

[Cite as *Cimperman v. Cimperman*, 2003-Ohio-869.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80807

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| LEE ANN CIMPERMAN | : | |
| | : | |
| Plaintiff-Appellee | : | JOURNAL ENTRY |
| | : | |
| -vs- | : | AND |
| | : | |
| MICHAEL J. CIMPERMAN | : | OPINION |
| | : | |
| Defendant-Appellant | : | |

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| Date of Announcement of Decision: | FEBRUARY 27, 2003 |
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| Character of Proceeding: | Civil appeal from Court of Common Pleas Domestic Relations Division Case No. D-275519 |
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| Judgment: | Affirmed |
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Date of Journalization:

Appearances:

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| For Plaintiff-Appellee: | DALE F. PELSOZY, ESQ. P.O. Box 391411 Solon, Ohio 44139 |
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| For Defendant-Appellant: | MARY V.G. WALSH, ESQ. 4403 St. Clair Avenue Cleveland, Ohio 44103 |
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JAMES J. SWEENEY, J.:

{¶1} Defendant-appellant Michael J. Cimperman appeals from various aspects of the judgment entry and decree of divorce entered by the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, arising out of the divorce action between defendant and plaintiff-appellee Lee Ann Cimperman. For the reasons set forth below, we affirm.

{¶2} Plaintiff and defendant were married on September 24, 1988. One child was born as issue of the marriage: Michael, born September 10, 1984. Plaintiff filed for divorce on August 15, 2000. Defendant counterclaimed on November 1, 2000. A contested divorce trial was held on August 30 and 31, 2001. Plaintiff's findings of fact and conclusions of law were adopted by the trial court on December 13, 2001. The trial court issued a decision on January 2, 2002, finding that the plaintiff was entitled to a divorce and resolving the distribution of the parties' assets and debts. On January 28, 2002, defendant filed an appeal from that decision and raised three assignments of error.¹

{¶3} "I. The trial court abused its discretion in determining, characterizing and dividing the marital assets."

{¶4} In his first assignment of error, defendant raises several issues, all relating to the trial court's resolution of the parties' property distribution and debt allocation.

{¶5} In a divorce proceeding, a trial court must divide the marital property of the parties equitably. R.C. 3105.17.1(B); *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355. In order to divide property equitably, the trial court must place a value on each contested item of property. *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794, 799. Valuing property involves factual inquiries, requiring an appellate court to apply a manifest weight of evidence standard of review. *Wright v.*

¹In his original brief before this Court, defendant raised five assignments of error; however, on May 24, 2002, he withdrew Assignments IV and V since those issues were being relitigated in the trial court.

Wright (Nov. 10, 1994), Hocking App. No. 94CA02, unreported. An appellate court will not reverse a trial court's valuation if it is supported by some competent, credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77 at 80.

{¶6} With these principals in mind, we proceed to address defendant's first issue.

1. Lost Equity

{¶7} Defendant argues that the trial court erred in its findings with regard to the property located at 3347 West 47th Street, Cleveland, Ohio.

{¶8} First, defendant argues that the trial court erred in finding that the entire value of the property located at 3347 West 47th Street, Cleveland, Ohio was a marital asset. We disagree.

{¶9} Under certain circumstances, separate property may be converted to marital property when it is commingled with marital property. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. The commingling of separate and marital property, however, does not destroy the character of the separate property unless its identity as separate property is not traceable. R.C. 3105.171(A)(6)(b); *Peck*, supra. The party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property. *Id.*

{¶10} Here, the trial record reveals that defendant acquired the property at 3347 West 47th Street 12 years prior to the marriage; however, during the marriage, the property was used as a rental property, and in April 1998, the property was refinanced and placed in both parties' names. Moreover, defendant testified that he considered the West 47th Street property to be joint marital property. (Tr. 195). Accordingly, the trial court did not err in determining that the entire value of the property at West 47th Street was marital property.

{¶11} Next, defendant argues that the trial court improperly valued the West 47th Street property. We disagree. In November 1998, when the property was refinanced, the bank set its value at \$65,000. Accordingly, the trial court did not abuse its discretion in adopting the plaintiff's finding of fact that the property had a fair market value of \$68,000 at the time of the filing of the divorce in August 2000.

{¶12} Finally, defendant argues that the trial court erred in finding that there was "lost equity" in the property in the amount of \$19,343.63 and offsetting that amount from his share of the marital assets. We disagree.

{¶13} At the divorce trial, extensive testimony was heard from plaintiff as to the value of the property. She testified that defendant defaulted on two mortgage payments for the combined amount of \$3,350.00 and that the bank charged her personal checking account for the missed payments. She also testified that the defendant failed to pay the real estate taxes on the property in the amount of \$3,993.63. Finally, she testified that defendant's failure to maintain the property caused a diminution in the value of the property of approximately \$12,000 when the parties had to sell the property for \$56,000 in order to avoid future losses and deficiencies. Although defendant contests these amounts, he offered no documentary evidence to support his claims. Indeed, he was unable to account for the auditor's tax bill and denied knowledge of the penalties imposed by the bank for the delinquent mortgage payments.

