[Cite as *Eden v. Eden*, 2014-Ohio-740.]

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

Amy L. Eden

Appellant

v.

James W. Eden

Appellee

Court of Appeals No. L-13-1065

Trial Court No. DR2010-0476

DECISION AND JUDGMENT

Decided: February 28, 2014

* * * * *

Steven B. Winters, for appellant.

Salvatore C. Molaro, Jr., for appellee.

* * * * *

YARBROUGH, P.J.

I. Introduction

{¶ 1} Appellant, Amy Eden, appeals from the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which divided the assets between the parties in their divorce action. We affirm, in part, and reverse, in part.

A. Factual and Procedural Background

{¶ 2} Appellant and appellee, James Eden, were married on June 23, 2001. Prior to their marriage, the parties executed a prenuptial agreement, which states, in pertinent part:

> 6. SEPARATE DEBT OF PARTIES. Neither Party shall be responsible for any debts or liabilities which are incurred separately by the other Party hereto (including, without limitation, both those which were incurred prior to the marriage and those incurred during their marriage).
>
> 7. RETIREMENT PLANS. As to any retirement plan, including IRAs, in which either party is or may hereafter become a participant in during the marriage (including, without limitation, those listed on Exhibits A and B attached hereto), the Parties agree that any interest or increase in value, including any subsequent deposits, which occurs after the Parties' marriage, shall be divided between them on a 50-50 basis. This provision is intended to apply while the Parties are married and in the event of the death of either Party or the legal termination of the Parties' marriage.

{¶ 3} Shortly thereafter, in August 2001, the parties purchased their marital home. The parties agreed that appellant would contribute $50,000 as a down payment, and appellee would be responsible for paying the monthly mortgage, taxes, and insurance. Further, as a condition for obtaining financing, the bank required appellee to pay down a

significant amount of premarital debt. In order to do so, appellee withdrew $62,000 from his 401(k) retirement account.

{¶ 4} Later, in November 2001, appellant filed for a divorce. At the time, the parties had a second mortgage on the home in the form of an equity line of credit for $30,000. Appellee advanced $15,000 from that line of credit, and deposited the amount into his personal checking account. Appellee testified that he used the money to buy furniture for the home and pay some bills. Appellant testified that the money was spent to pay down appellee's premarital debts. Appellant also testified that, in December 2002, she paid $5,000 from her personal inheritance on the line of credit. Eventually, the parties reconciled.

{¶ 5} However, in May 2010, appellant again filed a complaint for divorce. The matter proceeded to a one-day trial on all issues. Relevant to this appeal, the trial court ordered that the marital residence be sold, and that the parties shall divide equally the proceeds of the sale, or any deficiency, after payment of the mortgage and home equity line of credit. Further, the trial court ruled that appellee was responsible for the payment on the mortgage and line of credit until the property was sold, and appellant was responsible for payment of all utilities, homeowner's association fees, and insurance.

{¶ 6} In addition, the trial court found that the value of appellee's 401(k) account was $107,118.00 at the time of the parties' marriage in June 2001, and was $128,298.27 at the time of the trial in March 2012. The court ruled that the difference of $21,180.27

represented the marital portion, of which appellant was entitled to one-half, or $10,590.14.

B. Assignments of Error

{¶ 7} The trial court entered its final judgment entry on March 20, 2013. Appellant has timely appealed, raising three assignments of error:

1. The Trial Court Erred When Dividing The Value Of Appellee's 401(k) Account.

2. The Trial Court Erred When Dividing The Debt Incurred In The Second Mortgage On The Parties' Residence.

3. The Trial Court Erred In Assessing All Homeowner Association Fees To Appellant.

II. Analysis

{¶ 8} We begin our analysis by noting, "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).

{¶ 9} "In divorce proceedings, the court shall * * * determine what constitutes marital property and what constitutes separate property. * * * [U]pon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section." R.C. 3105.171(B). In general, the court shall divide marital property equally between the spouses, unless such a division would be inequitable, and the court shall disburse a spouse's separate property to that spouse. R.C. 3105.171(C)(1) and (D).

{¶ 10} For purposes of the present matter, marital property includes "[a]ll interest that either or both of the spouses currently has in any real or personal property * * * that was acquired by either or both of the spouses during the marriage." R.C. 3105.171(A)(3)(a)(ii). "'Marital property' does not include any separate property." R.C. 3105.171(A)(3)(b). Separate property, on the other hand, includes "[a]ny real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement." R.C. 3105.171(A)(6)(a)(v).

{¶ 11} Here, the parties have entered into a prenuptial—or "antenuptial"—agreement. In Ohio, prenuptial agreements are valid and enforceable "(1) if they have been entered into freely without fraud, duress, coercion, or overreaching; (2) if there was full disclosure, or full knowledge and understanding of the nature, value and extent of the prospective spouse's property; and (3) if the terms do not promote or encourage divorce or profiteering by divorce." *Gross v. Gross*, 11 Ohio St.3d 99, 464 N.E.2d 500 (1984), paragraph two of the syllabus. "If parties have freely entered into a prenuptial agreement,

a court should not substitute its judgment and amend the contract." *Avent v. Avent*, 166 Ohio App.3d 104, 2006-Ohio-1861, 849 N.E.2d 98, ¶ 17 (6th Dist.), citing *Gross* at 109. In this case, the parties do not contest the validity and enforceability of the prenuptial agreement. Rather, they contest the trial court's classification and division of three property interests under the agreement.

