

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

Dawn E. Greenwood

Court of Appeals No. L-12-1094

Appellee

Trial Court No. DR2010-0676

v.

Douglas W. Greenwood

DECISION AND JUDGMENT

Appellant

Decided: December 6, 2013

* * * * *

Matthew O. Hutchinson, for appellee.

Keithley B. Sparrow, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Douglas W. Greenwood, appeals the decision and judgment entry of divorce issued by the Lucas County Court of Common Pleas, Domestic Relations Division. For the reasons that follow, we affirm the decision of the trial court.

{¶ 2} Appellant married plaintiff-appellee, Dawn E. Greenwood, in June 1998.

{¶ 3} In June 2010, appellee filed a complaint for divorce.

{¶ 4} Three days before the December 2011 trial date, Mr. Greenwood filed for bankruptcy protection under Chapter 13 of the U.S. Bankruptcy Code. A notice of bankruptcy was filed with the domestic relations court.

{¶ 5} On December 7, 2011, the parties appeared for trial. Mr. Greenwood's counsel agreed to proceed on the issue of child support and grounds for divorce, but objected to the taking of evidence relating to spousal support. Counsel argued that the automatic stay prohibits the taking of evidence relating to spousal support because (a) Ohio law requires a division of assets prior to a determination of spousal support and (b) the bankruptcy stay prohibits the continuation of any proceeding that seeks to determine the division of property that is property of the bankruptcy estate. Noting Mr. Greenwood's objection, the trial court indicated that, for reasons of judicial economy, it would hear all evidence, but refrain from issuing any orders on the division of marital property until the bankruptcy was resolved.

{¶ 6} The parties proceeded to trial on the issue of child support. Mrs. Greenwood testified as to the history and status of her employment, her current and past income, the needs of the children, and her day to day involvement in the children's lives. Mr. Greenwood testified as to his monthly expenses, annual income, the status of his business, and his monthly business expenses.

{¶ 7} Next, the court heard evidence on grounds for divorce. And then, the court heard evidence on spousal support. Mrs. Greenwood testified as to the birthdates of the three minor children, her standard of living, her education, and work history. She denied any separate retirement benefits, but indicated that Mr. Greenwood had both a pension and a 401(K) account. She testified as to her monthly expenses, debts and installment payments. Evidence was introduced as to the reasonableness of attorney's fees charged by Mrs. Greenwood's counsel.

{¶ 8} Mr. Greenwood was questioned about past business and individual tax returns. He testified as to the financial status of his corporation, monies in checking accounts, the value of the marital home and furnishings, and the balance of his pension plan and 401(K) account. Mr. Greenwood testified as to his work schedule, health issues, income, and past bankruptcies.

{¶ 9} The trial continued on December 9, 2011. Expert testimony was introduced regarding the value of the marital home and the value of Mr. Greenwood's business. The parties stipulated as to the value of the automobiles, the balance on the mortgage, the cash surrender value of a life insurance account, and the balance in the college savings accounts.

{¶ 10} On January 30, 2012, the trial court issued a partial judgment entry. The entry addressed issues relating to parenting time, child support, the children's health insurance, and the children's therapy sessions. The court noted that upon issuance of the

order the case would be placed “on the Court’s inactive docket pending relief from stay or resolution of Defendant’s bankruptcy proceedings.”

{¶ 11} On the same day, Mr. Greenwood dismissed his Chapter 13 bankruptcy petition. Upon notice of the dismissal, the domestic relations court reactivated the Greenwood case. No further evidence was taken.

{¶ 12} On March 16, 2012, the trial court issued a final judgment and decree of divorce. The final judgment incorporated the partial judgment entry, declared separate and marital property interests, divided marital assets and liabilities, ordered spousal support and child support, awarded attorney’s fees to Mrs. Greenwood, and granted an absolute decree of divorce.

{¶ 13} Mr. Greenwood appealed, assigning one error for our review.

