

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ROBERT J. BUDD

C. A. No. 24485

Appellee

v.

LINDA M. BUDD

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2004-09-3850

Appellant

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

CARR, Judge.

{¶1} Appellant, Linda Budd, appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} Appellee, Robert Budd (“Robert”), filed a complaint for divorce on September 30, 2004. Linda Budd (“Linda”) filed her answer and counterclaim on October 29, 2004. Robert responded to the counterclaim on November 1, 2004. Linda’s request for temporary restraining orders was granted on November 8, 2004. On November 10, 2004, the trial court granted Robert’s request that he be granted exclusive possession and use of the former marital residence.

{¶3} After hearing testimony from both parties, the trial court approved an agreement between the parties and granted them a divorce on March 1, 2006. On March 23, 2006, Linda filed a motion to vacate, amend or modify divorce decree which was subsequently granted.

{¶4} Robert then filed a motion for temporary orders on May 26, 2006, and the case was again set for trial on November 8, 2006. The case proceeded to trial but before the trial court could issue a decision, the trial judge recused himself on November 28, 2006, and Linda's attorney subsequently withdrew on November 30, 2006.

{¶5} Robert again filed a motion for temporary orders and requested that the trial court issue a decision based upon the transcript of the proceedings. A new judge was appointed and the transcript of the November 2006 trial was transcribed at his request on March 27, 2007. Linda had filed a motion opposing the request for a ruling on the transcript on February 15, 2007. She proceeded to file a motion for a new trial on January 2, 2008.

{¶6} The case proceeded to trial on May 20, 2008. The record indicates that the parties disputed the value of certain marital assets and could not stipulate to a set of dates by which marital assets were to be valued. Counsel for Robert requested additional time to submit updated pension reports which were subsequently filed on June 16, 2008. The trial court issued its decision on October 21, 2008 and it is from that decision that Linda appeals.

{¶7} Linda raises twelve assignments or error. This Court has consolidated certain assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FAILING TO MAKE A FINDING AS TO THE TERM OF THE MARRIAGE.”

{¶8} Ohio appellate courts generally apply the abuse of discretion standard in domestic relations cases where there is a challenge to the trial court's decision regarding the distribution of marital assets. See e.g. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. However, the question of whether the trial court complied with a statutory provision is a question of law. This Court

reviews questions of law under the de novo standard of review. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, at ¶11. When reviewing a matter de novo, this Court does not give deference to the trial court's decision. *Id.*

{¶9} In her first assignment of error, Linda contends that the trial court erred in failing to make a finding as to the term of the marriage. According to R.C. 3105.171(A)(2), "During the marriage" means whichever of the following is applicable:

"(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

"(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, 'during the marriage' means the period of time between those dates selected and specified by the court."

{¶10} In *Berish v. Berish* (1982), 69 Ohio St.2d 318, 321, the Supreme Court of Ohio recognized that the circumstances of a particular case may make a date prior to trial more equitable for the determination and valuation of marital assets. The Supreme Court held:

"In order to do equity, a trial court must be permitted to utilize alternative valuation dates, such as the time of permanent separation or de facto termination of the marriage, where reasonable under the facts and circumstances presented in a particular case. In this fashion, the trial court will have the necessary flexibility to exercise its discretion in making truly equitable awards consistent with legitimate expectations of the parties." *Id.*

{¶11} R.C. 3105.171(G) further provides:

"In any order for the division or disbursement of property or a distributive award made pursuant to this section, the court shall make written findings of fact that support the determination that the marital property had been equitably divided and shall specify the dates it used in determining the meaning of 'during the marriage'."

{¶12} In the judgment entry which was dated October 21, 2008, the trial court found that the parties were married on May 15, 1976. While the trial court made reference to the marriage

lasting 32 years on two separate occasions, the judgment entry did not include a specific finding as to the date on which the marriage terminated. R.C. 3105.171(G) requires the trial court to specify the dates it used in determining the meaning of “during the marriage.” Here, the trial court did not specify the termination date. Failing to specify the precise dates that were used in valuing assets constitutes error on the part of the trial court. *Weller v. Weller*, 11th Dist. Nos. 2006-G-2723, 2006-G-2724, 2007-Ohio-4964, at ¶29. Given the broad discretion a trial court has in determining the duration of the marriage, the trial court must clearly identify the date upon which the marriage was terminated for the purpose of valuing marital assets. Generally, the trial court should consistently apply the same set of dates when valuing marital property in a divorce proceeding. *Coble v. Gilany* (Dec. 23, 1999), 11th Dist. No. 97-T-0196. If the trial court determines it is necessary to value certain marital assets from a different set of dates, it must adequately explain its reasons for choosing different valuation dates for those particular marital assets. *Id.* An appellate court cannot undertake a review of whether marital assets have been accurately valued and divided until the specific valuation dates used by the trial court have been clearly identified.

