

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

Rhonda Meifert

Court of Appeals No. L-13-1192

Appellee

Trial Court No. DR2012-0724

v.

Edward F. Meifert, III

DECISION AND JUDGMENT

Appellant

Decided: March 6, 2015

* * * * *

Steven C. Hales, for appellee.

George J. Conklin, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Edward F. Meifert, III, appellant, appeals a July 31, 2013 judgment of the Domestic Relations Division of the Lucas County Court of Common Pleas, after trial on a complaint and counterclaim for divorce. Appellee is Rhonda Meifert. In the judgment, the trial court granted the parties a divorce, awarded separate property and divided

marital property. The judgment also awarded appellant spousal support in the amount of \$400 per month for a period of 120 months, subject to earlier termination on stated conditions.

{¶ 2} The parties married on February 25, 1978, and separated in August 2012. Appellee filed a complaint for divorce on July 11, 2012. The parties have three children, now adults, who are issue of the marriage. Both parties testified that they are incompatible and requested termination of the marriage.

{¶ 3} The parties entered into stipulations with respect to certain separate property interests and value of certain marital assets. The case proceeded to trial on unresolved issues, including: (1) the separate property interest of each party, (2) valuation and division of marital assets and debt not otherwise covered by the stipulations, and (3) whether the court should award spousal support and the amount and duration of any award.

Assignments of Error

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

Assignment of Error No. 1: The trial court abused its discretion in awarding spousal support to the plaintiff-appellee.

Assignment of Error No. 2: The trial court improperly imputed income to the defendant-appellant or failed in its calculation of earning abilities of the parties.

Assignment of Error No. 3: The trial court improperly computed the division of marital property.

Assignment of Error No. 4: The findings and decision of the court are against the manifest weight of the evidence.

{¶ 5} We consider assignments of error Nos. 1 and 2 together. Under assignment of error No. 1, appellant contends that the trial court abused its discretion in awarding spousal support to appellee. Under assignment of error No. 2, appellant asserts trial court erred in its determination of income and earning capabilities. He argues that the trial court either improperly imputed income to him or incorrectly calculated earning capabilities of the parties. The income of the parties and their relative earning abilities are factors to be considered by a court in determining whether an award of spousal support is appropriate and reasonable and the nature, amount, terms of payment, and duration of any award. R.C. 3105.18(C)(1)(a) and (b).

{¶ 6} Trial courts are granted broad discretion in making spousal support awards. *Schultz v. Schultz*, 110 Ohio App.3d 715, 724, 675 N.E.2d 55 (10th Dist.1996). An award of spousal support will not be disturbed on appeal absent an abuse of discretion. *Kunkle v. Kunkle*, 51 Ohio St.3d 64, 67, 554 N.E.2d 83 (1990).

{¶ 7} The trial court expressly stated in its judgment that it considered the statutory factors under R.C. 3105.18(C)(1) in determining an award of spousal support in this case. These factors include:

(C)(1) In determining whether spousal support is appropriate and reasonable, and in determining the nature, amount, and terms of payment, and duration of spousal support, which is payable either in gross or in installments, the court shall consider all of the following factors:

(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code;

(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.

{¶ 8} Appellant testified that he has been self-employed in construction work for the past 15 years and that he has not maintained any business records, invoices or receipts with respect to his work. He has not maintained any business accounts.

{¶ 9} Appellant testified that the only bank account he used for the business was the joint checking account maintained at Fifth Third Bank in both his and appellee's names. Appellant was unable at trial to identify any deposits he made to the checking

account in 2009, 2010, or 2011 from his business. He did testify to earnings of \$20,462 in 2011, \$16,000 in 2010, and \$9,936 in 2009 and that all the income was derived from his construction work.

{¶ 10} Appellee disputed appellant's testimony on income. Appellee testified that appellant's income has always been greater than he reported, as demonstrated by appellant's deposits to the Fifth Third checking account during the year.

{¶ 11} In its judgment, the trial court found that appellant reported net income of \$9,936 for tax year 2010 with gross receipts that year of \$16,527. (The 2010 federal tax return is in evidence and discloses these amounts.) The court noted that the joint checking account that year showed deposits totaling almost \$51,000 to the account, in addition to the direct deposits of appellee's employment income from Dillard's.

