

[Cite as *Wilson v. Wilson-Michelakis*, 2010-Ohio-370.]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Brian J. Wilson,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-81
	:	(C.P.C. No. 06DR12-4990)
Leia M. Wilson-Michelakis,	:	
Defendant-Appellant.	:	(REGULAR CALENDAR)

D E C I S I O N

Rendered on February 4, 2010

Solove and McCormick, Ronald L. Solove and Kerry L. McCormick, for appellee.

Tyack Blackmore & Liston Co., L.P.A., and Thomas M. Tyack, for appellant.

APPEAL from the Franklin County Court of Common Pleas,
Division of Domestic Relations

CONNOR, J.

{¶1} Defendant-appellant, Leia M. Wilson-Michelakis, appeals from a judgment entry and decree of divorce entered by the Franklin County Court of Common Pleas, Division of Domestic Relations. The divorce action began with a complaint filed by plaintiff-appellee, Brian J. Wilson.

{¶2} The parties were married on April 22, 2004, after meeting through an internet dating service. Despite the fact that they were married abroad, on a Greek

island, both are long-term residents of central Ohio. The couple has one child, Nikeleia M. Wilson-Michelakis, born March 25, 2005. A court-appointed guardian ad litem represents the child's interests in these proceedings.

{¶3} The matter was originally scheduled for trial in July 2008. Approximately one month before trial, counsel for appellant withdrew and appellant proceeded for the time being pro se. On the eve of the scheduled trial date, appellant reconsidered her position and contacted new counsel, who appeared in court on the trial date and requested a continuance to familiarize himself with the case. The court continued the matter to October 2008, but ordered appellant to reimburse the travel expenses incurred by one of appellee's witnesses who had already traveled to Columbus in anticipation of the July trial date.

{¶4} The matter proceeded to trial beginning on October 7, 2008. The court heard extensive testimony from the parties and various friends and family on behalf of each. Appellant also presented the testimony of an expert psychologist to rebut a previous psychological assessment prepared pursuant to court order by Dr. John Mason. Although the court considered Dr. Mason's written report, which generally favored appellee's suitability as custodial parent, Dr. Mason did not appear to testify in person.

{¶5} The guardian ad litem submitted a report and recommendation after trial, followed by written arguments by the parties. The court then rendered its decision addressing child custody and property division issues. The court designated appellee as the sole residential parent and legal custodian of Nikeleia, with the child spending alternate weekends and Tuesday nights with appellant, a schedule recommended by the guardian ad litem. Based upon disparities in income, appellant's checkered employment

history, and appellant's general lack of resources, the court deviated from the child support guidelines and ordered no child support payable by appellant to appellee.

{¶6} With respect to the property division, the court found that there was no equity in the marital residence purchased before the marriage by the appellee for a price of \$189,150, valued at \$165,000 in 2007, and with an outstanding mortgage balance of \$175,560 in May 2008. The court awarded the marital residence and its negative equity to appellee. The court found that a timeshare property purchased before the marriage by appellee was his separate property, and that another vacation plan purchased after the marriage was marital property that should be awarded to appellant. The court classified appellee's 401(K) retirement plan, including unquantified contributions made by his employer during the course of the marriage, as marital property, but awarded the plan entirely to appellee. The court similarly awarded to appellee as separate property an annuity. The court further found that appellee's IRA account, from which \$50,021 was withdrawn in 2006, leaving a balance of approximately \$30,000, would be awarded to appellee.

{¶7} Addressing the parties' debts, the court made each party responsible for their respective student loan debt. A further \$21,250 owed on a credit card was classified as marital debt, but the court ordered this to be paid solely by appellee due to appellant's lack of current resources to pay this obligation. The court similarly disposed of an overdraft reserve owed on the marital checking account in the amount of \$5,567.

{¶8} Finally, the trial court ordered appellant to reimburse appellee for the uninsured cost of \$1,013.70 for a sleep study undertaken pursuant to court order by

appellee, pursuant to allegations by appellant that appellee suffered a serious sleep disorder.

