

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
OTTAWA COUNTY

Randy L. Rasey

Court of Appeals No. OT-11-036

Appellant

Trial Court No. 10-DR-203B

v.

Suzan Rasey

DECISION AND JUDGMENT

Appellee

Decided: January 18, 2013

* * * * *

Christina Smaldone and Ron L. Rimelspach, for appellant.

Stephen E. Cottrell, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This is an appeal from a decision issued by the Ottawa County Court of Common Pleas, Domestic Relations Division, in divorce proceedings. Because we conclude that the trial court erred in failing to consider appellant's objections, and in its property division calculations, but did not err in determining appellee's IRA and CD accounts as separate property, we affirm in part, reverse in part, and remand.

{¶ 2} Appellant, Randy Rasey, and appellee, Suzan Rasey, were married in September 2002. Appellee had a stroke in 1991, is paralyzed on her left side, is limited in her work ability, and receives monthly disability in the amount of \$339. Appellant works for Buckeye Cablevision and earns \$49,000 per year in income. After appellee stopped receiving child support in 2004, appellant paid the mortgage payments, utility bills, car payments, insurance for autos and house, and other major purchases. Appellee contributed to the household by purchasing groceries, paying for minor repairs on the home, and by taking care of all household chores and yard work.

{¶ 3} Appellant filed for divorce in August 2010 and a magistrate conducted a trial as to evidentiary matters, including debt and equity in the marital home, other debts, pensions and other retirement accounts, and other marital property. After the magistrate issued a decision on September 2, 2011, appellee filed objections on September 9, 2011. On September 19, 2011, appellant filed objections to the magistrate's decision and his response to appellee's objections. On September 22, 2011, the magistrate placed a notation in the record that appellant's objections were received after the 14 day objection period. Therefore, the trial court did not address those objections.

{¶ 4} In a judgment entry dated October 4, 2011, the trial court granted the parties a divorce and issued the final decree. The trial court did not address appellant's objections, but did find appellee's objections well-taken as to the calculation and award of the equity portion of the marital home. The court then adopted the magistrate's

findings of fact and conclusions of law, with the exception of the separate property and division of loss in equity of the real property.

{¶ 5} Appellant now appeals from that judgment arguing the following three assignments of error:

I. The trial court erred as a matter of law when it failed to consider the objections filed by Appellant-Plaintiff.

II. The trial court abused its discretion when it issued the Judgment Entry of October 4, 2011 and same should be reversed.

III. The trial court's Judgment Entry filed on October 4, 2011 is against the manifest weight of the evidence and should be reversed.

I.

{¶ 6} In his first assignment of error, appellant asserts that the trial court erred in failing to address his objections. We agree.

{¶ 7} Civ.R. 53(D)(3) provides, in pertinent part that:

(b) Objections to magistrate's decision.

(i) Time for filing. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). *If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed.* If a party makes a timely request for

findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. *The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections. (Emphasis added.)*

{¶ 8} Thus, according to Civ.R. 53(D)(3), appellant had ten days after appellee filed her objections to file his objections and then an additional 30 days to file the transcript. The magistrate and trial court erred in failing to address appellant's

objections. The case must be remanded for the trial court to permit appellant to file the transcript and to consider any objections.

{¶ 9} Accordingly, appellant's first assignment of error is well-taken.

II.

{¶ 10} Appellant next argues that the trial court abused its discretion in

1) awarding appellee premarital equity in the marital home that did not exist at the time of the divorce, 2) failing to award appellant his premarital interest in his retirement account, and 3) awarding appellee her retirement accounts as her separate property.

{¶ 11} Generally, a court dividing property upon divorce must award each spouse his or her separate property. R.C. 3105.171(D). Absent an abuse of discretion, an appellate court will not reverse a trial court's property award. *Cherry v. Cherry*, 66 Ohio St.2d 348, 355, 421 N.E.2d 1293 (1981). "However, a trial court's characterization of property as separate or marital is reviewed under a manifest weight of the evidence standard of review." *Nance v. Nance*, 4th Dist. No. 95CA553, 1996 WL 104741, *5 (Mar. 6, 1996). Thus, the court's characterization "will not be reversed if it is supported by some competent, credible evidence." *Id.* The factfinder "is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of proffered testimony." *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 12} Therefore, the trier of fact determines the credibility to be afforded testimony and the weight to be given evidence. *State v. Ball*, 4th Dist. No. 07CA2,

