

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

RICHARD W. LINVILLE

Appellant/Cross-Appellee

v.

COLLEEN M. LINVILLE

Appellee/Cross-Appellant

C. A. No. 25108

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2008-07-2110

DECISION AND JOURNAL ENTRY

Dated: November 24, 2010

CARR, Judge.

{¶1} Richard Linville (“Husband”) and Colleen Linville (“Wife”) separately appeal the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} Husband filed a complaint for divorce on July 16, 2008. On August 13, 2008, Wife filed an answer and counterclaim for divorce. Husband filed an answer to the counterclaim. Pursuant to temporary orders issued on September 5, 2008, Husband was ordered, among other things, to vacate the marital home and pay temporary spousal support to Wife in the amount of \$500.00 per month.

{¶3} A trial was held on August 5, 2009, and October 8, 2009. Immediately prior to trial, Husband orally moved to amend his complaint to request a legal separation. On October 26, 2009, the domestic relations court issued a “Final Entry Decree of Divorce,” although the

court granted the parties a legal separation. The domestic relations court issued orders regarding the division of marital and separate property, and ordered Husband to pay spousal support to Wife. Husband filed a timely appeal, and Wife filed a timely cross-appeal. This Court consolidates and rearranges some assignments of error to facilitate review.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED BY NOT PROVIDING A FULL CREDIT FOR [HUSBAND’S] SEPARATE PROPERTY AS SUPPORTED BY THE EVIDENCE AS REQUIRED BY O.R.C. [§3105.171(A)(6), AND 9(B).”

CROSS-ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN GRANTING HUSBAND A SEPARATE PROPERTY INTEREST IN THE PROPERTY AT 121 SOUTHWEST AVENUE IN THE AMOUNT OF \$20,000.”

CROSS-ASSIGNMENT OF ERROR VI

“THE TRIAL COURT FAILED TO MAKE A FINDING OF WIFE’S SEPARATE PROPERTY DESPITE A STIPULATION OF THE PARTIES TO THE EFFECT THAT ITEMS OF PERSONAL PROPERTY WERE WIFE’S SEPARATE PROPERTY.”

{¶4} Husband and Wife argue that the trial court erred in its awards of separate property to the parties. This Court agrees.

{¶5} This Court has stated:

“The characterization of property as either marital or separate is a factual inquiry, and we review such characterization under a manifest weight of the evidence standard. As such, we will affirm the trial court’s characterizations if they are supported by competent, credible evidence. In applying the foregoing standard, this Court recognizes its obligation to presume that the trial court’s factual findings are correct and that while a finding of error in law is a legitimate ground for reversal, [] a difference of opinion on credibility of witnesses and evidence is not.” (Internal quotations and citations omitted.) *Wohleber v Wohleber*, 9th Dist. Nos. 08CA009402, 08CA009403, 2009-Ohio-995, at ¶7.

{¶6} R.C. 3105.171(B) states:

“In divorce proceedings, the court shall, and in legal separation proceedings upon the request of either spouse, the court may, determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section. For purposes of this section, the court has jurisdiction over all property, excluding the social security benefits of a spouse other than as set forth in division (F)(9) of this section, in which one or both spouses have an interest.”

{¶7} “Separate property” is defined as

“all real and personal property and any interest in real or personal property that is found by the court to be any of the following:

“(i) An inheritance by one spouse by bequest, devise, or descent during the course of the marriage;

“(ii) 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;

“(iii) Passive income and appreciation acquired from separate property by one spouse during the marriage;

“(iv) Any real or personal property or interest in real or personal property acquired by one spouse after a decree of legal separation issued under section 3105.17 of the Revised Code;

“(v) Any real or personal property or interest in real or personal property that is excluded by a valid antenuptial agreement;

“(vi) Compensation to a spouse for the spouse’s personal injury, except for loss of marital earnings and compensation for expenses paid from marital assets;

“(vii) Any gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse.” R.C. 3105.171(A)(6).

{¶8} 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.”

