

[Cite as *Williams v. Williams*, 2011-Ohio-939.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95346**

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**MARIEA WILLIAMS**

PLAINTIFF-APPELLEE

vs.

**ERIC DENNIS WILLIAMS**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED IN PART, REVERSED IN PART,  
AND REMANDED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Domestic Relations Division  
Case No. D-329331

**BEFORE:** Cooney, P.J., Rocco, J., and Keough, J.

**RELEASED AND JOURNALIZED:** March 3, 2011

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COLLEEN CONWAY COONEY, P.J.:

{¶ 1} Defendant-appellant, Eric D. Williams (“Eric”), appeals the court’s judgment entry of divorce. We find some merit to the appeal, affirm in part, and reverse in part.

{¶ 2} On December 11, 2009, plaintiff-appellee, Mariea Williams (“Mariae”), filed a complaint for divorce, which was served on Eric on February 10, 2010. Eric failed to file an answer, and the court scheduled an uncontested divorce hearing for April 20, 2010. Eric appeared for the hearing without counsel and requested leave to plead and a continuance. The trial court granted his request and continued the hearing to allow Eric to

obtain counsel and file an answer to the complaint. The trial court rescheduled the uncontested divorce hearing to May 27, 2010.

{¶ 3} Eric failed to file an answer before May 27, 2010, and no attorney entered an appearance on his behalf. The court proceeded with the uncontested divorce hearing, at which Mariea testified that the parties were married on May 18, 2007, separated in November 2008, and had no children. Mariea testified that she purchased the marital home located on East 214<sup>th</sup> Street in Euclid before the parties were married. She verified a schedule from her homeowner's insurance policy showing that her engagement ring was appraised and insured for \$10,254. Eric testified that the engagement ring was either "lost or stolen" but admitted that it was in his possession when it disappeared.

{¶ 4} Mariea further testified that Eric received a settlement award of \$47,100 in an employment discrimination lawsuit during their marriage. Eric presented no evidence or testimony to establish that the award should be treated as separate property. There was evidence that the parties shared several credit cards with outstanding balances. Mariea testified, however, that the Citicard account was "primarily" used by Eric.

{¶ 5} In the decree of divorce, the trial court categorized the award from Eric's lawsuit as marital property and divided the funds evenly between

the parties. The trial court also awarded Mariea the engagement ring or, alternatively, required Eric to pay her \$10,254 within 30 days. Finally, the court divided the parties' debt equally, with the exception of the balance owed on the Citicard account in the amount of \$4,700, which the court ordered Eric to assume.

{¶ 6} Eric now appeals, raising three assignments of error.

#### The Settlement Award

{¶ 7} In his first assignment of error, Eric argues the trial court erred in equally dividing his settlement award from his employment discrimination case. He contends the court's categorization of the settlement as marital property is against the manifest weight of the evidence. We disagree.

{¶ 8} The determination of whether property is marital or separate is a mixed question of law and fact and will not be reversed unless it is against the manifest weight of the evidence. *Torres v. Torres*, Cuyahoga App. Nos. 88582 and 88660, 2007-Ohio-4443, at ¶14. Once the characterization is made, the actual distribution of the property will not be disturbed absent an abuse of discretion. *Larkey v. Larkey* (Nov. 4, 1999), Cuyahoga App. No. 74765, citing *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293.

{¶ 9} Marital property is defined as “[a]ll real and personal property that currently is owned by either or both of the spouses, including, but not limited to, the retirement benefits of the spouses, and that was acquired by either or both of the spouses during the marriage.” R.C. 3105.171(A)(3)(a)(i).

Marital property also includes “\* \* \* all income and appreciation of separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage \* \* \*.” R.C. 3105.171(A)(3)(a)(iii). By contrast, separate property includes any real or personal property or interest in real or personal property that was acquired by one spouse prior to the date of the marriage. R.C. 3105.171(A)(6)(a)(ii).

{¶ 10} Property acquired during marriage is presumed to be marital property. Any party to a divorce proceeding may ask the trial court to classify property as separate or marital property. R.C. 3105.171(B). “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.” *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. See, also, R.C. 3105.171. Thus, unless a party seeks classification of a particular asset, the court may presume it to be marital property if it was acquired during the marriage.

{¶ 11} Eric argues the settlement was awarded as compensation for a personal injury and that, pursuant to R.C. 3105.171(A)(6)(a)(vi), such awards for personal injuries are separate property. However, Eric never asked the trial court to characterize the settlement as a “personal injury” award, or separate property. Moreover, the evidence demonstrated that the settlement was awarded as compensation for employment discrimination rather than personal injury. R.C. 3105.171(A)(6)(a)(vi) specifically refers to “personal injury” awards as separate property and does not include compensation for other losses litigated in other types of civil cases.

