

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

JIM S. BOYER,	:	
Plaintiff-Appellee/Cross-Appellant,	:	CASE NOS. CA2010-04-083 CA2010-05-109
- vs -	:	<u>OPINION</u> 3/7/2011
SANDRA L. BOYER,	:	
Defendant-Appellant/Cross-Appellee.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR2009-09-0979

Donald C. LeRoy, 304 North Second Street, Hamilton, Ohio 45011, for plaintiff-appellee/cross-appellant

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BRESSLER, P.J.

{¶1} Defendant-appellant and cross-appellee, Sandra L. Boyer ("Wife"), appeals the decision of the Butler County Court of Common Pleas, Domestic Relations Division, classifying property as separate and awarding it to plaintiff-appellee and cross-appellant, Jim S. Boyer, who cross-appeals the same order.

{¶2} The parties married in 1988 in Kentucky, and have two children who are

now emancipated. Husband filed for divorce on September 2, 2009 and the trial court issued its Decision on February 25, 2010. Husband moved for a Clarification and Findings of Fact and Conclusions of Law, and the trial court issued additional findings of fact and conclusions of law in an All Purpose Entry on March 3, 2010. The trial court entered its Judgment Entry and Decree of Divorce on April 8, 2010. Wife appeals the trial court's decision and raises one assignment of error. Husband also appeals the trial court's decision and raises one cross-assignment of error.

{¶3} Wife's Assignment of Error:

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT/APPELLANT/CROSS-APPELLEE WHEN IT AWARDED HER SEPARATE PROPERTY TO PLAINTIFF/APPELLEE/CROSS-APPELLANT."

{¶5} In Wife's assignment of error, she argues that the trial court improperly awarded her 2007 Chevrolet Trailblazer to Husband after making a specific finding that this vehicle was purchased with Wife's separate property.

{¶6} Property division in a divorce proceeding is a two-step process that is subject to two different standards of review. *Lynch v. Lynch*, Warren App. No. CA2008-02-028, 2008-Ohio-5837, ¶9. Initially, pursuant to R.C. 3105.171(B), "the court shall * * * determine what constitutes marital property and what constitutes separate property."

{¶7} Marital property includes real property that is currently owned by either or both of the spouses and that was acquired by either or both of the spouses during the marriage. R.C. 3105.171(A)(3)(a). In contrast, separate property includes real or personal property that is found by a court to be a gift or an interest in real or personal property made after the date of the marriage and proven by clear and convincing evidence to have been given to only one spouse. R.C. 3105.171(A)(6)(a)(vii). Clear and

convincing evidence means that degree of proof that will provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. *Golick v. Golick*, Clermont App. Nos. CA99-05-040, CA99-05-045, 2001-Ohio-8641.

{¶18} A trial court's classification of property as marital or separate must be supported by the manifest weight of the evidence, and an appellate court will not reverse the trial court's classification if its determination is supported by competent and credible evidence. *Zollar v. Zollar*, Butler App. No. CA2008-03-065, 2009-Ohio-1008, ¶10. In determining whether competent and credible evidence exists, "[a] reviewing court should be guided by a presumption that the findings of a trial court are correct, since the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use those observations in weighing the credibility of the testimony." *Id.*, quoting *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159.

{¶19} After labeling the assets as separate or marital property, "the court shall disburse a spouse's separate property to that spouse" and divide the marital property equally, unless the court finds an equal division would be inequitable. R.C. 3105.171(C)(1); R.C. 3105.171(D). The trial court is given broad discretion in determining what constitutes an equitable division of property and will not be reversed absent an abuse of that discretion. *Lynch* at ¶19; *Hutchinson v. Hutchinson* (1996), 113 Ohio App.3d 863, 867. To find abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} According to the record, in the trial court's All Purpose Entry of March 3, 2010, the trial court found that Wife's mother, Deborah Garrison, clearly testified that she gave Wife between \$320,000 to \$330,000 from proceeds of her late husband's life

insurance policy, and that she gave this money to Wife and the parties' children only and not to Husband. In this Entry, the trial court states, "[t]he money was the separate property of [Wife] and the children[,] and did not have to be divided or the property purchased with the [property] be divided in the divorce. The money and the real estate are separate property, not marital."

{¶11} In the trial court's Decision of February 25, 2010, it found that the parties owned a 2007 Chevrolet Trailblazer, which the parties purchased with \$15,000 in cash. The court further found that "[t]he source of the cash was the inherited money by [Wife], paid to her by her mother. However, later in this court's Decision, the trial court awarded Husband the 2007 Chevrolet Trailblazer, free and clear of any interest of Wife.