{¶9} Appellant has timely appealed and brings the following assignments of error:

I. THE TRIAL COURT ERRED IN ADMITTING A COPY OF A "COURT ORDERED EVALUATION" PURPORTEDLY PREPARED BY DR. JOHN MASON WHEN DEFENDANT'S COUNSEL WAS NOT ABLE TO CROSS-EXAMINE DR. MASON AT TRIAL AND THE REPORT DID NOT COMPLY WITH THE GUIDELINES AND PROTOCOL FOR SUCH A PROCEDURE.

II. THE TRIAL COURT ERRED IN AWARDING CUSTODY OF THE PARTIES MINOR DAUGHTER TO PLAINTIFF FATHER.

III. THE TRIAL COURT'S FINDINGS AND ORDER AS TO THE EXISTENCE AND ALLOCATION OF MARITAL ASSETS BETWEEN THE PARTIES WAS NOT SUPPORTED BY THE EVIDENCE AND CONTRARY TO THE PROVISIONS OF O.R.C. §3105.171 AS TO THE FOLLOWING ASSETS:

A. THE MORTGATGE DEBT REDUCTION ESCROWS ACCOUNT AS TO 390 WHEATFIELD DRIVE, DELAWARE, OHIO.

B. STAR ISLAND RESORT TIME SHARE BEING FOUND TO BE A NON-MARITAL ASSET.

C. THE PLAINTIFF'S 401(K) IN EXCESS OF \$31,000.

D. \$50,000 WITHDRAWAL FROM IRA'S AND ANNUITIES IN 2006 BY THE PLAINTIFF.

E. THE COST OF THE SLEEP STUDY OF THE PLAINTIFF AS REQUESTED BY THE GUARDIAN AD LITEM.

IV. THE TRIAL COURT ERRED IN ORDERING DEFENDANT TO REIMBURSE A PLAINTIFF'S WITNESS

FOR AIRFARE WHEN THE TRIAL DATE SCHEDULED FOR JULY 10, 2008, WAS CONTINUED TO PERMIT DEFENDANT TO RETAIN NEW COUNSEL.

{¶10} Appellant's first assignment of error asserts that the trial court erred in admitting Dr. Mason's report and psychological evaluation of the parties. This report was prepared pursuant to an agreed entry, which also stipulated that once the report was admitted into evidence, either party could call Dr. Mason for cross-examination.

{¶11} At the outset of trial, the court indicated that it would allow admission of the report when offered. Subsequently, counsel for appellant objected to the report on the basis that it was not signed by Dr. Mason.

{¶12} Appellant's argument on appeal stresses that appellant's own clinical psychologist expert witness, Dr. Thomas Paulucci, reviewed Dr. Mason's report and concluded that Dr. Mason did not comply with the applicable protocol when composing his report, since Dr. Mason never observed first-hand interaction between either of the parents and their child. While noting that the parties agreed to withdraw a paragraph from Dr. Mason's report that contained conclusory statements regarding parenting fitness that were outside the authorized scope of the report. Appellant points out on appeal, that this redaction was insufficient because the balance of the report also contained conclusions and recommendations based on hearsay and other information not obtained through first-hand observation of the parties. Appellant also argues that Dr. Mason's report relies on purported factual inaccuracies regarding appellant's personal history. Appellant asserts that Dr. Mason inaccurately reported that appellant misrepresented her educational accomplishments, such as her completion of high school graduation requirements, and misrepresented herself as a member of hereditary Greek royalty.

{¶13} Appellant points out that, because Dr. Mason did not appear for trial despite issuance of a subpoena, appellant was denied the opportunity to cross-examine Dr. Mason both on the procedural deficiencies in compiling his report and the factual inaccuracies relied therein.

{¶14} We note ab initio that the transcript clearly establishes that the question of whether Dr. Mason's report should have been admitted in unsigned form was abandoned by appellant's counsel at trial, after a brief discussion in which, after acknowledging that the report was unsigned, the trial court indicated that a signed copy could readily be obtained. Counsel for appellant made no further objection thereafter, and, in fact, the authenticity of the report as found in the record is not substantively challenged on appeal.

