

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

SANDRA RINALDI	:	JUDGES:
	:	Julie A. Edwards, P.J.
Plaintiff-Appellee	:	William B. Hoffman, J.
	:	Patricia A. Delaney, J.
-vs-	:	Case No. 2009 CA 00200
	:	
JOHN RINALDI	:	<u>OPINION</u>
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Stark County Court of Common Pleas, Family Court Division, Case No. 2008 DR 00442
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JUDGMENT:	Affirmed In Part and Reversed and Remanded In Part
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DATE OF JUDGMENT ENTRY:	June 30, 2010
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, P.J.

{¶1} Defendant-appellant, John Rinaldi, appeals from the April 17, 2009, Judgment Entry of the Stark County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant John Rinaldi and appellee Sandra Rinaldi were married on August 24, 1996. The two have a daughter who was born on June 9, 1993.

{¶3} On April 10, 2008, appellee filed a complaint for divorce against appellant. At the time, appellant was incarcerated.

{¶4} A temporary orders hearing was held on May 20, 2008. The Magistrate, in a Decision filed on May 21, 2008, recommended that appellant be ordered to pay \$177.52 a month in child support commencing on May 1, 2008. The trial court, as memorialized in a Judgment Entry filed on July 2, 2008, overruled appellant's objections to the Magistrate's Decision and approved and adopted the Magistrate's Decision.

{¶5} Thereafter, a trial was held on February 23, 2009. Appellant, who was represented by counsel, was not present at the trial due to his incarceration.

{¶6} At the trial, the parties stipulated to grounds of incompatibility. Appellee testified that she and appellant separated on March 2, 2007, when appellant was asked to leave the marital home by Children's Services and the Sheriff's Department over allegations involving sexual misconduct. In May of 2007, appellant was picked up by the Sheriff's Department and taken to jail. Testimony was adduced that appellant was sentenced to eight years in prison after having been convicted of sexually abusing appellee's child from a prior relationship for a period of eleven years. Appellee testified

that since March of 2007, appellant had not paid her any child support or provided her with any financial assistance.

{¶7} Appellee, who was 42 years old at the time, testified that she was employed by the Timken Company and had been employed there full time for 10 years. She testified that she had a 401K worth approximately \$39,447.00 and that, based on her 2008 W2, her monthly gross income was approximately \$4,771.00. Her income in 2008 was \$57,260.00. At the time his employment was terminated due to absences caused by his incarceration, appellant had been employed by the Hoover Company. Appellee testified that appellant had a pension at the Hoover Company and that he cashed out his pension and used \$16,000.00 for the defense in his criminal case.

{¶8} Appellant, who has a high school education, earned \$36,427.00 in 2003, \$38,444.00 in 2004, \$36,812.00 in 2005. His partial income for 2006 was \$29,017.00. Appellant's tax returns were admitted as Plaintiff's Exhibit 12.

{¶9} Appellee testified that appellant removed \$22,200.00 in marital property from the marital home on two occasions before his arrest. She testified that the property, except for guns, was moved to either appellant's friends' house or his mother's house. Appellee testified that she removed the guns from the marital home and told appellant where they were and that appellant and his brother then removed them from her brother-in-law's house and took them to his mother's house. The items that appellant removed were never appraised.

{¶10} Testimony was adduced that the marital home was appraised at \$104,000.00 and that the mortgage balance on the house was \$125,656.00. Appellee

testified that since appellant vacated the marital residence, she had made \$20,475.00 in mortgage payments. The monthly payments were \$975.00.

{¶11} On cross-examination, appellee testified that she signed the papers allowing appellant to withdraw the \$16,000.00 from his retirement account. Of the \$16,000.00, at least \$10,000.00 went to appellant's defense counsel and David Price, appellant's power of attorney. Appellee further testified that the marital home was listed in both parties' names, and that she intended to remain in the home. Appellee testified that she maintained a Dodge truck with approximately \$2,500.00 in equity and that appellant had three vehicles that were acquired during the marriage.

