

[Cite as *Akins v. Akins*, 2014-Ohio-4432.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SHARON LYNN AKINS,

)

PLAINTIFF-APPELLANT,

)

V.

)

CASE NO. 12 CA 882

)

OPINION

ROBERT LEE AKINS,

)

DEFENDANT-APPELLEE.

)

)

)

CHARACTER OF PROCEEDINGS:

Civil Appeal from Court of Common
Pleas, Domestic Relations Division of
Carroll County, Ohio
Case No. 11DRB26662

JUDGMENT:

Affirmed in part
Reversed and remanded in part

APPEARANCES:

For Plaintiff-Appellant

Attorney Robert G. Abney
116 Cleveland Ave. NW
Suite 500
Canton, Ohio 44702

For Defendant-Appellee

Attorney Andrew L. Zumbar
526 East Main Street
P.O. Box 2595
Alliance, Ohio 44601

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 26, 2014

[Cite as *Akins v. Akins*, 2014-Ohio-4432.]
DONOFRIO, J.

{¶1} Plaintiff-appellant, Sharon Akins, appeals from a Carroll County Common Pleas Court judgment granting her a divorce from defendant-appellee, Robert Akins. Appellant takes issue with the property division and spousal support award.

{¶2} The parties were married on August 6, 1971. They have two children together who are now adults.

{¶3} The parties separated in 2007. Appellant filed a complaint for divorce on February 15, 2011. The matter proceeded to a trial. The trial court granted the parties a divorce. It made detailed findings including property division and an award of spousal support for appellant. The findings and awards relevant to this appeal will be discussed in detail in each of appellant's assignments of error.

{¶4} Appellant filed a timely notice of appeal on November 28, 2012.

{¶5} Appellant now raises four assignments of error, the first of which states:

THE TRIAL COURT ERRED IN ASSIGNING BAKER COMPANY STOCK PROCEEDS AS AN ASSET TO APPELLANT FOR PURPOSE[S] OF PROPERTY DIVISION.

{¶6} During the marriage, appellant received a personal injury settlement. The parties invested the settlement proceeds in Baker Company stock. In May 2007, the parties liquidated the stock. At trial, the parties agreed the stock proceeds were co-mingled and put toward the purchase and repair of a house on Myers Road. The Myers Road property was used as an investment property as well as appellant's temporary residence.

{¶7} The trial court awarded appellant the Baker Company stock proceeds in the amount of \$18,900.45. It also awarded appellant the parties' Myers Road property worth \$80,900.00.

{¶8} Appellant argues the Baker Company stock was not in existence at the time of the divorce. She notes that the stock was liquidated over four years prior to the divorce. Appellant further points out that the court awarded her the Myers Road

property. She argues the evidence was clear that the Baker Company stock proceeds were put toward the purchase of the Myers Road property. Therefore, she asserts the trial court awarded her the same asset twice, first \$18,900.45 as the stock proceeds and then again as part of the \$80,900.00 of equity in the Myers Road property. She contends this created a windfall for appellee in the amount of \$9,450.00 (1/2 of \$18,900.00).

{¶9} A trial court has broad discretion in dividing property in divorce actions. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998). Thus, this court will not disturb a trial court's division of property absent an abuse of discretion. Abuse of discretion connotes more than an error of law or judgment; it implies the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶10} The parties purchased a house on Myers Road in March 2007, for \$90,000. (Tr. 81). Appellant characterized it as an investment property. (Tr. 81). Appellee stated they purchased the Myers Road property so appellant could have a house of her own. (Tr. 154). The house is titled in both parties' names. (Tr. 83, 154). Appellant moved into the Myers Road house and stayed there for several years before moving into a friend's house in August or September of 2010. (Tr. 91, 126).

{¶11} Appellant had been involved in an automobile accident during the marriage and received a settlement, which the parties invested in Baker Company stock. (Tr. 118). The parties stipulated the stock was a marital asset. (Tr. 118).

{¶12} The parties sold the stock. (Tr. 117). The parties agreed that the entire proceeds from the sale of the stock were \$18,822.04. (Tr. 15). Appellant testified that the parties agreed the stock proceeds would be used toward the purchase of the Myers Road property. (Tr. 82). Appellee testified the entire balance of the stock proceeds was used toward the purchase of the Myers Road property. (Tr. 156).