{¶15} The flaws in appellant's remaining arguments regarding the report are twofold. First, Dr. Paulucci's observations regarding incorrect protocol in establishing the report generally address only the fact that Dr. Mason ventured to make a recommendation concerning custody, which was outside his authorized scope of evaluation. (Tr. 548-58.) The parties stipulated, and the trial court agreed, that this aspect of the report would be stricken, and no error can devolve therefrom. With respect to the factual inaccuracies, these are inaccuracies only if appellant's other evidence is accepted in to and appellee's entirely discounted. The trial court's assessment of credibility of witnesses and reliability of evidence is a manifest weight issue, to which we accord due deference, and the record demonstrates that the trial court did not rely on Dr. Mason's report to ascertain facts that were not otherwise supported by more pertinent evidence.

{¶16} We accordingly find that the trial court did not err in its handling of Dr. Mason's report and limited reliance thereon, and appellant's first assignment of error is overruled.

{¶17} Appellant's second assignment of error raises manifest weight arguments of asserting error in the award of custody to appellee of the parties minor child. When reviewing a trial court's decision on a manifest weight of the evidence basis, we are guided by the presumption that the factual findings of the trial court were correct. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The rationale for this presumption is that the trial court is in the best position to evaluate the evidence by viewing witnesses and observing their demeanor, voice inflections, and gestures. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. Likewise, documentary evidence is best viewed in the context of the entire scope of evidence heard at trial, and the trier of fact is in the best position to assess the global weight of all evidence heard. Thus, judgments supported by some competent, credible evidence going to all the essential elements will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279.

{¶18} Moreover, child custody decisions by a trial court are afforded great deference upon appellate review. *Miller v. Miller* (1988), 37 Ohio St.3d 71.

{¶19} As is the case in most custody disputes arising in divorce proceedings, the evidence before the trial court presented by the parties conflicted markedly regarding the various issues affecting their respective capacities to provide a satisfactory home

environment for the child. Addressing this evidence, the court set forth a detailed recital of the facts presented at trial by the parties, and proceeded to address the relevant statutory factors in light of those facts. Among the uncontroverted facts noted by the trial court were that Nikeleia has a close relationship with both of her parents and their respective parents and siblings, and that the parents and relatives are involved with Nikeleia's social and instructional activities. The court also noted that Nikeleia appears well-adjusted at home, school, and community.

{¶20} The court also noted, however, that appellee, under those parts of Dr. Mason's report that were properly considered, produced a valid result on the administered psycho diagnostic test, while appellant's results were of marginal validity. The court noted that Dr. Mason felt that these results were due to appellant's attempt to place herself in a positive light by structuring her answers to influence the test assessment in her favor. Dr. Mason's assessment based upon these tests was that appellant's defensiveness was beyond even that generally expected in typical custody proceedings, and that she demonstrated broad deficits in "introspectiveness and psychological mindedness." (Decision, at 16.) The trial court also noted Dr. Mason's conclusion that appellant was rigid in her thinking, refused self-evaluation, overestimated her personal and professional abilities, and was intolerant of the views of others. Dr. Mason noted that all these traits were reflected in her narcissistic and obsessive-compulsive behavior.

{¶21} Drawing on further evidence outside Dr. Mason's report, the trial court found corroborating indications of a wide gap between appellant's actual functional capacities and her inflated estimation of her own abilities, particularly when addressing health issues for the child. In particular, the trial court quoted extensively from an email sent by

appellant to her in-laws concerning an ultrasound during her pregnancy. Without the benefit of any formal medical education, appellant purported in this email to interpret the ultrasound and give a detailed impression of the health of the fetus, even assessing the unborn child's personality. Appellant purported to provide an organ-by-organ review of the unborn child's health, and feared that the baby would require "immediate reconstructive surgery after birth" due to a jaw condition that appellant could purportedly discern from this ultrasound image. (Plaintiff's exhibit No. 32.)

{¶22} The court noted that appellant's willingness to exaggerate her diagnostic abilities and insight into the child's health had led the guardian ad litem to express concerns that appellant initiated treatments for her daughter that were unnecessary. These included chiropractic treatment for spinal conditions that were not independently diagnosed. The court also questioned the independence of a diagnosis by appellant's brother (a practicing dentist) that Nikeleia suffered from a tongue condition caused by appellee feeding her excessively spicy food.

