

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

Nancy Calvert

Court of Appeals No. OT-12-024

Appellee

Trial Court No. 10DR128K

v.

Timothy Calvert

DECISION AND JUDGMENT

Appellant

Decided: September 27, 2013

* * * * *

James V. Barilla, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Timothy Calvert, appeals an August 1, 2012 judgment of the Ottawa County Court of Common Pleas in an action brought by his spouse, Nancy Calvert (appellee), for legal separation and in which he counterclaimed for a divorce. The case proceeded to final hearing on May 24, 2011, May 31, 2011, July 18, 2011, July 22, 2011, and August 23, 2011.

{¶ 2} Both parties asserted multiple grounds for relief in their respective complaint and counterclaim but narrowed the grounds when the case proceeded to trial. Nancy Calvert's complaint for separation alleged, as grounds for relief, extreme cruelty, gross neglect of duty, and adultery. The complaint also alleged incompatibility. At trial appellee asserted adultery as the grounds for separation. Appellant's counterclaim for divorce asserted as grounds for relief gross neglect of duty, extreme cruelty, and incompatibility. At trial appellant sought divorce on the grounds of incompatibility.

{¶ 3} In the August 1, 2012 judgment, the trial court found that grounds for separation were established at trial, as appellant admitted to adultery in both his answer and at trial. The court found that the evidence at trial was insufficient to establish grounds for divorce on the basis of incompatibility. Nancy Calvert testified at trial and denied incompatibility. The court held that, under R.C. 3105.01(K), the denial precluded the court from granting a divorce on the basis of incompatibility.

{¶ 4} In the judgment, the trial court granted Nancy Calvert a legal separation from Timothy Calvert and dismissed Timothy Calvert's counterclaim for divorce. The trial court also determined marital and separate property, division of marital property, allocation of debt, spousal support, and allocation of parental rights and responsibilities with respect to the parties' three minor children.

{¶ 5} Timothy Calvert has appealed the August 1, 2012 judgment to this court. Nancy Calvert has neither filed an appellate brief nor otherwise participated in this appeal.

{¶ 6} Appellant asserts four assignments of error on appeal:

Assignments of Error

1. The trial court erred and abused its discretion when it held the defendant failed to prove grounds and dismissed counterclaim for divorce.

2. The court erred and abused its discretion when it failed to allocate marital assets in contravention of ORC 3105.171.

3. The court erred and abused its discretion when it denied the appellant exclusive use of his home for one year beyond the graduation of the children and failed to order the appellee quit claim her interest to appellant.

4. The finding that all of the wife's credit card debt is marital is against the manifest weight of the evidence and the court ordering the husband to pay all the credit card debt in wife's name is an abuse of discretion.

Dismissal of Counterclaim for Divorce

{¶ 7} Under Assignment of Error No. 1, appellant challenges the trial court's determination that he failed to establish grounds for divorce and the court's dismissal of his action for divorce. First, appellant argues that the trial court erred in failing to grant appellant a divorce on the grounds of incompatibility. Alternatively, appellant contends that the evidence at trial established grounds for divorce under R.C. 3105.01(J).

Incompatibility

{¶ 8} R.C. 3105.01 lists causes for which a court of common pleas may grant divorces. With respect to incompatibility, the statute provides:

The court of common pleas may grant divorces for the following causes:

* * *

(K) Incompatibility, unless denied by either party.

{¶ 9} Appellant contends that appellee admitted incompatibility in her complaint for separation. The complaint asserted incompatibility as grounds for separation. While appellee denied allegations in the counterclaim of incompatibility, appellant argues that appellee filed her reply to the counterclaim late and without leave of court. Appellant argues that under Civ.R. 8(D) allegations in the counterclaim as to incompatibility were deemed admitted due to the untimely filing of the responsive pleading.

{¶ 10} Ohio courts have recognized that the incompatibility as grounds for divorce is not a matter of proof, to be litigated at trial:

Incompatibility, under R.C. 3105.01(K), is really not a “ground” that has to be proven so much as a status that must be agreed on by both parties; it is a consensual ground that is not intended to be litigated. Baldwin’s Ohio Domestic Relations Law (Supp.1989) 22, Section 23.03(L). The requirement that the allegation of incompatibility not be denied by either party was included to prevent the unilateral declaration of incompatibility

by one party which would otherwise give the court the jurisdiction to terminate the marriage and make all concomitant orders. *Id.* at 23. *Lehman v. Lehman*, 72 Ohio App.3d 68, 71, 593 N.E.2d 447 (4th Dist. 1991).