{¶12} Appellee was questioned about the appraisal of the house and the parties' personal property. She testified that she did not instruct the appraiser what items to appraise and that "he appraised what he was suppose (sic) to appraise." Transcript at 29. The following is an excerpt from her testimony on cross-examination:

{¶13} "Q. Is it fair to say that you had an opportunity to advise him that there was property that belonged to your husband that you maintained an interest in elsewhere?

{¶14} "A. I asked him if he was appraising the property that was removed from the house. He said that he had no order to do so.

{¶15} "Q. Okay. Did you talk to your counsel about that issue?

{¶16} "A. Yes.

{¶17} "Q. Is it fair to say that you had the opportunity to pay him to go appraise that property?

{¶18} "A. No.

{¶19} “Q. You knew where the property that Mr. Rinaldi had allegedly took from the marital residence was located did you not?”

{¶20} “A. I know where it was taken from originally but I have no idea where it is now.”

{¶21} “Q. You suggested that it may be in the possession of his Mother and or his power of attorney Dave Price is that accurate?”

{¶22} “A. Ah when it left the house that’s where it (sic) most of his property went to Dave’s and I supposed that the guns went to his Mother’s or that his Mother had them.”

{¶23} “Q. But you didn’t hire an appraiser to go to his Mother’s or to Dave Price’s to appraise that property?”

{¶24} “Q. No.” Transcript at 29-30.

{¶25} When questioned about the property that appellant had removed from the marital home, appellee testified that appellant removed 300,000 trading cards. She testified that the cards were worth \$3,000.00 based upon a minimum purchase price of one penny apiece. Plaintiff’s Exhibit 15, which was admitted at trial, listed \$22,200.00 in property that appellant allegedly had removed from the marital residence.

{¶26} Appellee also testified that appellant had an approximately \$4,000.00 medical debt to Concord Therapy Group that was incurred during the marriage for therapy to his shoulder.

{¶27} Pursuant to a Judgment Entry filed on April 17, 2009, the trial court granted the parties a divorce on the basis that the parties had lived separate and apart for a period of one year without cohabitation. The trial court ordered appellant to pay

child support in the amount of \$346.21 a month if health insurance was provided and \$288.65 plus cash medical support in the amounting \$93.67 if health insurance was not available. The trial court further awarded appellee the marital residence, her Timken 401K, personal property valued at \$2,282.00 and the 2000 Dodge Durango. The trial court awarded appellant the \$16,000.00 Hoover pension that he previously had withdrawn and “[t]he personal property removed by him from the marital residence for which he has failed to account.” In its Judgment Entry, the trial court ordered appellant to pay appellee \$7,729.00 as and for spousal support “[i]n order to affect an equalization of income.” Finally, the trial court, in its Judgment Entry, stated, in relevant part, as follows:

{¶28} “The Court further, based upon the financial misconduct of the Defendant relative to the loss of his employment awards to the Plaintiff the sum of \$10,238.00 representing one-half of the mortgage payments made by her subsequent to the Defendant’s vacating the marital residence until the final hearing date herein. Also, the sum of \$3,115.89 representing the amount of child support that the Defendant should have paid for the benefit of his child from the period of his vacating the martial residence to the date of May 1, 2008. This combined amount of \$13,353.89 is hereby awarded to the Plaintiff as and for spousal support and shall be paid by the Defendant at \$400.00 per month until paid in full through the Stark County Child Support enforcement Agency by wage withholding together with necessary poundage until paid in full.”

{¶29} Appellant now raises the following assignments of error on appeal:

{¶30} “I. IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO GRANT THE DIVORCE ON THE GROUNDS THAT THE PARTIES HAVE

LIVED SEPARATE AND APART FOR OVER A YEAR, WHEN THE PARTIES STIPULATED TO INCOMPATIBILITY AND THE COURT PREVIOUSLY FOUND INCOMPATIBILITY.

{¶31} “II. IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FIND APPELLANT COMMITTED FINANCIAL MISCONDUCT AND TO ASSIGN THAT FINANCIAL MISCONDUCT TO SPOUSAL SUPPORT.