{¶13} Thus, the uncontroverted evidence was that the proceeds from the sale of the stock were used toward the parties' purchase of the Myers Road property.

{¶14} In making its property distribution, the trial court awarded appellant “The Baker Company stock proceeds in the amount of \$18,900.45.” (Judgment Entry ¶4A). It also awarded appellant “The real estate located at 10311 Myers Road * * * valued at \$80,900.00.” (Judgment Entry ¶4K). Notably, the court does not list the Baker Company stock proceeds in its list of assets in its findings of fact.

{¶15} Because the evidence was uncontroverted that the entire amount of the Baker Company stock proceeds were used toward the purchase of the Myers Road property, no Baker Company stock proceeds existed at the time of the divorce. Thus, the court’s award of \$18,900.45 from the Baker Company stock proceeds to appellant was an empty award. This asset did not exist at that time. Consequently, the trial court abused its discretion in awarding appellant an asset that did not exist and considering it as part of appellant’s total property award.

{¶16} Accordingly, appellant’s first assignment of error has merit.

{¶17} Appellant’s second assignment of error states:

THE TRIAL COURT ERRED IN AWARDING APPELLEE A
\$21,273.31 CREDIT IN THE PROPERTY DIVISION FOR POST
SEPARATION MORTGAGE PAYMENTS.

{¶18} The trial court gave appellee a \$21,273.31 credit for the amount he paid toward the Huntington Bank mortgage while the parties were separated.

{¶19} The evidence at trial as to the purchase of the Myers Road property was that in addition to the stock proceeds, the parties took out a loan secured by the marital residence (the Meters Road property). At the time, the Meters Road property was \$3,000 to \$5,000 away from being paid off. (Tr. 82, 155). Because the loan for the Myers Road property was secured by the Meters Road property, the Myers Road property was free and clear of any mortgage secured by the property itself. After the parties purchased the Myers Road property, appellee made the payments on the loan balance. (Tr. 158-159). Appellee made all of the mortgage payments reducing the amount owed from \$90,000 to approximately \$68,000 in five years. (Tr. 158-

159).

{¶20} Appellant contends here that because appellee made the loan payments using marital income, the trial court should not have given him a credit for those payments. She argues this is akin to a finding that the \$21,273.31 appellee used to make the payments was his separate property. Appellant asserts the mortgage loan payments appellee received credit for was used to pay a marital debt and paid by marital funds. Therefore, she argues appellee was not entitled to a credit for these payments.

{¶21} In examining whether the trial court abused its discretion, a reviewing court cannot examine the valuation and division of a particular marital asset or liability in isolation. *Grove v. Grove*, 7th Dist. No. 01-JE-29, 2008-Ohio-1552, ¶13, citing *Jelen v. Jelen*, 86 Ohio App.3d 199, 203, 620 N.E.2d 224 (1st Dist.1993). Instead, the reviewing court must view the property division in its entirety, consider the totality of the circumstances, and determine whether the property division reflects an unreasonable, arbitrary, or unconscionable attitude on the trial court's part. *Id.*

{¶22} Appellant moved into the Myers Road property in May 2007. (Tr. 122). She resided there until August or September 2010. (Tr. 122). During this time, appellant never had to make a house payment or a rent payment. (Tr. 126). This was due to the fact that the parties took out a loan on the Meters Road property so that the Myers Road property would be free and clear of any mortgage. (Tr. 155). Appellee made all of the payments on that loan, totaling approximately \$22,000 over five years. (Tr. 158-159).

{¶23} Appellant testified that she moved out of the Myers Road property and rented the property from August or September 2010 until March 2012. (Tr. 126). During that time, appellant collected \$500 per month in rent. (Tr. 126). Appellee did not receive any of the rental income. (Tr. 127). Appellant agreed that she was the only one who benefited from the rental income. (Tr. 128). Moreover, appellee was not part of the process as to who rented the Myers Road property or how much rent appellant charged. (Tr. 127). Adding up appellant's rental income amounts to

\$10,000 that appellant collected and used as her own.