{¶23} Apart from the specific medical issues, the court was concerned that appellant displayed consistent lack of credibility and stability in other domains. Appellant's work history is intermittent in duration and field. The court noted testimony that appellant overstated her professional qualifications and educational achievements, grossly inflated her resume and work history, and portrayed herself as related to Greek royalty. Some of these exaggerated professional and educational qualifications, as well as her purported status as a Greek "princess," were literally stated in the couple's printed wedding invitation. Appellant in her testimony at trial asserted that she never communicated these fabrications to anyone and that they must have been the work of her

former in-laws in preparing the wedding invitations. Testimony from appellee's parents rebutted this, and the trial court gave no credibility to appellant's position and refused to attribute these exaggerations to spontaneous embroidery by the former in-laws.

{¶24} Resolving this conflicting evidence regarding appellant's character and behavior, the trial court meticulously analyzed the evidence and reached a conclusion which, while unpalatable to one party, was not against the manifest weight of the evidence or an abuse of discretion. As stated by the trial court, it is not in the best interest of the child to grow up receiving unnecessary medical treatment or in an environment where the truth was malleable according to the whims of her mother. We accordingly find that the trial court did not err in awarding custody to appellee, and appellant's second assignment of error is overruled.

{¶25} Appellant's third assignment of error addresses the division of marital property and debt. Appellant addresses five specific items: the value and allocation of the marital residence; ownership of a vacation property referred to as the "Star Island Resort timeshare;" the value of contributions to appellee's 401(K) retirement plan through his employer; a \$50,000 withdrawal from IRA's and annuities owned by appellee; and the cost of the sleep study to be reimbursed by appellant.

{¶26} In a divorce proceeding, the trial court must first determine whether property is marital or separate property. R.C. 3105.171(B). The court shall then distribute the marital and separate property equitably between the spouses. *Id.* Separate property generally will be distributed to the owning spouse, R.C. 3105.171(B), unless a distributive award is needed or other equitable considerations given in R.C. 3105.171(E) apply. *Id.* Each spouse is deemed to have contributed equally to the production and acquisition of

marital property, R.C. 3105.171(C)(2), and marital property will accordingly be distributed equally unless such a distribution would be inequitable, in which case the court may adjust the distribution accordingly after considering the statutorily enumerated factors. R.C. 3105.171(C)(1) and 3105.171(F).

{¶27} A domestic court has broad discretion to make divisions of property. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401. We review a trial court's classification of property as marital or separate under a manifest weight of the evidence standard and will affirm if some competent, credible evidence supports the classification. *Taub v. Taub*, 10th Dist. No. 08AP-750, 2009-Ohio-2762, ¶15.

{¶28} The trial court found that appellee acquired, prior to the marriage, a single family residence at a price of \$189,150 financed with a mortgage for \$186,277. Appellee presented at trial evidence indicating that the market value of the property had fallen to \$165,000, while the mortgage remained at \$175,560.06. Appellant now argues that the reduction in the mortgage balance (and a modest increase in current escrow balance) represented a net accretion in wealth to appellee, on the basis that, regardless of any loss of in value of the underlying asset, appellee was better off by some \$11,000 due to the reduction of debt. Appellant requests that half of this alleged gain should be allocated as appellant's marital share. While this proposed valuation certainly could be applied by a trial court in instances where it reflects an actual financial benefit that has accrued to the parties, that is not the case here. In awarding the marital residence free and clear of any claim by appellant, the trial court in effect awarded appellee a negative equity in the property and ordered him to hold appellant harmless on the debt. If the purpose of allocating marital property is to ensure that the parties equally share in the benefits and

burdens of their shared financial lives, it is entirely inappropriate here to allow appellant to walk away from her share of depreciation in the marital asset while she recaptures the associated reduction in marital debt. The trial court's approach to this was both equal and equitable, and there was no error in awarding the home to appellee without adjustment for the decrease in associated debt.