2008-Ohio-337, ¶ 21, citing *State v. Dye*, 82 Ohio St.3d 323, 329, 695 N.E.2d 763 (1998); *State v. Frazier*, 73 Ohio St.3d 323, 339, 652 N.E.2d 1000 (1995). “The factfinder may accept or reject all, part, or none of the testimony of each witness.” *In re A.E.*, 2d Dist. No. 2006 CA 153, 2008-Ohio-1864, ¶ 15, citing *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964).

Real Property

{¶ 13} In this case, the trial court was presented with two appraisals and mortgage debt figures for the marital home, one set from the beginning of the marriage in 2002 and the other set from 2011, at the end of the marriage. Appellee owned the house prior to her marriage to appellant, and in 2002, the property was valued at \$160,000 with a mortgage of approximately \$40,000 remaining, providing an equity amount of \$120,000. Appellee testified that only five years remained on the mortgage at that time. In 2006, the parties refinanced the house to pay for repairs to the house, \$11,500 to pay off appellee’s car lease, and approximately \$9,700 to pay off credit card debts that were incurred during the marriage.

{¶ 14} The 2011 appraisal valued the residence and property at \$146,000 and the mortgage remaining was \$69,000. Therefore, due to both the lower value and higher mortgage debt, the equity in the property had decreased to \$77,000. Although the magistrate awarded the entire equity of the marital residence to appellee, that value was based on the 2011 equity of \$77,000. The trial court overruled that award, and, instead,

awarded appellee the full equity of the home, \$120,000, as it was valued in 2002. The court then took the “extra” \$43,000 from appellant’s Vanguard Pension.

{¶ 15} The trial court erred in using the actual equity of \$120,000 from 2002. Since the property value of the house had decreased simply due to market prices, and appellee did receive some benefit from the refinance, the 2002 equity is no longer a valid measure of the amount of premarital value. Rather, the court may determine a percentage (75 percent of the value was her premarital property in 2002) and then subtract from that an amount which appellee benefited. The court may also determine that it is equitable to simply award appellee the \$77,000 equity as appraised in 2011. The court may not, however, use the phantom equity amount which existed in 2002.

{¶ 16} We also note that, in its judgment entry, the trial court awarded appellee “[appellant’s] interest in the marital residence * * * and [appellant] is hereby ordered to execute a quit claim deed in favor of [appellee] to said property * * *.” The trial court then also ordered that appellee “shall refinance any and all mortgages associated with said property, within three years to hold [appellant] harmless. If [appellant] is unable to refinance, the marital property shall be sold to satisfy the obligation. If the property must be sold the proceeds from the sale of the real property shall be divided as follows: half to each party.”

{¶ 17} We conclude that this language is inconsistent and contains a conflict which must be resolved by the trial court. On the one hand, the trial court has awarded appellee all equity in the home along with title to the property. The court then, however,

revokes that award, based upon appellee's inability to refinance, and then re-divides the proceeds, if any to be split with appellant. Once the property has been deeded to appellee, the court cannot undo the award. Therefore, upon remand, the trial court must include this section when considering the award of the equity and ownership of the property.

Appellee's Pensions

{¶ 18} The trial court is free to believe any portion of the testimony it wishes. In this case, appellee testified that the IRA and CD accounts she held were from her first marriage and were therefore awarded as her separate property. We decline to disturb those findings.

Appellant's Pensions

{¶ 19} Since this was the subject of appellant's objections which were not addressed by the trial court, it must be determined on remand by the trial court.

{¶ 20} Accordingly, appellant's second assignment of error is well-taken in part as to the calculation and award of the equity in the marital residence. The assignment of error is not well-taken as to the award of appellee's IRA and CD accounts as her separate property. The remainder of the issues in the second assignment of error are remanded for determination by the trial court.

{¶ 21} Based upon our disposition of appellant's second assignment of error, his third assignment of error is deemed moot.

{¶ 22} The judgment of the Ottawa County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed in part. The case is remanded to the trial court for proceedings consistent with this decision. Appellant and appellee are each ordered to pay one-half of the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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