{¶32} “III. IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO AWARD APPELLEE SPOUSAL SUPPORT TO EITHER EQUALIZE INCOME OR EQUALIZE PROPERTY DIVISION.

{¶33} “IV. IT WAS ERROR AND ABUSE OF DISCRETION FOR THE TRIAL COURT TO DIVIDE THAT MARTIAL PROPERTY BASED ON INADEQUATE VALUATION.”

I

{¶34} Appellant, in his first assignment of error, argues that the trial court erred in granting the parties a divorce on grounds that the parties had lived separate and apart for over one year without cohabitation. Appellant notes that the parties stipulated to grounds of incompatibility and that the trial court indicated on the record that it would be granting the divorce on the stipulated grounds.

{¶35} In *Buckles v. Buckles* (1988), 46 Ohio App.3d 102, 546 N.E.2d 950, paragraph eight of the syllabus, the court held as follows: “[a] trial court has broad discretion to determine the proper grounds for divorce, and such finding should not be overturned in the absence of any showing that there was an abuse of discretion of such a nature as to affect the distribution of property, the award of sustenance alimony and

division of property, the award of child custody, or otherwise to prejudicially affect the complaining party.” In determining whether the trial court abused its discretion, we are reminded that “abuse of discretion” ‘connotes more than an error of law or of judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable. [Citations omitted.]” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶36} We find that there’s no evidence that appellant was prejudiced by the court’s actions in granting the divorce on the grounds that it did rather than on grounds of incompatibility. Moreover, there was evidence in the record that the parties had lived separate and apart for over a year without cohabitation. As is stated above, evidence was adduced at the trial that appellant, who was sentenced to eight years in prison on August 15, 2007, had been incarcerated since 2007 and was incarcerated as of the time of the trial.

{¶37} Based on the foregoing, we find that the trial court did not abuse its discretion in granting the parties a divorce on grounds of living separate and apart for a period of one year without cohabitation. The trial court’s decision was not arbitrary, unconscionable or unreasonable.

{¶38} Appellant’s first assignment of error is, therefore, overruled.

II

{¶39} Appellant, in his second assignment of error, argues that the trial court abused its discretion when it found that appellant had committed financial misconduct and when it assigned the financial misconduct to spousal support.

{¶40} R.C. 3105.171(E)(3) provides “[i]f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.” The burden of proving financial misconduct is on the complaining spouse.

{¶41} The trial court has discretion in determining whether a spouse committed financial misconduct, subject to a review of whether the determination is against the manifest weight of the evidence. *Boggs v. Boggs*, Delaware App. No. 07 CAF 02, 2008-Ohio-1411 at paragraph 73, citing *Babka v. Babka* (1992), 83 Ohio App.3d 428, 615 N.E.2d 247.

{¶42} Financial misconduct implies some type of wrongdoing such as interference with the other spouse's property rights. *Bucalo v. Bucalo*, Medina App. No. 05CA0011-M, 2005-Ohio-6319. The burden of proving financial misconduct is on the complaining party. *Gallo v. Gallo*, 2002-Ohio-2815, Lake App. No. 2000-L-208.

{¶43} In *Mikhail v. Mikhail*, Lucas App. No. L-03-1195, 2005-Ohio-322, the Sixth District found that financial misconduct must be based on “wrongdoing.” In describing the wrongdoing, the court stated “[t]ypically, the offending spouse * * * either profit[s] from the misconduct or intentionally defeat[s] the other spouse's distribution of marital assets.” *Id.* at paragraph 28.

{¶44} In *Eggeman v. Eggeman*, Auglaize App. No. 02-04-06, 2004-Ohio-6050, the Third Appellate District also found that “[b]efore a compensating award is made * * * there must be a clear showing that the offending spouse either profited from the alleged misconduct or intentionally defeated the other spouse's distribution of assets.” *Id.* at

paragraph 24. The court found while the husband did engage in financial misconduct, the distributive award to the wife was not warranted because the record failed to show the husband personally gained or profited from his misconduct or that the wife's interest was defeated. *Id.*

{¶45} In the case sub judice, the trial court found that appellant had committed financial misconduct because, after vacating the marital residence, appellant failed to contribute to any of the marital debt or the expenses incurred by his family for their sustenance. The court stated that appellant's "failure to do so constitutes financial misconduct based upon his voluntary actions which culminated in his incarceration and loss of employment."