{¶24} Additionally, the trial court ordered that appellee was to pay the remaining balance of \$68,746.00 on the mortgage. (Judgment Entry ¶5E). And it awarded appellee the Myers Road property, free and clear of any mortgage.

{¶25} Given these considerations, the trial court did not abuse its discretion in giving appellee a credit for the mortgage payments he made during the marriage. For three years of this time, appellant lived in the house without having to make a single payment. And for the remaining 20 months, appellant rented the house out and collected the rent without input from appellee and without sharing the rental income with him. During this time, appellee made the mortgage payments while appellant collected the rental income. Thus, considering the evidence as a whole, the trial court acted within its discretion.

{¶26} Accordingly, appellant's second assignment of error is without merit.

{¶27} Appellant's third assignment of error states:

THE TRIAL COURT ERRED IN NOT AWARDING APPELLANT
REASONABLE SPOUSAL SUPPORT.

{¶28} The trial court awarded appellant spousal support in the amount of \$1,000.00 per month. Support is to continue until appellant turns age 66 in December 2014, when appellant can obtain Social Security benefits based on appellee's contributions and can collect retirement benefits through the School Employees Retirement System of Ohio (STRS) and the Ohio Public Employees Retirement System (OPERS). The court retained jurisdiction over spousal support.

{¶29} Appellant argues the trial court should have awarded her an open-ended or lifetime spousal support award. She contends such an award was warranted given the 41-year duration of the marriage, the fact that the parties are in their sixties, she now has little opportunity to develop a more financially beneficial career, and appellee has significantly more earning potential. Appellant also argues the court failed to consider her marital responsibilities during the 41-year marriage

that reduced her income production. And she argues the court failed to consider her mental and physical health problems of depression and Celiac's Disease.

{¶30} Additionally, appellant contends the court failed to consider that because she will collect state government retirement benefits, she will not be entitled to collect her full amount of appellee's social security benefits. She states that pursuant to 42USC(A) Section 404.408(a), she will lose \$2 of her social security benefit for every \$3 that she receives from her own state government pension. Appellant contends the trial court's award is based on the incorrect assumption that she is entitled to collect 50 percent of appellee's social security benefits.

{¶31} We review matters surrounding spousal support decisions for an abuse of discretion. *Corradi v. Corradi*, 7th Dist. No. 01-CA-22, 2002-Ohio-3011, ¶51. In determining whether a spousal support award is appropriate and reasonable and in fashioning that award, the trial court shall consider:

- (a) The income of the parties, from all sources, * * *;
- (b) The relative earning abilities of the parties;
- (c) The ages and the physical, mental, and emotional conditions of the parties;
- (d) The retirement benefits of the parties;
- (e) The duration of the marriage;
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;
- (g) The standard of living of the parties established during the marriage;
- (h) The relative extent of education of the parties;
- (i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;
- (j) The contribution of each party to the education, training, or earning ability of the other party, including, but not limited to, any party's

contribution to the acquisition of a professional degree of the other party;

(k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training, or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training, or job experience, and employment is, in fact, sought;

(l) The tax consequences, for each party, of an award of spousal support;

(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

(n) Any other factor that the court expressly finds to be relevant and equitable.

R.C. 3105.18(C)(1).

{¶32} The trial court in this case analyzed the statutory factors in detail in its findings of fact. It made the following findings.

{¶33} Appellee's most recent average three-year income exceeds \$60,000 annually, which is more than twice appellant's annual income. (R.C. 3105.18(C)(1)(a)).

{¶34} Appellee is a self-employed registered surveyor who grossed \$275,000 last year while taking on the risks associated with a sole proprietorship. Appellant is a fixed-income public employee. (R.C. 3105.18(C)(1)(b)).

{¶35} Appellant is 61 years old and appellee is 64 years old. There was no testimony that either party is physically, mentally, or emotionally unhealthy. (R.C. 3105.18(C)(1)(R.C. 3105.18(C)(1)(c)).

{¶36} Both parties have significant social security benefits available to them when they reach ages 62 and 66 depending on the choices they make relative to their benefits. Each party will also have a 401(K) fund valued at \$51,231.81 and other substantial liquid assets. Appellant will have STRS and OPERS retirement and

health benefits available to her. Each party leaves the marriage with assets valued at \$381,807.93. (R.C. 3105.18(C)(1)(d)).