Husband's separate property interest in the marital home

{¶9} Husband argues that the domestic relations court erred by awarding him only a \$20,000.00 interest in the marital home as separate property. Wife argues that the domestic relations court erred by awarding Husband a \$20,000.00 interest in the marital home as his separate property. This Court agrees that the domestic relations court's order in this regard is against the manifest weight of the evidence.

{¶10} The undisputed facts are as follows. The parties were married on September 5, 1987. They lived in the marital home at 121 Southwest Avenue, Tallmadge, Ohio, since 1991. Husband and his brother each inherited a one-half interest in the home prior to marriage. Each interest was then worth \$33,000.00. Husband and Wife bought out the brother's one-half interest by paying him \$20,000.00 with money they realized from the sale of a prior marital home and \$200.00 per month from marital money until they had purchased the brother's interest in full. The house is titled in the names of both Husband and Wife. The home at 121 Southwest Avenue was free and clear of any mortgage or other debt when Husband and Wife took a \$40,000.00 mortgage against the home to build an addition consisting of a dog salon for Wife's home business and a family room. Two years later, Husband and Wife refinanced the mortgage and borrowed \$70,000.00 which they used, in part, to buy a car for Wife and a Harley-Davidson motorcycle for Husband. The balance remaining on the loan at the time of the hearing was approximately \$17,000.00. The fair market value of the home at the time of the hearing was \$110,000.00.

{¶11} This Court has stated:

“The fact that the property was brought into the marriage by one party is not determinative of the disposition of the property. Indeed, the actions and intent of the parties may convert separate property to marital property, such as when one spouse grants the other an interest in his or her separate property during the

marriage. The party seeking to have an asset classified as separate property bears the burden of proof by the preponderance of the evidence.” (Internal citations omitted.) *Bertoldi v. Bertoldi* (Oct. 8, 1997), 9th Dist. No. 18346.

In *Bertoldi*, we declined to find error in the trial court’s determination that the remaining equity in the parties’ real estate was marital property where the husband had granted the wife an interest in the property for their joint lives, remainder to the survivor, and where there were numerous mortgages taken against the property without any evidence to show how that money was spent or who repaid the loans. We concluded that there could be no error given the “paucity of pertinent details to determine how much, if any, separate property remains in the asset.” *Id.*

{¶12} Unlike the situation in *Bertoldi*, this case does not suffer from a “paucity of pertinent details.” The parties presented evidence regarding the value of Husband’s interest in the home by way of inheritance, the current fair market value of the property, the mortgages taken out against the home, improvements made to the home, and specific items purchased with the proceeds of the mortgages. Moreover, while there was evidence that Husband’s separate interest in the property was commingled with Wife’s interest, there was additional evidence regarding the use of mortgage proceeds for identifiable purchases.

{¶13} Instead of considering the traceability of Husband’s separate interest in the real estate, the domestic relations court merely awarded Husband the “one-half interest in the home [which] [h]e inherited[,]” which the trial court erroneously identified as \$20,000.00. The evidence was clear, however, that Husband’s one-half interest in the property was worth \$33,000.00 at the time of his inheritance. The parties paid Husband’s brother \$20,000.00 as a down payment to obtain the brother’s one-half interest in the property. They then paid the brother the balance of his interest in monthly installments. There was no evidence presented by either party that \$20,000.00 reflected the value of Husband’s inheritance. Furthermore, the trial

court failed to consider the actions taken by the parties with regard to the property subsequent to Husband's inheritance in an effort to determine what portion of the commingled assets can be traced as Husband's separate property, if any. Accordingly, the trial court's award of \$20,000.00 to Husband as separate property in relation to his interest in the marital home is against the manifest weight of the evidence. Husband's first assignment of error and Wife's first cross-assignment of error are sustained.

Wife's separate property interest in gifts from family members

{¶14} Wife argues that the domestic relations court erred by failing to award to her as separate property certain items stipulated to by the parties. This Court agrees.