THE TRIAL COURT ERRED, AS A MATTER OF LAW, WHEN IT HELD PROCEEDINGS REGARDING PROPERTY DIVISION IN VIOLATION OF THE AUTOMATIC STAY IMPOSED BY FEDERAL BANKRUPTCY LAW. THIS ERROR VIOLATED APPELLANT’S RIGHT TO DUE PROCESS PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS TEN AND SIXTEEN, ARTICLE I OF THE OHIO STATE CONSTITUTION.

{¶ 14} The issue presented by Mr. Greenwood’s appeal is whether the trial court violated the automatic bankruptcy stay when it heard evidence relating to the division of

property that was a part of the bankruptcy estate, even though the court refrained from issuing any orders dividing the marital assets until after the stay had been lifted.

The Bankruptcy Estate

{¶ 15} The property of a bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case. 11 U.S.C. 541(a)(1). The bankruptcy estate also includes all interests of the debtor and the debtor's spouse in community property that is "under the sole, equal, or joint management and control of the debtor." *Id.* at 541(a)(2)(A). In other words, both the separate property of the debtor and the debtor's interest in the marital property is property of the bankruptcy estate. *Lewis v. Lewis*, 423 B.R. 742, 756 (W.D.Mich.Feb.24, 2010).

The Bankruptcy Stay

{¶ 16} "As a general rule, the filing of a bankruptcy petition operates to stay, among other things, the continuation of a judicial proceeding against the debtor that was commenced before the petition." *Dominic's Restaurant of Dayton, Inc. v. Mantia*, 683 F.3d 757, 760 (6th Cir.2012). In *Chao v. Hospital Staffing Servs., Inc.*, 270 F.3d 374 (6th Cir.2001), the Sixth Circuit Court of appeals explained,

The purpose of the automatic stay is to protect creditors in a manner consistent with the bankruptcy goal of equal treatment. The stay of pre-petition proceedings enables the bankruptcy court to decide whether it will exercise its power under § 502(b) of the Bankruptcy Code to establish the validity and amount of claims against the debtor or allow another court to

do so. *Id.* at 382, quoting *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1069 (5th Cir.1986).

{¶ 17} The protection of the automatic stay does not apply in all cases. One exception to the automatic stay provision is found in 11 U.S.C. 362(b)(2). This exception allows certain aspects of a divorce or dissolution proceeding to continue despite the filing of bankruptcy. Under this exception, the automatic stay does not apply to the following actions: (1) actions to determine paternity; (2) actions to establish or modify an order for domestic support obligations; (3) actions concerning child custody or visitation; (4) actions for the “dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate.” *Id.*

{¶ 18} The term “domestic support obligation” is defined in 11 U.S.C. 101(14A) and includes in subsection (B) claims “in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated.”

Standard of Review

{¶ 19} Any decision to lift or modify an automatic stay is left to the sound discretion of the bankruptcy court. *White v. White*, 851 F.2d 170, 174 (6th Cir.1988). However, a non-bankruptcy court may determine whether a stay is in effect and whether an action it is about to take is subject to the stay. *Dominic’s*, 683 F.3d at 760.

{¶ 20} Here, the trial court determined the proceedings that took place on December 7 and 9, 2011, were not subject to the automatic stay. Our review of such a decision is de novo. *See May v. May*, 4th Dist. Adams No. 11CA910, 2012-Ohio-2348, ¶ 28.

Spousal Support

{¶ 21} R.C. 3105.18(A) defines “spousal support” as “any payment or payments to be made to a spouse or former spouse, or to a third party for the benefit of a spouse or a former spouse, that is both for sustenance and for support of the spouse or former spouse.” There is no question, under Ohio law “spousal support” fits within the Bankruptcy Code’s definition of domestic support obligation.

{¶ 22} R.C. 3105.18(B) provides for two types of awards: permanent spousal support and temporary spousal support. *See generally Kleinman v. Kleinman*, 2d Dist. Montgomery No. 25435, 2013-Ohio-4511. Permanent spousal support is the support awarded after the court determines the division or disbursement of property under R.C. 3105.171. Temporary spousal support is the support awarded during the pendency of any divorce proceeding.