{¶ 12} Compensation in employment discrimination cases is generally awarded to make the employee “whole and to place that employee in the position the employee would have been in absent a violation of the employment contract.” *Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶26. Just as wages earned during the marriage constitute marital property, R.C. 3105.171(A)(3)(a)(iii), compensation for the loss of those wages during the marriage must also be marital property. In the absence of evidence to the contrary, the trial court’s finding that Eric’s employment discrimination award was marital property is not against the manifest weight of the evidence.

{¶ 13} Therefore, the first assignment of error is overruled.

Denial of Continuance

{¶ 14} In his second assignment of error, Eric argues the trial court abused its discretion in denying his motion for continuance to obtain counsel. Eric contends his request for a continuance was reasonable because the case had only been pending for five months, there had only been one previous continuance, and he needed the benefit of counsel at trial.

{¶ 15} The decision to grant or deny a continuance is entrusted to the broad, sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Unger* (1981), 67 Ohio St.2d 65, 423 N.E.2d 1078.

In determining whether a trial court abused its discretion in denying a motion for a continuance, an appellate court should consider the following factors: (1) the length of the delay requested; (2) whether other continuances have been requested and received; (3) the inconvenience to witnesses, opposing counsel, and the court; (4) whether there is a legitimate reason for the continuance; (5) whether the defendant contributed to the circumstances giving rise to the need for the continuance, and other relevant factors, depending on the unique facts of each case. *Id.* at 67-68. The reviewing court must also weigh the potential prejudice to the movant against the trial court's right to control its own docket. *In re Barnick*, Cuyahoga App. No. 88334, 2007-Ohio-1720, ¶10, quoting *Unger*.

{¶ 16} Eric was aware of these divorce proceedings for several months before the first uncontested divorce hearing on April 20, 2010 and failed to retain counsel during that time. Eric was aware of and appeared for the uncontested divorce hearing on April 20, 2010, at which the trial court granted him a continuance to answer and return for the new hearing date. The continuance was also granted for the obvious purpose of obtaining representation. If the trial court had granted a second continuance, all the parties would have to be convened for a third time at significant expense and inconvenience. Although Eric advised the court that he had an appointment with an attorney in five days, such a statement demonstrates that he had not prepared for the hearing during the 30 days he had been allowed a continuance. Eric's conduct was the sole cause for his need for another continuance. Under these circumstances, we find the trial court's decision to deny the second continuance was not an abuse of discretion.

{¶ 17} The second assignment of error is overruled.



The Citicard Debt

{¶ 18} In his third assignment of error, Eric argues the trial court abused its discretion in assigning him the sole responsibility for the unpaid balance on the parties’ Citicard account. Eric contends there was no evidence to support the trial court’s finding that Eric solely incurred this \$4,700 debt.

{¶ 19} When a divorce is granted, the trial court must equitably divide and distribute the marital estate between the parties. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 130, 541 N.E.2d 597. The trial court is vested with broad discretion in determining what constitutes an equitable division of the property. *Id.* We therefore review the trial court’s division of marital property for an abuse of discretion. *Id.*

{¶ 20} In making an equitable division of marital property, the court must consider “all relevant factors,” including those found in R.C. 3105.171(F) such as the duration of the marriage, the assets and liabilities of the spouses, and “any other factor that the court expressly finds to be relevant and equitable.” *Torres* at ¶44; R.C. 3105.171(F)(1), (2), and (9). “Because the division of marital debt is ‘inextricably intertwined’ with the division of marital property, \* \* \* the same factors are relevant in fashioning an

equitable distribution of marital debt.” Id. at ¶45, citing *Samples v. Samples*, Washington App. No. 02CA21, 2002-Ohio-5441, ¶22.

{¶ 21} In assigning the debt to Eric, the trial court found, as stated in the divorce decree, that Mariea “established through testimony that the Defendant incurred solely the outstanding non-marital debt on the Citicard account and the Defendant did not deny this testimony.” However, Mariea did not testify that Eric was the sole user of the Citicard account, but rather that the Citicard account was “primarily” used by Eric. “Primarily” suggests that although Eric used it more than Mariea, Mariea sometimes used it. There is no evidence upon which the court could ascertain what percentage of the debt was actually incurred by Eric, but it must have been less than 100%.

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.” Since there is no evidence upon which to determine what portion of the Citicard debt was incurred by Eric, we find the trial court abused its discretion when it found that it was separate non-marital property.

{¶ 22} Accordingly, the third assignment of error is sustained.

{¶ 23} Judgment is affirmed in part and reversed in part. Case remanded for the court to make an equitable division of the Citicard debt.

It is ordered that appellant and appellee share the 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 common pleas court, 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.

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COLLEEN CONWAY COONEY, PRESIDING JUDGE

KENNETH A. ROCCO, J., and  
KATHLEEN ANN KEOUGH, J., CONCUR