{¶15} Wife testified regarding a list of 16 items she had received as gifts from various family members during the course of her marriage. Both Husband and his attorney agreed that Wife was entitled to those items. When asked whether there was any dispute regarding those items, Husband stated, "No. Her personal things are from her family." Nevertheless, the domestic relations court failed to recognize the gifts Wife had received from her family as her separate property. Accordingly, the trial court's judgment is against the manifest weight of the evidence. Wife's sixth cross-assignment of error is sustained.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY NOT ACCOUNTING AS INCOME TO [WIFE] HER RENTAL INCOME FROM A LAND CONTRACT AND SUBSEQUENTLY ORDERING SPOUSAL SUPPORT TO BE PAID BY [HUSBAND] TO [WIFE]."

CROSS-ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED IN DETERMINING THE INCOME OF WIFE IN HER DOG GROOMING BUSINESS AND IN NOT MAKING A FINDING OF HUSBAND'S INCOME."

CROSS-ASSIGNMENT OF ERROR III

“THE TRIAL COURT’S FINDING THAT WIFE HAD NOT LOST INCOME PRODUCTION CAPACITY AS A RESULT OF HER MARITAL DUTIES WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

CROSS-ASSIGNMENT OF ERROR IV

“THE TRIAL COURT’S FINDING THAT WIFE’S HEALTH DID NOT LIMIT HER EARNING ABILITY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶16} Both Husband and Wife argue that the trial court erred in its determination of spousal support because it failed to make appropriate findings regarding the incomes of the parties. This Court agrees.

{¶17} R.C. 3105.18(B) allows a trial court to award reasonable spousal support to either party in divorce and legal separation proceedings. The statute continues, in relevant part:

“In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support *** the court shall consider all of the following factors: [t]he income of the parties, from all sources ***.” R.C. 3105.18(C)(1).

{¶18} In this case, the domestic relations court failed to specify Husband’s income, stating only that “Husband’s income is more than three times greater than Wife’s.” In addition, the domestic relations court failed to account for the parties’ income from rental property they own jointly. Wife testified that she alone has collected the monthly rents from the four units, and that she uses that money to pay expenses associated with the rental property. Wife further testified that she puts a portion of the money collected from rent every month in an account for her daughter. She testified that she and Husband have also used monthly rental income to pay for family vacations. The evidence establishes that not all the monthly rental income was spent to maintain the rental property. Rather, the evidence established that some portion was available for recreational use and to allow Husband and Wife to bestow a monthly gift on their daughter.

Accordingly, some portion of the rental monies constituted income for one or more of the parties, yet the domestic relations court failed to consider such income as required by statute. By failing to properly consider the parties' incomes, the domestic relations court necessarily erred in its calculation of spousal support. Accordingly, Husband's second assignment of error and Wife's second cross-assignment of error are sustained.

{¶19} Wife further argues that the domestic relations court erred in its findings regarding her ability to earn income. Because the trial court must revisit the issue of the parties' respective incomes, including determining what amount of monthly rental income can be attributed to either, both, or neither party, the issue of the impact of Wife's marital duties and health issues on her ability to continue to earn income is premature.

{¶20} The land contract regarding the parties' rental property was in foreclosure at the time of the hearing. However, the outcome of the foreclosure action was still undetermined. Specifically, it was unknown whether the owner of the property would prevail in his action or whether Husband and/or Wife would manage to redeem their interest in the property prior to finalization of the matter. It is difficult to imagine how prior marital duties and on-going health issues would affect Wife's ability to cash rental checks. Therefore, any consideration of the evidence regarding prior marital duties and on-going health issues must be made within the context of the means by which Wife obtains her income. Our analysis would depend, in part, on whether the trial court ultimately attributes rental income to Wife and, if so, how much rental income would be attributed to her. Until such a determination is made by the trial court, this Court's consideration of the issues raised by Wife in her third and fourth assignments of error is premature. We, therefore, decline to address those assignments of error.

CROSS-ASSIGNMENT OF ERROR V

“THE TRIAL COURT ABUSED ITS DISCRETION IN THE AWARD OF SPOUSAL SUPPORT IN ONLY THE AMOUNT OF \$750 PER MONTH AND FOR ONLY THE DURATION OF 73 MONTHS.”

