[A]fter a trial court issues a final, appealable order, a motion for reconsideration of that final order is a nullity, and any judgment entered on such a motion is also a nullity." *Napier v. Napier*, 182 Ohio App.3d 672, 2009-Ohio-3111, 914 N.E.2d 1069 (4th Dist.), citing *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 379, 423 N.E.2d 1105 (1981).

{¶ 7} Civ.R. 75(F) provides, in relevant part, as follows:

{¶ 8} For purposes of Civ.R. 54(B), the court shall not enter final judgment as to a claim for divorce, dissolution of marriage, annulment, or legal separation unless one of the following applies:

> (1) The judgment also divides the property of the parties, determines the appropriateness of an order of spousal support, and, where applicable, either allocates parental rights and responsibilities, including payment of child support, between the parties * * *.

{¶ 9} Here, the April 14, 2011 decision made no determination with regards to payment of child support. The order merely directed the parties to provide the Sandusky County Child Support Enforcement Agency with the proper documentation needed to calculate the child support payments. As such, the court did not err in entertaining appellee's motion for reconsideration as the Apri1 14 decision was not a final, appealable order. Appellant's first assignment of error is found not well-taken.

{¶ 10} In her second assignment of error, appellant contends that the court erred in determining the value of the family farm. The trial court found the fair market value of the farm to be $234,000. Appellant contends that the fair market value of the farm is $385,000. In support, appellant cites to an appraisal she paid for that was submitted into evidence showing the value of the farm to be $385,000.

{¶ 11} When determining the value of marital assets, a trial court is not confined to the use of a particular valuation method but can make its own determination as to

valuation based on the evidence presented. *James v. James*, 101 Ohio App.3d 668, 681, 656 N.E.2d 399 (2d Dist.1995). We must affirm a trial court's determination if it is supported by competent, credible evidence and is not otherwise an abuse of discretion. *Moro v. Moro* (1990), 68 Ohio App.3d 630, 637, 589 N.E.2d 416 (8th Dist.1990). An abuse of discretion connotes more than a mere error of judgment; it implies that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 12} Appellant's appraisal, prepared by Schabel Appraisal Services, does not take into account the following facts. Appellant and appellee purchased the family farm from appellee's parents, and intervening parties, Steven and Patricia Lindsay, for $234,000. The purchase agreement gave the intervening parties a 20 year right of first refusal to purchase the property for $234,000. Thus, the property, encumbered, could not be sold on the open market for more than $234,000 at the time of the divorce. Accordingly, we do not find that the trial court abused its discretion in finding the fair market value of the family farm to be $234,000. Appellant's second assignment of error is found not well-taken.

{¶ 13} In her third assignment of error, appellant contends that the court erred in deducting $123,835 from the marital estate as a valid marital debt.

{¶ 14} The $123,835 amount represents what it cost appellee to use his father's combine to harvest his crops over a six-year period. This agreement was put in writing on November 3, 2006. In 2010, appellee paid his father $33,402.35 towards the debt

leaving a balance of $90,432.65. This too was put in writing. Appellant contends that because appellee applied for loans from a private entity during the marriage and did not list the loan from his father as an expense in his applications, the loan cannot officially be considered debt. We disagree.

{¶ 15} We will not reverse a trial court's allocation of marital property and debt absent an abuse of discretion. *Holcomb v. Holcomb,* 44 Ohio St.3d 128, 131, 541 N.E.2d 597 (1989). Debts incurred during the marriage are presumed to be marital unless it can be proved that they are not. *Kehoe v. Kehoe*, 8th Dist. Cuyahoga No. 97357, 2012-Ohio-3357, ¶ 14, citing *Vergitz v. Vergitz*, 7th Dist. Jefferson No. 05JE52, 2007-Ohio-1395, ¶ 12. The party seeking to establish a debt is separate rather than marital bears the burden of proving this to the trial court. *Hurte v. Hurte*, 164 Ohio App.3d 446, 2005-Ohio-5967, 842 N.E.2d 1058, ¶ 21 (4th Dist.). Marital debt has been defined as any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose. *Ketchum v. Ketchum,* 7th Dist. Columbiana No. 2001 CO60, 2003-Ohio-2559, ¶ 47.

{¶ 16} Here, the loan from appellee's father was a legitimate cost of running the family farm during the parties' marriage. As explained by the trial court:

> [Appellee] does not have a combine, it being one of the most expensive of farm equipment items. However, as a grain farmer he would either have to contract with someone to harvest his crop, or work an arrangement with his father to bring in the crop. [Appellee] chose the latter, and the court is satisfied from the testimony that at a minimum, a

quantum meruit argument exists which would support [appellee's father's] claim for annual harvesting costs related to [appellee's] crops. [Appellee and his father] did in fact enter into a written contract in the year 2006 to memorialize their arrangement as to past and future years.

{¶ 17} As this debt was incurred for the sole benefit of the family business during the parties' marriage and, regardless of the fact that it was money loaned from one family member to another, it amounted to marital debt. Accordingly, the court did not abuse its discretion in deducting the debt from the marital estate. Appellant's third assignment of error is found not well-taken.

{¶ 18} In her fourth assignment of error, appellant contends that the court erred in failing to find that appellee engaged in financial misconduct. Specifically, appellant contends that appellee committed financial misconduct when he constructed a grain bin during the pendency of the divorce and by spending $32,513.75 on drainage tile for a rental property.

{¶ 19} R.C. 3105.171(E)(3) provides:

{¶ 20} [I]f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.