{¶29} Appellee purchased the Star Island Resort timeshare immediately prior to the marriage. Appellant stresses that, by the time of the divorce, the property was titled in both their names. Appellee testified that he paid for it with separate funds prior to the marriage. Despite the fact that the timeshare property was held in both names, the trial court awarded it as appellee's separate property based on tracing the purchase monies and the timing of the purchase. The trial court did not err in this respect. Generally, "the holding of title to property by one spouse individually or by both spouses in a form of co-ownership does not determine whether the property is marital property or separate property." R.C. 3105.171(H). The considerations of timing and source of purchase funds in this case outweigh nominal title to this asset, and the court properly awarded the timeshare to appellee as separate property.

{¶30} We now turn to the trial court's disposition of appellee's 401(K) retirement savings plan, which is managed through his employer and funded by employer contributions. The plan had a value of \$31,177.80 as of April 30, 2008. All contributions were made by appellee's employer and occurred at least partially during the marriage, although a specific breakdown of premarital and postmarital contributions was not presented. The trial court determined that this was a marital asset, but awarded the entire balance to appellee. Given the mixed marital/separate nature of these

contributions and the trial court's order requiring appellee alone to assume over \$26,000 in marital credit card and checking reserve debt, the award to appellee of the entire value of this asset is equitable.

{¶31} Next, we consider the court's determination that it would not recapture IRA and annuity distributions amounting to \$49,000 made by appellee late in the marriage. The court did not consider this amount as a marital asset. Neither the origin nor the fate of this sum was conclusively established at trial; neither party presented sufficient evidence to determine in detail when and how the accounts were funded, although the general sense of appellee's testimony was that this largely took place well before the marriage.

{¶32} Appellant insinuates that appellee withdrew the money to shelter it from the divorce and pay his attorney fees. Appellee testified that he did not manage the couple's finances during the marriage and could not account for the money. He also testified that although the accounts concerned predated the marriage, he placed his wife's name on them later so that she could manage them. Although the taxable components of each distribution were reported on appellee's 2006 separate tax return, appellee denied taking any affirmative steps to initiate the distributions or account for them after the fact.

{¶33} The trial court might have had grounds to believe that appellee was racing his wife towards the credibility bottom on this issue, but chose to consider his testimony credible. More to the point, there is no competent evidence beyond innuendo to rebut his professed ignorance of the fate of these funds. The trial court was entitled to take his testimony at face value. Moreover, the trial court lacked any basis upon which to allocate this potential asset as either marital or separate, and given the timing of the creation of

these accounts might well have found the disbursed \$49,000, if defined as an asset, to be a separate asset entirely awardable to appellee. We find that the trial court did not err in declining to make any order regarding this sum.

{¶34} Finally, under the last aspect of appellant's third assignment of error, appellant argues that the court erred in ordering appellant to reimburse the uninsured portion of expenses incurred by appellee in undergoing a sleep study. This medical assessment was undertaken pursuant to request by the guardian ad litem, apparently in response to allegations by appellant that appellee suffered from a serious sleep disorder that would affect his ability to awaken if their child suffered an emergency during the night. The study did not reveal any sleep disorder.

{¶35} The trial court classified this expense as marital debt, and ordered appellant to reimburse appellee for the full amount owed. Given that the debt was incurred as a direct result of appellant's unfounded assertions regarding appellee's medical condition, and also given the trial court's allocation of the balance of marital debt to appellee, holding appellant financially responsible for this item was not inequitable.

{¶36} In summary, the trial court's decisions in classifying the parties' assets and liabilities and in allocating those items between them was supported by competent, credible evidence and equitable in its result. Appellant's third assignment of error is overruled.

{¶37} Appellant's fourth and final assignment of error asserts that the trial court erred in ordering her to reimburse expenses incurred by a witness who had traveled to Columbus to testify on behalf of appellee at the initial trial date. R.C. 3105.73(A) provides that the trial court may award litigation expenses in a domestic proceeding when

equitable. One of the enumerated bases for such an award is the conduct of the parties in the course of litigation. Given appellant's last-minute decision not to represent herself, and the resulting need for her newly retained counsel to request a continuance to familiarize himself with the case, it was within the trial court's discretion to award travel expenses incurred on the eve of trial in the legitimate expectation that the case would go forward as scheduled. Appellant's fourth assignment of error is overruled.

{¶38} In conclusion, appellant's four assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.