{¶21} Wife argues that the domestic relations court abused its discretion in determining the amount and duration of spousal support. Because of this Court’s resolution of the second assignment and cross-assignments of error, the fifth cross-assignment of error is rendered moot and we decline to address it. See App.R. 12(A)(1)(c).

CROSS-ASSIGNMENT OF ERROR VII

“THE TRIAL COURT ABUSED ITS DISCRETION IN ITS ORDERS RELATING TO THE HOUSE, THE OPTIONS TO EACH PARTY, AND THE TREATMENT OF THE FEDERAL TAX LIENS.”

{¶22} Wife argues that the trial court abused its discretion in its order regarding the division of marital property, specifically the marital home. This Court agrees.

{¶23} “A trial court has broad discretion in making divisions of property in domestic cases.” *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401. Accordingly, the domestic relations court’s decision regarding the division of marital property will not be reversed absent an abuse of discretion. *Id.* An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶24} In this case, the domestic relations court ordered that the marital home be sold and that the proceeds be divided equally between Husband Wife, but only after payment was made

from the proceeds for the mortgage, tax liens, and Husband's \$20,000.00 separate property award. This Court has already determined that the trial court erred in its determination of Husband's separate property interest in the marital home. Accordingly, the division of the marital home was arbitrary as it was premised in part on Husband's unsubstantiated separate interest in the property.

{¶25} The domestic relations court further ordered that first Wife, then Husband, would have the option to purchase the other's interest in the marital home within a specific limited period of time. The trial court recognized, however, an approximate \$37,000.00 tax lien on the marital home which arose out of the parties' failure to file income tax returns from 2000 through 2008. The trial court ordered that whichever party exercised the option would cause the other to be relieved of any liability with respect to the tax lien. However, in a later order, the trial court ordered the parties to file amended joint tax returns for tax years 2000 through 2008 and to divide equally any refunds or liabilities. This order is patently inconsistent with the prior order directing one party to cause the other to be relieved of the IRS lien arising out of the parties' failure to file tax returns. Accordingly, the order regarding the division of the marital home was arbitrary as it contradicted another order addressing the division of the parties' tax refunds and/or liabilities.

{¶26} Moreover, the evidence adduced at hearing demonstrated that Husband had hired an attorney who was helping to facilitate negotiations with the IRS to reduce the parties' tax obligation. If successful, the amount and perhaps existence of the tax lien on the marital home would change. Notwithstanding unrebutted evidence that the parties' tax issues and liabilities had not been settled, the trial court determined the equity in the marital home by subtracting \$16,000 for the mortgage, \$37,311.00 for the tax lien, and \$20,000.00 for Husband's separate

property award from \$110,000.00, the stipulated fair market value of the property. It then used the amount of equity to calculate how much each party must pay the other if he or she chose to exercise the option to buy out the other's share of the marital home and divide this marital asset. However, because two of the three figures had not yet been properly determined, the equity calculation was inaccurate and the method used by the trial court to divide the property was arbitrary.

{¶27} Based on the reasons above, the domestic relations court abused its discretion in its division of the marital home. Wife's seventh cross-assignment of error is sustained.

III.

{¶28} Husband's first and second assignments of error are sustained. Wife's first, second, sixth, and seventh cross-assignments of error are sustained. We decline to address the third, fourth, and fifth cross-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 opinion.

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 equally to both parties.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, P. J.
CONCURS, SAYING:

{¶29} I concur in the majority’s judgment and most of its opinion. I write separately to note that Ms. Linville’s seventh cross-assignment of error must be sustained because, as noted in the majority’s opinion in regard to Mr. Linville’s first assignment of error and Ms. Linville’s first cross-assignment of error, the trial court’s division of the parties’ home was against the manifest weight of the evidence. To say that that division is also an “abuse of discretion” does nothing but contribute to the existing confusion regarding standards of review.

APPEARANCES:

CHRIS G. MANOS, Attorney at Law, for Appellant/Cross-Appellee.

KENNETH L. GIBSON and MORA LOWRY, Attorneys at Law, for Appellee/Cross-Appellant.