{¶14} In its final judgment entry of divorce, the trial court adopted the plaintiff's finding of fact that defendant's actions constituted economic waste, and that defendant's failure to maintain the property and pay real estate taxes and mortgage payments caused lost equity in the property in the amount of \$19,343.63. We find that the trial court did not abuse its discretion in reaching this

conclusion. Both parties testified as to their financial contributions toward the property. The trial court was free to weigh this conflicting testimony and make its decision accordingly. See *Buckles v. Buckles* (1988), 46 Ohio App.3d 102, 110. Accordingly, the record supports the trial court's decision that the defendant's actions constituted economic waste and offsetting the amount of \$19,343.63 against defendant's share of the marital assets. This issue is overruled.

2. Dental Bills

{¶15} Defendant argues that the trial court erred when it failed to find that the dental bills incurred by the minor child were a marital liability. We disagree.

{¶16} A trial court's division of marital property need not be equal in order to be considered equitable. *Winkler v. Winkler* (1997), 117 Ohio App.3d 247. While the starting place for an equitable property division is an equal assignment of marital debt, after considering all the relevant factors in a case, a trial court may choose to award one party more of the marital debts and still have an equitable order. *Cherry*, 66 Ohio St.2d 348.

{¶17} Here, a review of the record from the trial court demonstrates that the trial court's assignment of dental bills to the defendant was, in fact, equitable given the circumstances of the case. In the temporary support order dated December 12, 2000, defendant was ordered to maintain health insurance, including dental coverage, for the minor child. At the divorce trial, defendant admitted that he had not complied with this order, but argued that he lost his job through which that insurance coverage came. Testimony at trial demonstrated, however, that defendant failed to apply for COBRA insurance and deliberately failed to take family medical coverage at his new job shortly thereafter. (Tr. 75-76). In its final judgment entry of divorce, the trial court adopted the plaintiff's

finding of fact that if defendant had complied with the temporary order, this debt would not have existed at the time of trial.

{¶18} The facts and circumstances of each case dictate what constitutes an equitable division of marital property. *Terry v. Terry* (1994), 99 Ohio App.3d 228. Keeping this in mind, it is clear from the record that, under the present circumstances, the trial court's finding that defendant was solely responsible for the dental bills incurred by the minor child did not constitute an abuse of discretion. Accordingly, this issue is overruled.

3. Personal Property from Defendant's Business

{¶19} Defendant argues that the trial court erred when it considered equipment from his business in determining the assets of the marriage. We disagree.

{¶20} At the divorce trial, defendant testified that most of the equipment/tools used in the business were premarital; however, he could not produce any documentation evidencing this. Plaintiff, on the other hand, produced evidence that the business began during the marriage and that the tools and equipment were purchased during the marriage.

{¶21} In its final judgment entry of divorce, the trial court adopted the plaintiff's finding of fact that \$10,000 worth of personal property from the business was marital property and divided it equally between the parties. The trial court also adopted the plaintiff's finding that defendant sold some of the equipment during the pendency of the divorce, despite a court order forbidding such a sale.

{¶22} We find the trial court did not abuse its discretion in reaching this conclusion. The trial court serves as the trier of fact in a divorce proceeding and must judge the credibility of the witnesses and the weight of the evidence. *Bussey v. Bussey* (1988), 55 Ohio App.3d 117, 119. Thus,

the trial court was free to weigh defendant's testimony and make its decision accordingly. *Id.* Accordingly, we find no abuse of discretion by the trial court in attributing \$10,000 of equipment and tools as a marital asset subject to division as opposed to separate premarital property owned by defendant. This issue is overruled.

4. Plaintiff's Pension Plan

{¶23} Defendant argues that the trial court erred in finding that the amount of plaintiff's pension plan was \$16,516.64 instead of \$17,676.52. We disagree.

{¶24} At the divorce trial, plaintiff testified that at the time she filed for divorce, the value of her 401(K) was \$16,516.64. (Tr. 115-116). She also testified that the value of the 401(K) had increased in value to \$17,676.52 at the time of trial. (Tr. 128). In its final judgment entry of divorce, the trial court adopted the plaintiff's finding of fact that the value of plaintiff's 401(K) was \$16,516.64.