{¶37} The marriage lasted for 40 years. (R.C. 3105.18(C)(1)(e)).

{¶38} The parties' children are emancipated. (R.C. 3105.18(C)(1)(f)).

{¶39} The parties lived a middle/upper class life style that permitted them to acquire over \$700,000 in assets while possessing disposable income permitting ownership of numerous parcels of real estate. They had a combined annual income exceeding \$80,000 per year. Though the parties lived separately for three years, they still maintained disposable income to allow them to purchase and maintain separate residences. (R.C. 3105.18(C)(1)(g)).

{¶40} Appellant is a library assistant at a local school district. Appellee is a registered surveyor. They are both nearing retirement age, therefore the extent of their education is not very relevant. (R.C. 3105.18(C)(1)(h)).

{¶41} The parties have accumulated financial assets and provided for their retirements. The marital property is divided equitably, if not equally. Appellee has moderate liabilities and appellant has slight liabilities. (R.C. 3105.18(C)(1)(i)).

{¶42} Any party's contribution to the acquisition of a professional degree is not extremely relevant given the parties' ages and proximity to retirement. (R.C. 3105.18(C)(1)(j)).

{¶43} Likewise, the time and expense necessary for a party to acquire education, training, or job experience is not extremely relevant. (R.C. 3105.18(C)(1)(k)).

{¶44} The tax consequences for appellant will increase her annual income by \$12,000 and minimally increase her tax liability. Appellee's annual \$12,000 support obligation will be deductible and reduce his tax liability. (R.C. 3105.18(C)(1)(l)).

{¶45} There was no evidence of any lost income production of either party resulting from the party's marital responsibilities. (R.C. 3105.18(C)(1)(m)).

{¶46} The parties are well positioned for the last few years of their working careers and their nearing retirements given their relatively equal assets, their annual

incomes, and their retirement assets and benefits. (R.C. 3105.18(C)(1)(n)).

{¶47} These findings demonstrate that the court here clearly considered each of the statutory factors in fashioning its spousal support award of \$1,000 per month. While the court did not award appellant a life-time support award, it did retain jurisdiction over spousal support so that should the parties' circumstances change in the future, the court can modify the support award as needed.

{¶48} Additionally, while appellant did testify that she suffers from Celiac's Disease, she offered no testimony that her illness has kept her from working. (Tr. 113). Her only testimony on the subject was that it requires her to eat a gluten-free diet, which is expensive to maintain. (Tr. 113).

{¶49} Furthermore, the parties are nearing retirement age. Once the parties retire, they will rely on other sources of income rather than their employment. Both parties will collect social security, both parties will collect from appellant's 401(K), both parties were awarded significant assets by the trial court, and appellant will collect from STRS and OPERS. Moreover, there is no evidence, as appellant suggests, that the court failed to consider that because she will collect state government retirement benefits she will not be entitled to collect her full amount of appellee's social security benefits. Nowhere in the trial court's judgment does it state that appellant will collect 50 percent of appellee's social security benefits. In fact, the judgment entry specifically states that appellant is awarded "[a]ll interest in and to her Social Security benefits" and appellee is awarded "[a]ll interest in and to his Social Security benefits." (Judgment Entry ¶4A, 7C).

{¶50} Given the trial court's thorough consideration of the issue and the fact that it retained jurisdiction over spousal support, we cannot conclude the court abused its discretion in awarding appellant \$1,000 per month in support until she reaches age 66.

{¶51} Accordingly, appellant's third assignment of error is without merit.

{¶52} Appellant's fourth assignment of error states:

THE TRIAL COURT ERRED IN ORDERING A DISTRIBUTIVE

AWARD WHEN MARITAL ASSETS WERE AVAILABLE TO BE DIVIDED EQUITABLY WITHOUT A FINDING OF A BURDEN TO EITHER PARTY OR THAT IT WAS IMPRACTICAL TO DIVIDE THE MARITAL ASSETS.

{¶153} The trial court ordered a distributive award of \$30,453.83 payable by appellee to appellant in order to facilitate the equitable division of marital property. The court ordered that appellee make the payment to appellant no later than one year from the date of the divorce entry.