{¶ 11} In the decision of *Rodgers v. Henninger Rodgers*, 5th Dist. Licking No. 02CA79, 2003-Ohio-2642, the Fifth District Court of Appeals explained:

This Court, in interpreting *Lehman*, has held that “[i]n saying the ground of incompatibility was ‘not intended to be litigated’, the *Lehman* court meant a divorce on such ground could not be granted unilaterally over an objection of the other party.... If incompatibility is contested, the contest is over, and the claim must be dismissed.” *Byers v. Byers* (Feb. 5, 2001), Stark App. No.2000CA000159. *Id.* at ¶ 13.

{¶ 12} Appellee testified on cross-examination at the close of trial on the issue of compatibility. Appellee was clear and unequivocal in denying incompatibility:

Q. Are you in agreement with your husband that you and he are no longer compatible to be married?

A. No, I am not.

Q. You are not?

A. I am not in agreement with that at all. When I married Tim, I married him for richer, for poorer, for sickness and health, and that is exactly what I planned to do. * * *.

I never wanted a divorce. I told him I never wanted a divorce and I still do not want a divorce.

{¶ 13} Appellant did not claim unfair surprise at trial due to appellee’s denial of incompatibility and did not seek a continuance due to the denial. Appellee argued in her post-trial brief that the denial of incompatibility precluded a grant of divorce on that ground. As the issue of compatibility was contested at trial, we conclude that the trial court did not err in denying a divorce on the basis of incompatibility.

Grounds for Divorce under R.C. 3105.01(J)

{¶ 14} Appellant alternatively argues that grounds for divorce under R.C. 3105.01(J) were established at trial. R.C. 3105.01(J) authorizes a court to grant a divorce “when husband and wife have, without interruption for one year, lived separate and apart without cohabitation.” Appellee testified on August 23, 2011, that she and appellant had lived separate and apart from July 2010, when appellant moved his camper from the marital residence.

{¶ 15} Appellant requests this court to grant leave to amend his counterclaim to conform to the evidence at trial and set forth grounds for divorce under R.C. 3105.01(J). Appellant next requests this court to grant him a divorce on that ground.

{¶ 16} Appellant did not file a motion under Civ.R. 15(B) in the trial court to amend his counterclaim to assert R.C. 3105.01(J) grounds for divorce. Appellant did not assert R.C. 3105.01(J) grounds for divorce in the trial court, either at trial or in his post-

trial proposed findings of fact and conclusions of law. Appellant raises these issues for the first time on appeal.

{¶ 17} We deem the issues of whether grounds for divorce were established at trial under R.C. 3105.01(J) and whether divorce should have been granted on that ground to have been waived due to the failure of appellant to timely raise the issues in the trial court. “[I]t is a cardinal rule of appellate procedure that a party cannot assert new legal theories for the first time on appeal.’ *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, 964 N.E.2d 442, ¶ 33 (6th Dist.), citing *In re Banks*, 4th Dist. No. 07CA3192, 2008-Ohio-2339, ¶ 7-10.” *State v. Owens*, 6th Dist. Lucas No. L-11-1207, 2013-Ohio-325, ¶ 36; see *McConnell v. McConnell*, 4th Dist. Washington No. 11CA7, 2013-Ohio-694, ¶ 14.

{¶ 18} We find Assignment of Error No. 1 not well-taken.

{¶ 19} Under Assignment of Error No. 2, appellant argues that the trial court erred in failing to allocate certain marital assets pursuant to R.C. 3105.171. The assignment of error concerns furniture and appliances located in the marital residence and household goods and tools, in the garage. The personal property is identified and estimated values are provided in property affidavits that were admitted into evidence at trial as joint exhibits Nos. 43 and 58. The August 1, 2012 judgment did not refer to the property.