{¶46} There was evidence adduced at trial that, due to the allegations of sexual misconduct involving appellee's daughter, appellant was asked to leave the marital residence on March 2, 2007. Appellee testified that appellant was picked up by the Sheriff's Department and taken to the Stark County Jail at the end of May of 2007. As evidenced by Plaintiff's Exhibit 10, appellant was indicted on May 30, 2007, on two counts of rape and one count of sexual battery and, on August 10, 2007, entered pleas of guilty to two counts of rape and one count of sexual battery as charged in an amended indictment. As a result, appellant, on August 15, 2007, was sentenced to an aggregate prison sentence of eight years. As evidenced by Plaintiff's Exhibit 8, appellant was terminated by the Hoover Company due to four consecutive days of absence (June 1st, 4th, 5th and 6th of 2007) without report or with an unacceptable report. Thus, appellant lost his job as a result of his incarceration. We do not find this to be financial misconduct as intended by R.C. 3105.171(E)(3), which states that financial

misconduct includes, but is not limited to, dissipation, destruction, concealment or fraudulent disposition of assets.

{¶47} Furthermore, the trial court, in its April 17, 2009, Judgment Entry, specifically awarded appellee the sum of \$10,238.00 “representing one-half of the mortgage payments made by her subsequent to [appellant’s] vacating the marital residence until the final hearing date herein”. The trial court also awarded appellee the sum of \$3,115.89 “representing the amount of child support that [appellant] should have paid for the benefit of his child from the period of his vacating the marital residence to the date of May 1, 2008.” May 1, 2008, was the date on which temporary child support was ordered to begin. The trial court ordered appellant to pay the combined \$13,353.89 to appellee “as and for spousal support.”

{¶48} However, there was no temporary order requiring appellant to pay spousal support to appellee in this case. By ordering appellant to pay spousal support to appellee from the date appellant vacated the marital residence in March of 2007 forward, the trial court effectively retroactively awarded spousal support. A trial court can only retroactively award spousal support to a date when spousal support was requested. *LeBlanc v. LeBlanc* (July 17, 1998), Greene App. No. 97 CA 85, 1998 WL 399902. We find, therefore, that the trial court could not retroactively award spousal support to the date of vacation of the marital residence when there was no spousal support requested at such time.

{¶49} Finally, we note that pursuant to this Court’s Opinion in *Ebner v. Ebner*, Stark App. Nos. 2007 CA 00318, 2007 CA 00396, 2008-Ohio-5335, a trial court cannot

award spousal support based on a finding of financial misconduct. As noted in *Ebner*, the remedy for financial misconduct is an unequal distribution of marital assets.

{¶50} In conclusion, we do not find that appellant's actions constituted financial misconduct under R.C. 3105.171(E)(3) and, even if we did, compensation could not be awarded as spousal support. In addition, any spousal support could not be ordered retroactively. While we are not unsympathetic to what the trial court was trying to accomplish, we do not find that the law allows it.

{¶51} Appellant's second assignment of error is, therefore, sustained.

III

{¶52} Appellant, in his third assignment of error, argues that the trial court abused its discretion when it awarded appellee spousal support "to either equalize income or equalize property division."

{¶53} The trial court, in its April 17, 2009, Judgment Entry, stated that "[i]n order to affect an equalization of income, [appellant] shall pay to [appellee] the sum of \$7,729.00 as and for spousal support...." However, Exhibit A attached to such Judgment Entry, which is captioned "Division of Property and Debt", indicates that the \$7,729.00 was the "[a]mount owed to [appellee] by [appellant] to equalize division of property to be paid to [appellee] as spousal support at \$400.00 per month." (Emphasize added). Thus, the trial court awarded appellee spousal support to equalize the property division.