{¶154} Appellant argues the distributive award was in error because the court did not find that a division of marital property in kind or in money would be impractical or burdensome as required by R.C. 3105.171(E)(2). This is a prerequisite to a distributive award, appellant asserts. Appellant contends the trial court arrived at the \$30,453.83 figure for the distributive award due to the inequitable property division of the marital assets and liabilities. But appellant argues the trial court should have equitably divided the marital assets and liabilities without a distributive award. She asserts that the distributive award is subject to the risk of non-payment and then she would never receive an equal division of property.

{¶155} The decision to grant a distributive award is within the sound discretion of the trial court. *Babka v. Babka*, 83 Ohio App.3d 428, 432-433, 615 N.E.2d 247 (9th Dist.1992).

{¶156} A “distributive award” is “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.” R.C. 3105.171(A)(1). The trial court may make a distributive award to facilitate, effectuate, or supplement a division of marital property. R.C. 3105.171(E)(1). “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.” R.C. 3105.171(E)(2).

{¶57} Before making a lump sum distributive award, the trial court must make the statutorily-required finding that a division of marital property in kind or in money would be impractical or burdensome. *Baker v. Baker*, 4th Dist. No. 07CA24, 2007-Ohio-7172, ¶31. A trial court abuses its discretion if it makes a distributive award without following all of R.C. 3105.171's requirements. *Id.* at ¶32.

{¶58} When a trial court determines that all of the parties' assets are marital, there can be no distributive award, which by definition comes from separate property. *Schwarck v. Schwarck*, 3d Dist. No. 2-11-24, 2012-Ohio-3902, ¶35. When an award comes from marital property and is meant to equalize the division of marital property, it is not a distributive award even if the trial court characterizes it as a distributive award. *O'Rourke v. O'Rourke*, 4th Dist. No. 08CA3253, 2010-Ohio-1243, ¶19.

{¶59} In its judgment entry, the trial court specifically stated: "The Court orders distributive award in the amount of \$30,453.84 payable by Defendant to Plaintiff in order to facilitate and effectuate the equitable division of marital property herein. * * * This distributive award shall be secured by a lien on the Defendant's separate property and his share of the marital property awarded herein." (Judgment Entry ¶8).

{¶60} And in its Findings of Fact and Conclusions of Law the court titled a section "DISTRIBUTIVE AWARD TO PLAINTIFF." It then set out the statutory law dealing with distributive awards. The court next addressed each of the R.C. 3105.171(F)(1) through (10) factors. The court then stated it was making a distributive award "in order to facilitate and effectuate the equitable division of marital property herein." Finally, the court stated the distributive award should be "made from the Defendant's property or income" and had "not been ordered paid from marital property."

{¶61} Given the court's repeated references to a "distributive award" and the fact that it set out the law dealing with distributive awards, we conclude the court did intend to make a distributive award. The court's intention is made even clearer by the fact that it ordered appellee to pay the distributive award from his property or

income and did not order appellee to pay the award from marital property. Thus, we must determine whether the court complied with the statutory law in making this distributive award.

{¶62} Despite the trial court's efforts to comply with all of the statutory findings, it did not make the determination that "a division of the marital property in kind or in money would be impractical or burdensome" as is required by R.C. 3105.171(E)(2). This was an abuse of discretion because the trial court failed to make a statutorily-required finding prior to making a distributive award. See *Baker*, 4th Dist. No. 07CA24, at ¶¶31-32; *Smith v. Smith*, 91 Ohio App.3d 248, 257, 632 N.E.2d 555 (10th Dist.1993). The court was required to make a determination in compliance with R.C. 3105.171(E)(2) before it could make a distributive award.

{¶63} Accordingly, appellant's fourth assignment of error has merit.

{¶64} For the reasons stated above, the trial court's judgment is hereby reversed as to the court's award of the Baker Company stock proceeds and as to the distributive award. It is remanded so that the trial court can reconsider an equitable division of assets and so it can properly determine whether a distributive award is warranted. The judgment is affirmed in all other respects.

Waite, J., concurs.

DeGenaro, P.J., concurs.