{¶13} This case must be remanded to determine a specific date of termination and to make all other necessary factual findings prior to the valuation and division of marital assets.

Linda’s first assignment of error is sustained.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN VALUING THE VARIOUS ASSETS AT DIFFERENT DATES WITHOUT SPECIFIC FINDINGS AS TO THE RATIONALE FOR THE VALUATION INCONSISTENCIES.”

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT EQUALLY DIVIDING THE ASSETS OF THE MARRIAGE AS OF THE DATE OF THE FIRST TRIAL.”

ASSIGNMENT OF ERROR IV

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN VALUING THE RETIREMENT ASSETS OF THE PARTIES AS OF JUNE OF 2008 WHEN APPELLEE HAS BEEN ‘SPENDING DOWN’ HIS RETIREMENT ASSETS DURING THE PENDENCY OF THE ACTION WHILE APPELLANT HAS BEEN INCREASING THE VALUE OF HERS AS SHE CONTINUED TO WORK THROUGHOUT THE PENDENCY OF THE ACTION.”

ASSIGNMENT OF ERROR V

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY NOT EQUALLY DIVIDING THE ASSETS OF MARRIAGE.”

ASSIGNMENT OF ERROR VI

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY AWARDING SUBSTANTIALLY MORE MARITAL PROPERTY TO APPELLEE BASED UPON SOME HYPOTHETICAL FUTURE SPOUSAL SUPPORT CREDITED TO HIM.”

ASSIGNMENT OF ERROR VII

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY ORDERING APPELLANT TO PAY SPOUSAL SUPPORT WITHOUT THE REQUISITE FINDINGS REQUIRED BY STATUTE.”

ASSIGNMENT OF ERROR VIII

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THE APPELLEE TO BE VOLUNTARILY UNEMPLOYED/UNDEREMPLOYED.”

ASSIGNMENT OF ERROR IX

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT APPELLEE CONTRIBUTED TO APPELLANT’S EDUCATION WHEN THE MANIFEST WEIGHT OF THE EVIDENCE DEMONSTRATED THAT APPELLANT HAD RECEIVED SCHOLARSHIPS

AND GRANTS AND ALSO INCURRED SUBSTANTIAL STUDENT LOAN OBLIGATIONS TO ACQUIRE HER EDUCATION.”

ASSIGNMENT OF ERROR X

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THE SEVERENCE PACKAGE PAID TO APPELLEE TO BE A MARITAL ASSET AND EQUITABLY DIVIDING OR APPORTIONING ITS VALUE IN THE DIVISION OF ASSETS.”

ASSIGNMENT OF ERROR XI

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY FAILING TO FIND THE WORKER’S COMPENSATION AWARD RECEIVED BY APPELLEE TO BE A MARITAL ASSET AND EQUITABLY DIVIDING OR APPORTIONING ITS VALUE IN THE DIVISION OF ASSETS.”

ASSIGNMENT OF ERROR XII

“THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE ACCOUNT CLOSED BY APPELLEE WAS THE ASSET OF THE PARTIES’ EMANCIPATED SON.”

{¶14} Linda raised eleven additional assignments of error. Linda alleges the trial court erred in equitably dividing marital assets, awarding spousal support and reaching certain findings of fact. A review of these issues would be premature without a clear understanding of the valuation dates used by the trial court. The filings in this case indicate that the parties clearly have conflicting views as to the date which should be used in determining the value of certain assets. It would be premature for this Court to review the trial court’s findings related to the distribution of assets as well as the awarding of child support until all assets are initially valued in accordance with a set of dates which clearly define the duration of the marriage.

{¶15} Because our resolution of the first assignment of error is dispositive of this appeal, this Court declines to address the remaining assignments of error as they are rendered moot. See App.R. 12(A)(1)(C).

III.

{¶16} Linda's first assignment of error is sustained. This Court declines to address the remaining eleven assignments of error. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division is reversed and the cause remanded for further proceedings consistent with this decision.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

MARGARET E. STANARD, Attorney at Law, for Appellant.

RANDAL A. LOWRY, and KENNETH L. GIBSON, Attorneys at Law, for Appellee.