{¶25} In order to achieve an equitable distribution of property, the trial court must be allowed to use alternative valuation dates where reasonable under the particular facts and circumstances of the case. *Langer v. Langer* (1997), 123 Ohio App.3d 348. The determination as to when to apply a valuation date other than the actual date of divorce is within the discretion of the trial court and cannot be disturbed on appeal absent a demonstration of an abuse of discretion. *Gullia v. Gullia* (1994), 93 Ohio App.3d 653, 666. Keeping this in mind, we do not find that the trial court abused its discretion in utilizing the September 2000 valuation of the 401(K) in its division of the marital property rather than the August 2001 valuation which reflected plaintiff's contribution to her retirement accounts subsequent to the filing of the divorce complaint. Accordingly, this issue is overruled.

5. Vehicle

{¶26} Defendant argues that the trial court erred when it valued the marital vehicle at \$500.00. We disagree.

{¶27} At the divorce trial, plaintiff conceded that she had valued the marital vehicle at \$1,500 in her pretrial statement. However, she also testified that she sold the vehicle for \$300.00 to a neighbor because the vehicle was unsafe and she had been told by defendant that she should not drive it for distances over fifty miles.

{¶28} In its final judgment entry of divorce, the trial court adopted the plaintiff's finding of fact that the vehicle was worth \$500.00 and divided it equally between the parties.

{¶29} We find the trial court did not abuse its discretion in reaching this conclusion. Since the trial court serves as the trier of fact in a divorce proceeding and must judge the credibility of the witnesses and the weight of the evidence, it was free to weigh plaintiff's testimony and make its decision accordingly. *Bussey*, 55 Ohio App.3d at 119. Accordingly, we find no abuse of discretion by the trial court in placing a value of \$500.00 on the family vehicle. This issue is overruled.

6. Marital Funds in Possession of Plaintiff

{¶30} Defendant argues that the trial court erroneously disposed of marital funds. We disagree.

{¶31} The record reveals that the parties received net proceeds of \$21,000 upon the sale of the marital home on Silsby Road in 1998. Defendant concedes that most of this money was used to pay marital bills but claims that \$10,000 was given to plaintiff's mother. Plaintiff testified, however, that all but \$1,890 of these funds were spent on basic living expenses, taxes from the sale of the marital residence, and the dental bills for the minor child. Although defendant claims that plaintiff

could have filed a joint tax return in 1999, which would have saved them money because the capital gains from the house sale would have been offset by his business losses, defendant provided no documentation to support this claim.

{¶32} In its final judgment entry of divorce, the trial court adopted the plaintiff's finding of fact that the net proceeds from the sale of the house in the amount of \$10,000 were used to pay marital bills during the pendency of the divorce and that the \$1,890.00 that remained was marital property.

{¶33} We find the trial court did not abuse its discretion in reaching this conclusion. Defendant was unable to substantiate his claim that plaintiff should have filed a joint tax return since he had substantial business losses. Because the trial court serves as the trier of fact in a divorce proceeding and must judge the credibility of the witnesses and the weight of the evidence, it was free to weigh defendant's testimony and make its decision accordingly. *Bussey*, 55 Ohio App.3d at 119. Accordingly, we find no abuse of discretion by the trial court in placing a value of 1,890.00 on the value of the marital funds in possession of the plaintiff. This issue is overruled.

{¶34} Assignment of Error I is overruled.

{¶35} "II. The trial court abused its discretion in requiring appellant to pay any portion of appellee's attorney fees."

{¶36} In his second assignment of error, defendant argues that the court erroneously awarded plaintiff \$8,000 in attorney fees. We disagree.

{¶37} A decision to award attorney fees is a matter within the sound discretion of the trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356, 359. Absent a clear abuse of discretion, a reviewing

court will not reverse the judgment of the trial court. *Birath v. Birath* (1988), 53 Ohio App.3d 31, 39.

{¶38} Here, the record indicates that defendant did not request, pursuant to Civ.R. 52, separate findings of fact and conclusions of law regarding the trial court's award of attorney fees to plaintiff. Absent separate findings of fact and conclusions of law on this issue, we will presume that the trial court considered all the relevant statutory guidelines, including the provisions of R.C. 3105.18.² *Cherry*, 66 Ohio St.2d at 356; *Carman v. Carman* (1996), 109 Ohio App.3d 698, 705. As long as the record contains evidence in support of the award of attorney fees, the trial court's decision will not be reversed by this court. *Rand*, supra, at 359.

{¶39} Here, the record contains sufficient evidence to support the trial court's decision to award attorney fees to plaintiff in the amount of \$8,000. The record indicates that defendant was voluntarily underemployed at the time of trial. The record also shows that defendant failed to comply with discovery requests and failed to comply with the temporary orders for health coverage and child support.