{¶ 12} The trial court found that the deposits were made by appellant. The court also found "at least \$34,000 was not reported in that year as part of Defendant's [appellant's] gross income."

{¶ 13} The trial court also found that appellant made cash deposits of \$43,499 to the checking account in 2011. Two federal income tax returns by appellant for 2011 are in evidence. One is dated August 2, 2012, and the other is dated October 3, 2012. The court noted that appellant stated gross receipts in the first 2011 return of \$49,204, but increased gross receipts to \$53,346 in the second return. The tax returns are in evidence and disclose a reported net profit of \$28,424 in the first return and a reported \$32,329 in the second.

{¶ 14} In its judgment, the trial court also noted that appellant reported gross receipts in 2012 of \$21,900. The return discloses a reported net income for the business of \$13,101 and a claimed adjusted gross income of \$2,040.

{¶ 15} In cross-examination at trial, appellant was questioned as to the cause of the drop in gross receipts in 2012 from those reported in 2011, a decrease of over \$30,000. He testified “maybe” it was caused by his cell phone being shut off and his having to get a new phone number, because he did not advertise and his business was generated by word of mouth.

{¶ 16} Appellant did not present any business record of any kind at trial to support his claims as to the yearly income and expenses from his construction business. He relied on his unsupported trial testimony and the income and expenses reported by him in his tax returns.

{¶ 17} Appellant claimed approximately \$20,500 as his current annual income at trial. The trial court rejected the claim:

The Court finds Defendant’s claim of approximately \$20,500.00 as his current annual income does not accurately reflects [sic] his earning potential. The Court further finds Defendant’s self-employment income, averaged over 2010-2011 of \$52,132.00 per year more accurately reflect his earning potential.

{¶ 18} In its judgment, the trial court also made a specific finding as to credibility of the parties in this case:

Having listened to the testimony of each party, and giving consideration to their demeanor, gestures and voice inflection while testifying, and giving further consideration to the implausibility of Defendant's testimony regarding his business practices and financial machinations, the Court finds Plaintiff to be more credible than the Defendant.

{¶ 19} The court did not impute any income to appellant or award spousal support in punishment of appellant. Rather, the court found appellant's testimony as to his income and expenses from employment untrustworthy.

{¶ 20} A reviewing court is to give deference to the findings of the trial court "with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 21} We find no abuse of discretion in the trial court's determination of appellant's income and earning capability. We conclude that the trial court's determination of income and earning abilities of the parties are based upon competent, credible evidence in the record. In reaching its conclusions on appellant's income from his business and earning ability, the trial court conducted a studied review of yearly deposits to the Fifth Third Bank joint checking account and the gross receipts from the construction business reported by appellant in his federal income tax returns. Appellant

offered no testimony or other evidence on which to conclude that any funds from the Fifth Third checking account were used to pay expenses of the construction business.

{¶ 22} We find assignment of error No. 2 not well-taken.

{¶ 23} Although assignment of error No. 1 is addressed to spousal support generally, appellant's argument under the assignment of error also is limited to challenging the court's determinations as to income and earning ability factors under R.C. 3105.18(C)(1).

{¶ 24} In its judgment the trial court stated that it had considered all the statutory factors under R.C. 3105.18(C)(1) in making the award of spousal support. At the time of trial appellant was age 61 and appellee age 58. Both are college graduates. The parties married in 1978. Computed to the date of the final hearing, the duration of the marriage is 35 years. There are no minor children of the marriage.

{¶ 25} Appellee is employed in the retail industry and has worked at Dillard's for the past seven years. Appellee is currently the business manager for the Lingerie Department and is compensated at an hourly rate. Although the employment is stable and includes benefits, appellee testified that there is no opportunity for advancement.

{¶ 26} Appellee reported employment earnings of \$24,894 in 2010, \$29,059 in 2011, and \$26,438 in 2012. Appellee testified that she expected wage earnings of \$29,000 in 2013. Non-employment income included quarterly payments of \$312 received by appellee under a mortgage loan made by her. This generates annual income of \$1,248.