{¶ 23} R.C. 3105.18(C)(1) requires the trial court to review certain statutory factors in making its determination of spousal support awards. The factors include

- (a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

- (b) The relative earning abilities of the parties;
- (c) The ages and the physical, mental, and emotional conditions of the parties;
- (d) The retirement benefits of the parties;
- (e) The duration of the marriage;
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
- (g) The standard of living of the parties established during the marriage;
- (h) The relative extent of education of the parties;
- (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;
- (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

- (l) The tax consequences, for each party, of an award of spousal support;
- (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;
- (n) Any other factor that the court expressly finds to be relevant and equitable.

Analysis

{¶ 24} In support of his sole assignment of error, appellant asserts that the trial court erred when it “continued proceedings by taking evidence related to property and its division, despite determining that the automatic stay was in place.” At least one court has held that an order issued after an automatic stay expires, but as a result of a proceeding that took place in violation of the provisions of the automatic stay, is unenforceable. *See Dexter v. Grove*, 116 B.R. 92, 94 (S.D.Ohio 1990) (In support of its holding, the court reasoned that “[A]ny other result would reward entities who take action in violation of the automatic stay * * * over those who follow the requirements of the Federal Bankruptcy Code and refrain from prohibited actions until they have obtained an order terminating, modifying, annulling, or conditioning the automatic stay.”).

{¶ 25} The crux of Mr. Greenwood's appeal involves the interplay in Ohio law between the division and disbursement of property and the award of spousal support. R.C. 3105.18(B) clearly provides that “spousal support” is the support awarded *after* the court determines the division or disbursement of property under R.C. 3105.171.

However, that division of the code does *not* require the division or disbursement of property before an award of *temporary* spousal support, the support awarded during the pendency of a case.

{¶ 26} In his brief, appellant argues that R.C. 3105.18(C)(1)(a) requires a domestic relations court “to determine the division of property and income derived from that property when setting a final order for support.” He concedes, however, that temporary spousal support orders do “not require the trial court to determine the division of property in the same way that a final [spousal support] order” does.

{¶ 27} Previously, this court has held that a domestic relations court must consider the factors set forth in R.C. 3105.18(C)(1) before issuing an award of temporary spousal support. *See Forbis v. Forbis*, 6th Dist. Wood Nos. WD-04-056, WD-04-063, 2005-Ohio-5881. To that end, we disagree with appellant’s argument that the plain language of R.C. 3105.18(C)(1)(a) requires the division of property before issuing an award of spousal support. R.C. 3105.18(C)(1)(a) simply requires the court to consider income derived from property divided under R.C. 3105.171, if such division, disbursement or distribution has been made.

{¶ 28} Upon review of Mrs. Greenwood’s direct examination and the follow-up questions asked by the trial court, it is clear that Mrs. Greenwood’s request for spousal support was intended to include both permanent and temporary spousal support.

Q. You are requesting this Court’s spousal support in the amount of \$4,500, is that correct?

A. Yes.

* * *

Q. Are you also requesting since there is a [sic] inactive status of this case due to the filing of the bankruptcy, that during this period of time you be paid spousal support and than [sic] at the conclusion[,] a term of five years based on the length of the marriage [to] commence at that time?

A. Yes.

* * *

[TRIAL COURT]: So you are requesting an award of spousal support during the pendency of this case, is that correct?

A. Yes.

{¶ 29} As stated above, a domestic relations court is not required to determine the division or disbursement of property under section R.C. 3105.171 before issuing an award of temporary spousal support. The court is, however, required to consider evidence regarding all of the factors set forth in R.C. 3105.18(C)(1) before issuing such an award. All of the evidence heard on December 7 and 9, 2011, fits squarely within the R.C. 3105.18(C)(1) factors.