{¶ 20} Appellant argues that the property is marital property and that the trial court erred in failing to allocate the personal property between the parties pursuant to

R.C. 3105.171. Appellant requests the court to remand this case in order for the trial court to permit allocation of the assets.

{¶ 21} The record demonstrates that the trial court inadvertently omitted the furniture and appliances located in the marital residence and household goods and tools located in the garage from its consideration of personal property in its judgment. Remand is necessary to permit the trial court to determine whether these assets are separate or marital assets and to allocate between the parties those determined to be marital assets.

{¶ 22} We find Assignment of Error No. 2 well-taken in part.

{¶ 23} Assignment of Error No. 3 concerns the timing and manner of the trial court's judgment awarding appellee's interest in the marital residence to appellant. Appellant contends that the trial court erred and abused its discretion in both respects. In the August 1, 2012 judgment, the court ordered transfer of full ownership and exclusive possession of the marital residence (located at 2400 Sandy Lane, Port Clinton, Ohio) to appellant after all the children of the marriage graduated from high school:

The Court finds that Defendant's proposal that he pay for the mortgage, road fee, taxes, and insurance (totaling \$749/mo.) on the marital residence until the minor children graduate from high school and allowing Plaintiff and the three minor children to remain in the home until that time is reasonable and appropriate. Thereafter, Defendant is awarded the real

estate and shall be entitled to exclusive use/possession of the asset as provided below.

{¶ 24} Later in the judgment, the trial court ordered that appellee was entitled to exclusive use of the marital residence until June 30, 2014 and that “[f]rom July 1, 2014 and thereafter, Defendant [appellant] is awarded all right, title and interest in the real estate and shall be entitled to exclusive use/possession of same.”

{¶ 25} Appellant contends that the trial court mistakenly ordered transfer of ownership interests and exclusive possession of the property at the end of the school year in 2014, rather than 2013. The record discloses that the youngest two children, twins, turned 18 years of age in December 2012. Appellant contended in his appellate brief that the children were scheduled to graduate from high school at the end of the school year in 2013.

{¶ 26} We agree that the record discloses the trial court may have made a clerical error in setting the date for the transfer of exclusive rights of possession and ownership of the marital residence to appellant. The judgment set the transfer to occur in 2014, rather in 2013, when the twins were scheduled to graduate. Remand is necessary to permit the trial court to consider whether a clerical error occurred in the setting of the dates for transfer of ownership and exclusive possession of the marital residence.

{¶ 27} Appellant next contends that the trial court’s judgment is deficient in failing to order appellee to convey her interest in the real property to him by quitclaim

deed. The judgment includes an award of the marital residence to appellant but does not include an order requiring appellee to convey the property to appellant:

2. As to the real estate located at 2400 Shady (sic) Lane, Port Clinton, Ohio:

* * *

d. From July 1, 2014 and thereafter, Defendant is awarded all right, title and interest in the real estate and shall be entitled to exclusive use/possession of same.

{¶ 28} The Statute of Frauds, R.C. 1335.04, provides that “[n]o * * * interest * * * in , or out of lands * * * shall be assigned or granted except by deed, or note in writing, signed by the party assigning or granting it * * * by writing, or by act and operation of law.” Civ.R. 70 provides a trial court with continuing authority to enforce judgments directing a party to execute a conveyance of land. *State ex rel. Skyway Invest. Corp. v. Ashtabula Cty. Court of Common Pleas*, 130 Ohio St.3d 220, 2011-Ohio-5452, 957 N.E.2d 24, ¶ 13. Among other remedies afforded under the rule, Civ.R. 70 provides that where party fails to comply with an order requiring conveyance of real property and “the real * * * property is within this state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others, and such judgment has the effect of a conveyance executed in due form of law.” Civ.R. 70.

{¶ 29} In our view, the trial court judgment was deficient and the trial court erred in failing to include an order requiring appellee to execute a conveyance of her interest in

the real property awarded in the judgment. Structuring the judgment to include an order requiring conveyance provides continuing authority for the trial court to enforce the real property award under Civ.R. 70.

{¶ 30} We find Assignment of Error No. 3 well-taken.