{¶ 27} The trial court found that appellee has a current gross earning capacity of \$30,248. As discussed earlier in this decision, the court found that appellant's self-employment income for 2010-2011 was \$52,132 per year and that the amount demonstrated appellant's earning capability.

{¶ 28} The court reviewed the personal living expenses of the parties and the tax consequences of an award of spousal support.

{¶ 29} We have addressed appellant's challenge to the trial court findings with respect to appellant's construction business income and earning capabilities. Appellant has not challenged other findings by the court under R.C. 3105.18(C)(1) in its consideration of the award of spousal support.

{¶ 30} We find no abuse of discretion in the trial court's award of spousal support of \$400 per month for a period of 120 months, subject to earlier termination on stated conditions in the judgment.

{¶ 31} We find assignment of error No. 1 not well-taken.

{¶ 32} Under assignment of error No. 3, appellant contends that the trial court erred by improperly computing the division of marital property. A trial court has broad discretion in making a property award in an action for divorce, and a reviewing court reviews a property division under an abuse of discretion standard. *Berish v. Berish*, 69 Ohio St.2d 318, 319, 432 N.E.2d 183 (1982). In making a division of marital property, the court is required to consider all relevant factors, including those listed in R.C. 3105.171(F).

{¶ 33} R.C. 3105.171(B) and (C)(1) provide that marital property is to be divided equally unless an equal division would be inequitable. When an equal division would be inequitable, marital property is to be divided in an equitable manner. “Because the court must consider both assets and liabilities, an equitable division of marital property necessarily implicates an equitable division of marital debt. R.C. 3105.171(F)(2).” *Elliott v. Elliott*, 4th Dist. Ross No. 03CA2737, 2004-Ohio-3625, ¶ 12.

{¶ 34} We begin our consideration of the court’s division of marital property with two clarifications. First, appellant in his argument refers to \$25,000 received by appellee from her father’s trust and held for investment. The sum represents a portion of sums appellee received as a beneficiary of the trust. The trial court, however, ruled that beneficiary disbursements from the trust constituted separate property, not marital property. Appellant has not contested that determination in this appeal. Accordingly, we do not consider funds received by appellee as a beneficiary of the trust in our consideration of the court’s division of marital property.

{¶ 35} Second, appellant raises the issue of fees earned by appellee as trustee for the trust. The record demonstrates that appellee received \$20,100 in trustee fees, earned in May 2011.

{¶ 36} In its judgment, the trial court recognized appellant’s claim to one half of the trustee fees as part of the division of marital property. The trial court specifically

found that trustee fees were not separate property. The court, however, also found that the fees were paid 14 months prior to filing of the divorce complaint and that the fees were no longer in existence:

The Court notes the trustee fees were paid approximately 14 months prior to the institution of this divorce action. Furthermore, no evidence was introduced the fees are still in existence in some specified account, or the fees were not expended for marital purposes. The parties have a history of expending non-income sources of revenue to cover living expenses * * *.”

{¶ 37} The trial court also stated that it could not find any financial misconduct attributable to appellee with respect to the trustee fees received by appellee and that it also could not find that appellant had a present interest with respect to the fees received prior to the filing of the divorce complaint. Under these facts, the trustee fees constitute amounts expended during the marriage and not assets subject to allocation or division. *See Newman v. Newman*, 10th Dist. Franklin No. 11AP-373, 2012-Ohio-2467, ¶ 21; *Wertz v. Wertz*, 2d Dist. Montgomery No 19520, 2003-Ohio-3782, ¶ 17.

{¶ 38} In its division of marital assets, the trial court awarded appellee property having a combined value of \$11,289 and awarded appellant property with a combined value of \$6,375. The court also considered credits owing appellee due to other sums and property secured by appellant. First, appellant received \$3,500 in cash returned to appellant by appellee. Second, appellee was entitled to a credit for \$900 in appellee’s clothing taken by appellant.

{¶ 39} One dispute in the case concerned \$3,500 in cash contained in appellant's briefcase that was taken by appellee and subsequently returned to appellant. The court recognized in its judgment that appellee was entitled to a marital share of the money. The court also concluded that appellant also owed appellee \$900 for clothing taken by appellant and never returned.