{¶ 21} The burden of proving financial misconduct is on the complaining party. *Gallo v. Gallo,* 11th Dist. Lake No. 2000-L-208, 2002-Ohio-2815, ¶ 43. When

determining whether to make a distributive award on the grounds of financial misconduct, the court must consider all of the factors identified in R.C. 3105.171(F) and any other factors it deems relevant. Because R.C. 3105.171(E)(3) states that the court "may" compensate the offended spouse for the financial misconduct of the other spouse, the trial court's decision to make or not make a distributive award to compensate for financial misconduct is reviewed under an abuse of discretion standard. *Huener v. Huener*, 110 Ohio App.3d 322, 326, 674 N.E.2d 389 (3d Dist.1996).

> The financial misconduct statute should apply only if the spouse engaged in some type of wrongdoing. *Hammond v. Brown*, 8th Dist. No. 67268, 1995 WL 546903 (Sept. 14, 1995). Typically, the offending spouse will either profit from the misconduct or intentionally defeat the other spouse's distribution of marital assets. *Id.* The time frame in which the alleged misconduct occurs may often demonstrate wrongful scienter, *i.e.*, use of marital assets or funds during the pendency of or immediately prior to filing for divorce. See *Babka v. Babka*, 83 Ohio App.3d 428, 615 N.E.2d 247 (9th Dist.1992) (account liquidated "just prior to the parties' divorce"); *Gray v. Gray*, 8th Dist. No. 66565, 1994 WL 695328 (Dec. 8, 1994) (transferring or withdrawing funds during separation period in order to secret them from the other spouse); *Spychalski v. Spychalski*, 80 Ohio App.3d 10, 608 N.E.2d 802 (6th Dist.1992) (dissipation of wrongful death

settlement obtained while parties divorce complaint was pending). *Jump v. Jump*, 6th Dist. Lucas No. L-00-1040, 2000 WL 1752691 (Nov. 30, 2000).

{¶ 22} In this case, appellant presented no evidence that appellee intentionally sought to deplete her distribution of marital assets or to profit from the supposed "misconduct." Rather, appellee's testimony shows that his intentions were to improve the value of their marital assets by making their farm more productive and making their rental properties more valuable through improvements. In the case of the grain bins, appellant contracted for them nearly a year before appellee filed for divorce. Moreover, appellant did not raise the issue of financial misconduct in the court below. Accordingly, the trial court did not abuse its discretion in failing to find that appellee had engaged in financial misconduct. Appellant's fourth assignment of error is found not well-taken.

{¶ 23} In her fifth assignment of error, appellant contends that the court erred in not granting her a continuance to hire a tax expert to evaluate the parties' 2010 tax return. Appellant sought a continuance to hire a tax expert on the Friday before her trial began on a Monday.

{¶ 24} We review a decision on a request for continuance under an abuse of discretion standard. *Young v. Young*, 10th Dist. No. 11AP-1148, 2012-Ohio-4377, ¶ 6. In evaluating a motion for a continuance, a court should note, inter alia: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or

contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case. *State v. Unger,* 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981).

{¶ 25} The trial court, in this case, reserved ruling on appellant's motion stating:

> I'm going to reserve ruling on that motion until conclusion of the testimony. If the plaintiff or, if defendant's expert doesn't adequately explain the numbers, perhaps it would be appropriate to permit an expert on plaintiff's behalf, but let's- - not jump the gun on that.

{¶ 26} We note that appellant is not arguing about the ultimate conclusions regarding the 2010 tax return. Rather, appellant is merely contesting the court's failure to grant a continuance a Friday before a Monday trial. In that appellant has showed no prejudice, we fail to see how the court abused its discretion. Appellant's fifth assignment of error is found not well-taken.

{¶ 27} In her sixth and final assignment of error, appellant essentially reargues her first assignment of error contending that the April 14, 2011 judgment entry was a final appealable order. Having already determined it was not a final and appealable order in appellant's first assignment of error, appellant's sixth assignment of error is found not well-taken.

{¶ 28} In his first cross-assignment of error, appellee contends that the court erred in allowing the dependency tax exemption to be split between the parties. Specifically, appellee contends that the court erred in failing to state reasons for its decision.

{¶ 29} The language of R.C. 3119.82, the statute governing tax exemptions, "does not require that the trial court state its reasons on the record for awarding the exemption." *Streza v. Streza*, 9th Dist. Lorain No. 05CA008644, 2006-Ohio-1315, ¶ 12. The decision to allocate tax exemptions is a matter left to the sound discretion of the trial court. *In re Custody of Harris,* 168 Ohio App.3d 1, 2006-Ohio-3649, 857 N.E.2d 1235 (2d Dist.).

{¶ 30} Both parties have entered into a shared parenting agreement. Here, the trial court ordered that each party be allocated one child to claim the dependency tax exemption. Finding no abuse of discretion, appellee's cross-assignment of error is found not well-taken.

{¶ 31} In his second cross-assignment of error, appellee contends that the court erred in denying his motion for attorney's fees.

{¶ 32} R.C. 3105.73(A) provides:

> In an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that action, a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate.

{¶ 33} Appellee contends that he is entitled to attorney fees because he chose to hire an expert accountant, whereas appellant did not and, because appellant unnecessarily prolonged the litigation.

{¶ 34} We find appellee's argument to be without merit. First, the assistance from the expert accountant worked to appellee's benefit, rather than appellant's. Second, we do not find that appellant unnecessarily prolonged this case. This is a divorce that was filed in 2010. It was ultimately concluded in 2011. Given the fact that this case involved large amounts of property and the care of minor children, we do not find the timeframe of this case to be unreasonable. Appellee's second cross-assignment of error is found not well-taken.

{¶ 35} On consideration whereof, the judgment of the Sandusky County Court of Common Pleas, Domestic Relations Division, is affirmed. It is ordered that the parties equally share 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.

Arlene Singer, P.J.

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JUDGE

Thomas J. Osowik, J.

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JUDGE

James D. Jensen, J.
CONCUR.

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JUDGE