{¶ 30} Appellant cites *May v. May*, 4th Dist. No. 11CA910, 2012-Ohio-2348, for the proposition that a hearing held while a bankruptcy stay is in place that “addresses issues of marital property and debt” is a violation of the stay. *Id.* at ¶ 30. However, a hearing “address[ing] issues of marital property and debt” is not synonymous with the

proviso found at 11 U.S.C. 362(b)(2)(A)(iv). The proviso—an exception to the domestic relations exception—provides that the filing of a petition does not operate as a stay of the commencement or continuation of a civil action or proceeding “for the dissolution of a marriage, except to the extent that such proceeding seeks to determine the division of property that is property of the estate.” In *May*, the trial court violated the automatic stay because it held a proceeding for the dissolution of the marriage that sought to determine the division of property that was property of Mr. May’s bankruptcy estate.

{¶ 31} At this juncture, it is important to note the distinction between *May* and the case at bar. In *May*, there is no mention of spousal support or the spousal support exception to the bankruptcy stay found at 11 U.S.C. 362(b)(2)(A)(ii). The evidence taken at the hearing served one purpose beyond the actual dissolution of marriage—the division of marital property and debt.

{¶ 32} Here, the trial court undeniably held proceedings that “address[ed] issues of marital property and debt” while the automatic bankruptcy stay was in effect. However, the evidence served a dual purpose. First and foremost, the evidence presented during these proceedings was necessary to make a determination regarding Mrs. Greenwood’s request for temporary spousal support, a purpose clearly within the exception to the stay.¹ See 11 U.S.C. 362(b)(2)(A)(ii); *Sitzman v. Sitzman*, 5th Dist. Stark No. 2005CA00268, 2006-Ohio-3279 (Hoffman, J., dissenting)(“the trial court clearly has jurisdiction to issue

¹ For unknown reasons, the trial court elected not to issue an award of temporary spousal support to Mrs. Greenwood.

a temporary spousal support order during the pendency of the bankruptcy proceeding regardless of whether leave is sought or granted by the bankruptcy court.”). Later, the evidence was utilized by the trial court to divide the marital assets and issue an award of permanent spousal support. Significantly, the trial court was adamant throughout the proceedings that it would not utilize the evidence to divide and disburse the marital property until such time as the stay was lifted. *See Kallabat v. Kallabat*, 482 B.R. 563, 571 (E.D.Mich.2012) (holding that the trial court did not violate the automatic stay when a party requested adjudication of property rights during a proceeding held despite the automatic stay when judge was “careful to state that she was not adjudicating property interests of the parties because of the automatic stay.”).

{¶ 33} It is undisputed that the automatic bankruptcy stay does not operate as a stay of the commencement or continuation of a civil action or proceeding for the establishment of an order for domestic support obligations. 11 U.S.C. 362(b)(2)(A)(ii). It does, however, operate to stay any proceeding that “seeks to determine the division of property that is property of the estate.” 11 U.S.C. 362(b)(2)(A)(iv). Unfortunately, “the determination of spousal or child support and the division of the marital property are intertwined.” *Lewis v. Lewis*, 423 B.R. 742, 753 (W.D.Mich.2010). Consequently, domestic relations courts must utilize their specialized judicial expertise to award spousal and child support without encroaching on the province of the federal courts and the protections of the automatic bankruptcy stay. After careful consideration of the facts of this case, we find that the trial court did not err when it determined that proceedings held

on December 7 and 9, 2011, were not subject to the automatic bankruptcy stay because the evidence considered by the court was necessary for the court to consider Mrs. Greenwood's request for temporary spousal support under R.C. 3105.18(C)(1).

{¶ 34} Appellant has failed to present any argument in support of his assertion in his sole assignment of error that the trial court violated appellant's right to due process. For this reason and the reasons set forth above, appellant's sole assignment of error is not well-taken.

{¶ 35} 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

Thomas J. Osowik, J.

JUDGE

James D. Jensen, 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>