{¶12} According to R.C. 3105.171(D), the only exceptions to the mandatory distribution of separate property to the owning spouse is if it is "otherwise provided in [R.C. 3105.171(E)] or by another provision of [R.C. 3105.171(D)]." See *Comella v. Comella*, Cuyahoga App. No. 90969, 2008-Ohio-6673, ¶52. The only other provision contained in R.C. 3105.171(D) states that: "If a court does not disburse a spouse's separate property to that spouse, the court shall make written findings of fact that explain the factors that it considered in making its determination that the spouse's separate property should not be disbursed to that spouse." *Id.*

{¶13} R.C. 3105.171(E) provides:

{¶14} "(1) The court may make a distributive award to facilitate, effectuate, or supplement a division of marital property. The court may require any distributive award to be secured by a lien on the payor's specific marital property or separate property.

{¶15} "(2) The 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.

{¶16} "(3) The court shall require each spouse to disclose in a full and complete manner all marital property, separate property, and other assets, debts, income, and expenses of the spouse.

{¶17} "(4) If a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property."

{¶18} After reviewing the record, we find the trial court erred in awarding the 2007 Chevrolet Trailblazer to Husband as his separate property after finding that the vehicle was purchased solely with funds derived from Wife's separate property. There is nothing in the record to indicate the court made a distributive award, nor did the court issue written findings explaining which factors it considered in awarding the vehicle to Husband. Accordingly, we find the trial court abused its discretion in awarding the 2007 Chevrolet Trailblazer to Husband in violation of R.C. 3105.171(D). We must reverse the trial court's decision awarding the 2007 Chevrolet Trailblazer to Husband and remand the matter for compliance with R.C. 3105.171(D). Wife's assignment of error is sustained.

{¶19} Husband's Cross-Assignment of Error:

{¶20} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF/APPELLEE/CROSS-APPELLANT WHEN IT DETERMINED THAT THE DEWBERRY REAL ESTATE, THE 2008 CHEVROLET SUBURBAN VEHICLE, AND THE \$40,000 WERE NOT MARITAL PROPERTY, AND AWARDED THOSE ASSETS TO DEFENDANT/APPELLANT/CROSS-APPELLEE AND TO KEVIN BOYER."

{¶21} In Husband's assignment of error, he argues the trial court erred in awarding property to Wife as her separate property when she failed to meet her burden of proof to establish that gifts from Garrison were gifts intended solely for Wife and the parties' children, Kevin and Amanda.

{¶22} R.C. 3105.171(A)(6)(a)(vii) defines separate property as "[a]ny 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."

{¶23} As we found above, Deborah Garrison testified that she gave Wife, her daughter, a gift of \$320,000 to \$330,000 for the sole benefit of Wife and the parties' children. Garrison specified that when she gave Wife the money, she wrote checks in Wife's name only, and that she did not intend in any way to give money to Husband. Wife also testified that the money Garrison gave her was solely for the benefit of the children and herself.

{¶24} Further, as we found above, in the trial court's All Purpose Entry of March 3, 2010, the trial court found that the money Garrison gave to Wife and the parties' children is separate property. In the same Entry, the trial court found that a home at 6303 Dewberry Court, West Chester, Ohio and a 2008 Chevrolet Suburban vehicle were purchased with these funds, and that these funds are the property of the parties' son, Kevin, free and clear of any interest of Husband.

{¶25} In addition, the evidence indicates Wife had two individual bank accounts into which she deposited the funds before making withdrawals. One withdrawal was a cashier's check in the amount of the purchase price of the Dewberry property, and another in the amount of \$40,000, which corresponds with a deposit of that amount into

Kevin's personal bank account on the same day. In addition, Wife testified that she wrote a check from one of these accounts to purchase the 2008 Chevrolet Suburban.

{¶26} After reviewing the record, we find competent, credible evidence supporting the trial court's findings that funds Garrison gave to Wife and the parties' children is not marital property, and therefore the Dewberry property, the 2008 Chevrolet Suburban, and the \$40,000 transferred to Kevin's account are likewise not marital property. Husband's assignment of error is overruled.

{¶27} Based on our resolution of Wife's assignment of error, we reverse the trial court's decision with respect to the 2007 Chevrolet Trailblazer only, and this matter is remanded to the trial court for further proceedings in compliance with R.C. 3105.171(D).

{¶28} Judgment affirmed in part, reversed in part, and remanded.

POWELL and RINGLAND, JJ., concur.