

[Cite as *Collins v. Collins*, 2009-Ohio-5687.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91761

IRENE COLLINS

PLAINTIFF-APPELLANT

vs.

JOHN C. COLLINS, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
REVERSED AND REMANDED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-310254

BEFORE: Rocco, P.J., Kilbane, J., and Jones, J.

RELEASED: October 29, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Plaintiff appeals from a domestic relations court order dismissing her complaint for legal separation. She argues that the court erred by dismissing her complaint and by refusing to provide findings of fact and conclusions of law. She further contends that the manifest weight of the evidence does not support the court's finding that the parties were not "living separately in a marital sense." We find no competent credible evidence to support the court's decision that the parties did not voluntarily live separate and apart from one another. Therefore, we reverse and remand for further proceedings.

Procedural History

{¶ 2} Plaintiff's complaint for legal separation alleged that the parties had lived separate and apart for more than one year and that they were incompatible. Defendant, through his legal guardian, denied that the parties were incompatible, but counterclaimed for legal separation. He later amended his counterclaim to request a divorce.

{¶ 3} The court conducted a limited hearing on June 9, 2008 on the question whether the parties had voluntarily lived separate and apart for more than one year. Plaintiff testified that she and the defendant had been married for 49 years, and had two adult children. She said that the

defendant suddenly developed dementia in 2005. He was placed in Bradley Bay Nursing Home after a hospital stay for pneumonia.

{¶ 4} Initially, the defendant lived in the assisted living section. The nursing home gave plaintiff the opportunity to live with defendant, but she chose not to because she found assisted living too confining. The defendant was transferred to the nursing home section “at least two years” before the June 2008 hearing. Plaintiff could not have lived in the nursing home section with the defendant, although she could have stayed in the assisted living section. She said she still loved her husband and would have kept him at home if she could have taken care of him.

{¶ 5} After the hearing, the court entered a judgment finding that plaintiff did not voluntarily choose to live separate and apart from the defendant. The court found plaintiff could not have lived with the defendant because she could not live in the nursing home area where he lived. The court found from plaintiff’s testimony that she still cared for the defendant and that the marital relationship had not broken down. Therefore, the court denied the plaintiff’s complaint for legal separation and the defendant’s counterclaim for divorce.

Law and Analysis

{¶ 6} The third assignment of error is dispositive of this case. In her third assignment of error, appellant contends that the manifest weight of the evidence did not support the trial court’s decision that the parties had not voluntarily lived

separate and apart for more than one year “in the marital sense.”¹ We find no competent credible evidence to support the court’s determination that the parties did not voluntarily live separate and apart from one another. Therefore, we reverse and remand for further proceedings.

{¶ 7} The court may grant a legal separation or a divorce “when husband and wife have, without interruption for one year, lived separate and apart without cohabitation.” R.C. 3105.01(J) and 3105.17(A)(9). The statutes’ use of “the word ‘may’ instead of ‘shall,’ gives the trial court the discretion to determine whether a legal separation or a divorce is more appropriate, in each situation. *Harcourt v. Harcourt* (Sept. 30, 1998), Ashtabula App. No. 97-A-0066.” *Mahon v. Mahon* (March 12, 1999), Trumbull App. No. 98-T-0050; see, also, *Harding v. Harding*, Cuyahoga App. No. 85022, 2005-Ohio-3010.

{¶ 8} “It is generally accepted that before separation can be used as a ground for divorce, the separation must be voluntary.” *Dailey v. Dailey* (1983), 11 Ohio App.3d 121, 122, cited with approval in *Launsbach v. Launsbach* (Dec. 1, 1998), Cuyahoga App. Nos. 54689 and 54690. The trial court’s determination whether the parties voluntarily live separate and apart is a

¹A significant part of appellant’s argument is devoted to the development of a distinction between “legal separation” and “divorce.” Appellant argues that the marital relationship need not be broken before a legal separation may be granted, and therefore the trial court’s determination that the parties did not voluntarily live separate and apart did not prevent the court from granting a legal separation. Whatever the merits of this argument may be, we need not distinguish between the grounds for legal separation and divorce in this case because we find that the court determination that the parties’ separation was not voluntary was not supported by competent, credible evidence.

determination of fact. Such a determination will not be reversed if there is competent, credible evidence in the record to support it.

{¶ 9} We find no competent, credible evidence in the record to support the common pleas court determination that, because the parties could not live together after the defendant was moved into nursing home care, the parties' separation was involuntary. The parties' present living arrangements were not suddenly imposed upon them by circumstances beyond the control of either party. Cf. *Dailey*, supra. When defendant first moved into assisted living at the nursing home, plaintiff could have lived there with him. She chose not to. This was a voluntary decision on her part. Her voluntary decision not to live with the defendant did not become involuntary when the defendant was moved into nursing home care. See *Heskett v. Heskett* (Nov. 25, 1991), Champaign App. No. 91-CA-05.

{¶ 10} We sustain the third assignment of error. The first and second assignments of error, that the court applied the incorrect legal standard to her complaint for a legal separation and abused its discretion by failing to issue findings of fact and conclusions of law, are rendered moot by this decision. The question whether the court should grant a divorce or a legal separation remains within the court's discretion, but the evidence that the parties have voluntarily lived separate and apart requires the court to select one of these two options. We reverse and remand for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

KENNETH A. ROCCO, PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
LARRY A. JONES, J., CONCUR