{¶54} In the case sub judice, the trial court awarded appellee spousal support in lieu of a distributive award in order to equalize the property division. "'Distributive award' means any payment or payments, in real or personal property, that are payable

in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code.” R.C. 3105.171(A)(1). R.C. 3105.171(E)(2) provides that “[t]he court may make a distributive award in lieu of a division of marital property in order to achieve equity between the spouses, if the court determines that a division of the marital property in kind or in money would be impractical or burdensome.” R.C. 3105.171(C)(3) provides that a court “shall provide for an equitable division of marital property under this section prior to making any award of spousal support to either spouse under section 3105.18 of the Revised Code and without regard to any spousal support so awarded.”

{¶55} Based on the forgoing, we find that it was error for the trial court to award appellee spousal support in lieu of a distributive award to equalize the property division. We further note that, pursuant to *Ebner v. Ebner*, Stark App. Nos. 2007 CA 00318, 2007 CA 00346, 2008-Ohio-5335, a trial court cannot “assign financial misconduct to spousal support.” *Id.* at 50. Any determination of financial misconduct “should have been addressed and/or assigned when determining the issue of unequal distribution of marital assets, not spousal support...” *Id.* at paragraph 49.

{¶56} Appellant’s third assignment of error is, therefore, sustained

IV

{¶57} Appellant, in his fourth assignment of error, argues that the trial court abused its discretion in dividing the marital property based on what appellant alleges was an inadequate evaluation.

{¶58} Prior to making a distribution of property, the trial court must first place a value on the individual marital assets. In performing this function, the court has broad discretion to develop some measure of value. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 432 N.E.2d 183. A flat rule to determine the value of assets cannot be established because equity depends on the totality of the circumstances. *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222, 459 N.E.2d 896. When determining the value of marital assets, a trial court is not confined to the use of a particular valuation method but can make its own determination as to valuation based on the evidence presented. *James v. James* (1995), 101 Ohio App.3d 668, 681, 656 N.E.2d 399. A trial court's valuation of marital property will not be reversed absent an abuse of discretion. *Id.*

{¶59} Appellant specifically contends that the trial court erred in finding that “property removed from the marital residence by [appellant] which has been unaccounted for totals \$22,200.00.” The trial court, on Exhibit A (Division of Property and Debt), listed such figure under appellant’s name as a marital asset. Appellant now argues that the trial court erred in valuing such property based on an inadequate valuation.

{¶60} At the trial in this matter, appellee testified that appellant had removed \$22,200.00 in property from the marital home on two occasions in April of 2007. The property, which included guns, was never appraised. At trial, appellee submitted Exhibit 15, which contained an itemized listing of the items that appellee alleged that appellant removed along with values for the same. Of the \$22,200.00, a total of \$4,000.00 represented three vehicles that appellant removed at the time of vacating the marital residence, \$7,000.00 represented tools that appellant removed at such time, \$3,000.00

represented 300,000 trading cards, \$3,000.00 represented football memorabilia, \$3,000.00 represented guns and \$200.00 represented three air compressors .

{¶61} We find that the trial court did not abuse its discretion in accepting appellee's opinion as to the value of the above items. The trial court, as trier of fact, was in the best position to assess credibility. The trial court clearly found appellee's testimony that appellant removed \$22,200.00 worth of marital property, and her Exhibit 15, credible.

{¶62} Appellant's fourth assignment of error is, therefore, overruled.

{¶63} Accordingly, the judgment of the Stark County Court of Common Pleas, Family Court Division, is affirmed in part and reversed and remanded in part. On remand, the trial court is ordered to address the approximately \$4,000.00 medical bill that appellant incurred due to his shoulder surgery.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/Patricia A. Delaney

JUDGES

JAE/d0413

Hoffman, J., concurring

{¶64} I concur in the majority's analysis and disposition of Appellant's Assignments of Error Nos. I, III and IV.

{¶65} I further concur in the majority's disposition of Appellant's Assignment of Error No. II. However, unlike the majority, I find the evidence does support a finding Appellant engaged in financial misconduct under R.C. 3105.171(E), which misconduct entitles the trial court to make an unequal distributive award of the marital property in her favor upon remand.

s/William B. Hoffman
HON. WILLIAM B. HOFFMAN