A. 401(k) Account

{¶ 12} In its decision preceding its final judgment entry, the trial court determined that appellant was not entitled to any portion of the $62,000 that appellee withdrew to pay off his personal debts. Instead, the court limited appellant's disbursement to one-half of the difference in value of the retirement account from the beginning of the marriage to the date of the trial. The court supported its determination by reasoning that the withdrawal was just as necessary as the $50,000 down payment to purchase the marital residence, and thus the withdrawal accommodated appellant. Further, the court noted that the prenuptial agreement authorized appellee to withdraw the funds, and appellant knew about and consented to the withdrawal and debt payoff.

{¶ 13} In her first assignment of error, appellant argues that the trial court abused its discretion by failing to also award her one-half of the $62,000 withdrawal. Appellant notes that paragraph 7 of the prenuptial agreement designates as marital property any increase in the value of the retirement account that occurred during the marriage. Appellant agrees that the $62,000 was appellee's separate property used to pay appellee's

separate debt. However, she argues that the trial court's decision effectively takes the marital asset of the increase in value, and makes it non-marital. We agree.

{¶ 14} The retirement account had an initial value of $107,118.00 at the time of the parties' marriage. Appellee then withdrew $62,000 from that account, thereby reducing the value by that amount. The parties do not suggest that appellee ever re-deposited the $62,000. Over the course of the next eleven years, the retirement account grew to a value of $128,298.27. Therefore, the increase in value of the retirement account during the course of the marriage was actually $83,180.27, of which appellant is entitled to half pursuant to the prenuptial agreement.

{¶ 15} We further note that it is irrelevant that appellant consented to the withdrawal or that the transaction was necessary to purchase the marital home. What matters is the increase in value of the retirement account. By looking only at the beginning and ending balances, the trial court's decision failed to take into account appellee's withdrawal to pay his separate debt, thereby effectively converting $62,000 of the increase in the value of the retirement account from marital property into appellee's separate property.

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

B. Home Equity Line of Credit

{¶ 17} Regarding the home equity line of credit—which at the time of trial had an outstanding balance of $13,834—the trial court ordered that any proceeds from the sale of the house after the mortgage and line of credit had been paid would be split evenly

between the parties, or in the event of a deficiency, any remaining liability would be shared evenly between the parties. Appellant had argued that appellee withdrew $15,000 to pay his separate debt, and therefore she should not be liable to repay this amount. Appellee, on the other hand, stated that he used the money to buy furniture and pay bills. The trial court, in light of the facts that appellee had supposedly already paid off his outstanding debt and appellant admitted that some of the money was used to buy furniture, found appellee to be more credible on the issue, and determined that the line of credit was marital debt.

{¶ 18} In her second assignment of error, appellant argues that the trial court abused its discretion when it found appellee to be more credible. Specifically, she ponders how the court could have found appellee to be more credible when the court prevented her from continuing in her line of questioning that was designed to uncover how appellee spent the money. During the hearing, the trial court ended the questioning after appellant had elicited that some of the money went to pay credit cards, and over $4,000 went to pay for a family membership at Brandywine Country Club. The trial court determined that the home equity line of credit was a joint debt, and that it was not material how the money was spent.

{¶ 19} We first note that although appellant argues that the trial court abused its discretion, we review the factual findings of the trial court relating to its classification of property as marital or separate under a manifest weight standard. *Duffy v. Duffy*, 6th Dist. Wood No. WD-11-019, 2012-Ohio-2808, ¶ 11, citing *Barkley v. Barkley*, 119 Ohio

App.3d 155, 159, 694 N.E.2d 989 (4th Dist.1997). "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." *Id.*, citing *Myers v. Garson*, 66 Ohio St.3d 610, 614, 614 N.E.2d 742 (1993).

{¶ 20} Upon our review of the record, we cannot say that the trial court's determination that the home equity line of credit was a marital debt was against the manifest weight of the evidence. There was sufficient evidence in the form of appellant's admission that appellee had purchased some furniture and the record of the payment to Brandywine for the court to determine that appellant had not proven that appellee used all of the money to pay his personal debts.

{¶ 21} Alternatively, appellant argues that she has already repaid $5,000 from her own separate property, and therefore should only be required to pay $2,500. R.C. 3105.171(A)(6)(b) provides that "[t]he 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." Because appellant is arguing that the $5,000 is separate property, she bears the burden of tracing that asset to her separate property. *Duffy* at ¶ 14. Here, although not directly addressed by the trial court, the court implicitly found that appellant had not satisfied her burden. Again, we cannot say that the trial court's decision was in error as there is no documentation in the record that the $5,000 came from appellant's separate property.

{¶ 22} Accordingly, appellant's second assignment of error is not well-taken.

C. Homeowner's Association Fees

{¶ 23} In her third and final assignment of error, appellant argues that the trial court abused its discretion when it ordered appellant to pay $400 in homeowner's association fees. In particular, appellant notes that the trial court referenced the parties' "course of dealing" when determining that appellee would be responsible for the mortgage and line of credit, and appellant would be responsible for the utilities, homeowner's association fees, and insurance. She contends, however, that the "course of dealing" between the parties was that appellee would be responsible for all the costs of the home, including the homeowner's association fees, after appellant made her $50,000 down payment.

{¶ 24} In light of the broad power granted to trial courts in determining the appropriate scope of property awards in divorce actions, we cannot conclude that the trial court abused its discretion in requiring appellant to pay the homeowner's association fees where she was the person residing in the residence while the property was for sale, and where appellee was still responsible for paying both mortgages.

{¶ 25} Accordingly, appellant's third assignment of error is not well-taken.

III. Conclusion

{¶ 26} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part. The portion of the trial court's judgment dividing appellee's 401(k) retirement account is

modified to reflect that the marital portion is $83,180.27, of which appellant is awarded $41,590.14. The remainder of the trial court's judgment is affirmed in its entirety. Costs are to be split evenly between the parties in accordance with App.R. 24.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.

_____
JUDGE