{¶40} Plaintiff also presented evidence of the hourly rate charged and the amount of time expended by her attorney. (Tr. 119). Specifically, plaintiff submitted billings for services rendered for her representation which listed a billing rate of \$175 per hour for a total amount due of

²{a} R.C. 3105.18(H) states in pertinent part:

{b} “In divorce or legal separation proceedings, the court may award reasonable attorney's fees to either party at any stage of the proceedings, including, but not limited to, any appeal, any proceeding arising from a motion to modify a prior order or decree, and any proceeding to enforce a prior order or decree, if it determines that the other party has the ability to pay the attorney's fees that the court awards. When the court determines whether to award reasonable attorney's fees to any party pursuant to this division, it shall determine whether either party will be prevented from fully litigating that party's rights and adequately protecting that party's interests if it does not award reasonable attorney's fees.”

approximately \$7,200. Further, the trial court heard testimony from Dale Pelsozy, plaintiff's attorney, who regularly practices in the field of domestic relations. Pelsozy testified that approximately \$4,000 of the fees were expended to obtain records that defendant failed or refused to produce. Finally, defendant stipulated to the experience of plaintiff's attorney. (Tr. 162).

{¶41} After a careful review of the record, we find that the trial court's decision to award plaintiff attorney fees does not amount to an abuse of discretion. See *Rand*, supra, at 359. There is evidence in the record that the attorney fees charged plaintiff were reasonable and that plaintiff cannot reasonably afford to pay all of her own attorney fees. Further, an award of attorney fees is warranted since defendant's voluntary underemployment, noncompliance with court orders, and lack of cooperation resulted in plaintiff's having to incur the additional attorney fees. See *Matyas v. Matyas* (Jan. 17, 1985), Cuyahoga App. No. 48645, unreported; *Pournarus v. Pournarus* (June 26, 1986), Cuyahoga App. No. 50782, unreported.

{¶42} Assignment of Error II is overruled.

{¶43} "III. The trial court erred in its calculation of child support."

{¶44} In his third assignment of error, defendant argues that the trial court erred in finding that he was voluntarily underemployed and in imputing to him an income of \$36,000 for purposes of child support obligations. Defendant also claims that the trial court erred in imputing to the plaintiff an income of \$34,000. We disagree.

{¶45} In calculating child support, the trial court must consider the combined gross income of both parents. See R.C. 3113.215 (B)(2). If the court determines that a parent is voluntarily unemployed or underemployed, it may impute to that parent income which it determines the parent would have earned if fully employed. R.C. 3113.215 (A)(5). The question whether a parent is

voluntarily unemployed or voluntarily underemployed is a question of fact for the trial court. *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112. Absent an abuse of discretion, that factual determination will not be disturbed on appeal. *Id.* A "parent's subjective motivations for being voluntarily unemployed or underemployed play no part in the determination whether potential income is to be imputed to that parent in calculating his or her support obligation." *Id.* at 111.

{¶46} In order to impute income to a party, the trial court must follow a two-step process. *Id.* First, the court must determine that the parent is voluntarily unemployed or underemployed. Second, the court must consider "the parent's employment potential and probable earnings based on the parent's recent work history, the parent's occupational qualifications, and the prevailing job opportunities and salary levels in the community in which the parent resides." R.C. 3113.215(A)(4)(b).

{¶47} Here, defendant testified that his employer, Daewoo Motor America, went out of business shortly after the filing of the divorce. One week later, defendant began working at Bedford Automotive Group as a mechanic. Defendant remained at Bedford Auto Group for approximately seven weeks, when he was terminated for taking off too much time from work. The office manager of Bedford Auto Group, Tammy Lease, testified that defendant could have earned \$36,000 per year if he had stayed on in that position. At the time of trial, defendant was employed by On The Spot Delivery Service, a courier service, earning approximately \$30,000 per year.

{¶48} We find the trial court did not err in determining that defendant was voluntarily underemployed. There was sufficient evidence presented to show that defendant lost his job at Bedford Auto Group due to his own wrong-doing and that he accepted a job as a courier for less money when he is capable of making more as a mechanic. Defendant's being fired due to his own

misdeeds does not excuse him from the responsibility of supporting his child based upon his income potential. Therefore, we do not find an abuse of discretion in the trial court's determination that defendant was voluntarily underemployed. Since the determination was supported by the record, we cannot say that the trial court abused its discretion when it imputed income to defendant in the amount of \$36,000 for the purposes of determining his child support obligation.

{¶49} Finally, with regard to plaintiff's income, the record shows that plaintiff is an Administrative Assistant at Garland Floor Company with an annual salary of \$34,000. Although she could make more if she received a bonus, there was no evidence that she would, in fact, receive such a bonus. Thus, we cannot say that the trial court abused its discretion when it determined that plaintiff's income was \$34,000 for the purposes of determining her child support obligation.

{¶50} Assignment of Error III is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant her costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TIMOTHY E. McMONAGLE, A.J., and

DIANE KARPINSKI, J., CONCUR.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).