{¶ 40} Allowing for these credits, there is a difference in value of marital assets distributed to the parties of \$514. Appellee received \$11,289 in marital assts. Appellant received a total of \$10,775 in marital assets after the value of the cash and clothing received by appellant is considered. We find no abuse of discretion with respect to division of marital assets.

{¶ 41} Appellant also contends that the trial court's division of marital debts is inequitable. The trial court found that appellant's debt totaled \$33,654, of which \$7,000 was owed to the Internal Revenue Service and \$20,000 owed for money borrowed by appellant from family members. The court found appellee's debt totaled \$25,444 and included approximately \$7,000 in medical expenses, credit card debt, and debt to retail stores. The court found the debt in the name of each party to be marital debt.

{¶ 42} "[W]hile the starting place for an equitable property division is an equal assignment of marital debt and marital assets, after considering all the relevant factors in a case, a trial court may choose to award one party more of the marital debts or marital

assets and still have an equitable order. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, paragraph one of the syllabus.” *Stacey v. Stacey*, 6th Dist. Lucas No. L-00-1079, 2001WL336471, * 8 (Apr. 6, 2001).

{¶ 43} Appellant did not argue for an equal allocation of marital debts at trial. Appellant argued that appellee should pay the Capital One credit card debt of \$1,820 and that the parties otherwise pay the debts held in their own names.

{¶ 44} The trial court recognized that the division of marital debt was not equal. Citing *Cherry*, the court stated the basis of its allocation:

Giving due consideration to the length of the marriage, the income of each party, the nature of the marital debt in that each party maintained separate accounts, the identity of the creditors of each party, and the nature of the marital debt with each party incurring expenses independently of the other, and not for the benefit of the other, the Court finds it equitable for each party to be responsible for the debt listed in their respective names and each shall hold the other harmless from the other’s indebtedness.

{¶ 45} The length of the marriage was 35 years. Appellee’s debt included \$7,000 for medical expenses. The court found a disparity in earning abilities, with appellant having a gross income earning capacity of \$52,132 per year and appellee, \$30,248 per year. Most of appellant’s debt was owed to a family member. We find no abuse of discretion in the trial court’s allocation of marital debt.

{¶ 46} We find assignment of error No.3 not well-taken.

{¶ 47} In assignment of error No. 4, appellant contends that the findings and decision of the trial court are against the manifest weight of the evidence. The assignment of error is directed to the grant of spousal support and the trial court's calculation of earning ability and appellant's claim that the trial court imputed income.

{¶ 48} The standard of review for a manifest weight of the evidence challenge to a trial court verdict is the same in civil and criminal cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17. Such a challenge questions whether the prevailing party met their burden of persuasion. *Id.* at ¶ 19. The analysis in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997) applies:

“The [reviewing] court * * * weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the [judgment] must be reversed and a new trial ordered.” (Alterations made in *Tewarson*.)
Eastley at ¶ 20, quoting *Tewarson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001). (Additional citations omitted.)

{¶ 49} In undertaking this analysis, we give deference to the findings of the trial court “with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.” *Seasons Coal*, 10 Ohio St.3d at 80, 461 N.E.2d 1273. Fundamental to the analysis is that “[j]udgments supported by some

competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 50} We find no manifest injustice in the trial court’s resolution of conflicting evidence in this case and credibility of witnesses. As we discussed under the first two assignments of error, we defer to the trial court’s determination that appellant lacked credibility in his claims as to the amount of his annual income from his construction business and his earning capacity. Appellant has maintained his construction business for 15 years and testified that he has not maintained any business records in the business, including invoices and receipts. He has maintained no business accounts.

{¶ 51} While a self-employed operator of a business may choose to operate his business in this fashion, a trial court may reasonably question the credibility of unsupported self-serving testimony by such a business operator with respect to claimed income and expenses from the business. We conclude that competent, credible evidence in the record supports the trial court verdict.

{¶ 52} We find assignment of error No. 4 not well-taken.

{¶ 53} Justice having been afforded the party complaining, we affirm the judgment of the Domestic Relations Division of the Lucas County Court of Common Pleas. We order appellant to pay the costs of this appeal, pursuant to App.R. 24.

Judgment affirmed.

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, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

<p>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: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