{¶ 31} Under Assignment of Error No. 4, appellant contends that the trial court erred and abused its discretion in ordering appellant to pay all the credit card debt on credit card accounts held in appellee's name. The trial court found in the judgment that the credit card debt was marital debt and to be divided equally. Appellant contends that the finding is against the manifest weight of the evidence. While the appellant was ordered to pay the entire credit card debt, he was afforded an offset for the payment in the court's allocation of marital assets.

{¶ 32} Appellate review of a trial court's classification of property as marital or separate is based upon a determination of whether the classification is against the manifest weight of the evidence. *Steward v. Steward*, 6th Dist. Wood No. WD-01-058, 2002-Ohio-3700, ¶ 31; *James v. James*, 101 Ohio App.3d 668, 684, 656 N.E.2d 399 (2d Dist.1995). Where a classification is supported by some competent credible evidence in the record, it will not be reversed as against the manifest weight of the evidence. *See C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 33} We recently outlined the analysis required in the decision of *Lindsay v. Lindsay*, 6th Dist. Sandusky No. S-11-055, 2013-Ohio-3290, ¶ 15:

Debts incurred during the marriage are presumed to be marital unless it can be proved that they are not. *Kehoe v. Kehoe*, 8th Dist. Cuyahoga No. 97357, 2012-Ohio-3357, ¶ 14, citing *Vergitz v. Vergitz*, 7th Dist. Jefferson No. 05JE52, 2007-Ohio-1395, ¶ 12. The party seeking to establish a debt is separate rather than marital bears the burden of proving this to the trial court. *Hurte v. Hurte*, 164 Ohio App.3d 446, 2005-Ohio-5967, 842 N.E.2d 1058, ¶ 21 (4th Dist.). Marital debt has been defined as any debt incurred during the marriage for the joint benefit of the parties or for a valid marital purpose. *Ketchum v. Ketchum*, 7th Dist. Columbiana No.2001 CO60, 2003-Ohio-2559, ¶ 47.

{¶ 34} The primary debts of this family are credit card debt. The court found that although appellant claimed lack of knowledge as to the credit cards, the evidence at trial was clear that appellant had used certain credit cards for purchases for hunting trips and his charter business.

{¶ 35} Appellee testified extensively at trial as to the credit card debt, reviewing credit card statements, in evidence, to identify the nature of purchases charged on the accounts. Appellee testified that much of the debt is longstanding debt for which statements are currently unavailable. A review of the record does not demonstrate that the credit card debt was incurred for purposes other than the joint benefit of the parties or other valid marital purposes.

{¶ 36} In our view, appellant failed to meet his burden of showing that the debt was separate rather than marital debt. We find competent credible evidence in the record supporting the trial court's classification of the debt as marital debt. We conclude that the trial court's classification of the debt as marital debt is not against the manifest weight of the evidence.

{¶ 37} We find Assignment of Error No. 4 not well-taken.

{¶ 38} 1. We reverse the trial court judgment to the extent the court's classification of separate and marital property and allocation of marital assets is incomplete. We remand for the court to consider personal property identified in joint trial exhibits Nos. 43 and 58 as furniture and appliances located in the marital residence and household goods and tools located in the garage, and to classify said property as separate or marital assets, to award separate assets to the respective party, and to allocate between the parties those assets determined to be marital assets.

{¶ 39} 2. We reverse the trial court judgment with respect to the date set under the judgment for termination of exclusive rights of possession and use of real property located at 2400 Sandy Lane, Port Clinton, Ohio by appellee and the date set for transfer of appellee's interest in said property to appellant because of a potential clerical mistake as to dates. On remand, the trial court shall determine whether the aforesaid dates set under the August 1, 2012 judgment were set in error and file an amended judgment setting forth the appropriate dates based upon its determination on the issue.

{¶ 40} 3. We reverse the trial court’s judgment to the extent it fails to order appellee to convey her interest in the 2400 Sandy Lane property to appellant as part of the court’s award that interest to appellant. On remand, we instruct the trial court to add to its judgment an order requiring appellee to convey her interest in the 2400 Sandy Lane property to appellant. In all other respects we affirm the trial court judgment. Pursuant to App.R. 24 we order the parties to each pay one-half of the costs of this appeal.

Judgment reversed in part
and affirmed 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.

Mark L. Pietrykowski, 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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