

ORIGINAL

IN THE SUPREME COURT OF OHIO

MARY M. GENTILE)	CASE NO. 2013-0692
)	
Appellee,)	On Appeal from the Eighth District Court
)	of Appeals
v.)	
)	Court of Appeals Case No. 97971
RICHARD D. GENTILE)	
)	
Appellant.)	

MEMORANDUM IN RESPONSE AND OPPOSITION TO APPELLANT
RICHARD D. GENTILE'S MEMORANDUM IN SUPPORT OF JURISDICTION

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I. STATEMENT OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Though it is difficult to glean from Appellant's submission, Dr. Gentile is essentially arguing to this Honorable Court that certiorari should be granted for two (2) reasons: 1) Dr. Gentile's Constitutional Rights were somehow violated and 2) that public policy demands that this Court accept jurisdiction in order to regulate the tracing of separate property assets in a divorce process.

Appellant's assertions are, of course, inaccurate. This is not a case of public or great general interest nor does it involve a substantial constitutional question, rather, as detailed further herein, this is a simple case of a wealthy doctor who played games with discovery during the pendency of his divorce, who failed to disclose an investment, and then when asked about the investment, claimed to have no records and essentially no knowledge and that the investment "failed". The trial court, as affirmed by the Eighth District Court of Appeals, found Appellant's credibility to be severely lacking on the issue. The issue of credibility is, of course, an issue that the trial court is charged with virtually solely. There is no public policy which supports a husband concealing an asset and once found, being charged with that asset in the division of the marital estate. That is the definition of equitable.

Further, Dr. Gentile's Constitutional Rights were never violated in the underlying divorce nor by the Court of Appeals. The trial court determined that Ms. Gentile had met her burden of proof, by a preponderance of the evidence on the tracing of her separate property. Based upon the volumes of case law, the trier of fact acted properly as did the Court of Appeals in its affirmation.

In essence, this is clearly a case of "nothing to see here". There is no issue that needs to be addressed by this Court nor is one required or mandatory. As such, this Court must deny to accept

jurisdiction of this matter.

II. STATEMENT OF THE CASE AND FACTS.

Given the failure of Appellant (“Richard”) to provide all of the pertinent facts in his recitation, Appellee hereby submits her Statement of the Case and Facts.

The parties herein were married for over twenty five (25) years. They had two (2) children who were born as issue of the marriage, one of whom was emancipated at the time of the divorce trial. Appellee (“Mary”) filed a Complaint for Divorce on November 16, 2010. There were numerous discovery issues during the divorce. Dr. Gentile is a sole practitioner with a successful medical practice. The record is replete with evidence of his failure to provide discovery is his obfuscation of the process. The trial in the underlying matter commenced in November of 2011, and was concluded later in December of 2011. A Decision was issued by the trial court in February of 2012.

Mary and Richard commenced their relationship in 1985 in Houston, Texas. They met for the first time the weekend after Mary graduated from college and Richard was a resident at Baylor University. The parties were married on February 14, 1986. In June, 1987, Mary and Richard moved to Northeast Ohio in order to further Richard's career as a plastic surgeon. Richard opened a plastic surgery practice in 1987 and formed a corporation in 1988. Mary was a classic homemaker and primary caretaker of the parties' two children throughout the term of the marriage.

At the commencement of trial, the parties entered into an Agreed Judgment Entry resolving the parenting issues. Mary was designated the residential parent and legal custodian of the parties minor child as Richard does not spend any significant time with his son.

The marital estate included real estate holdings, business interests, automobiles, retirement accounts, and miscellaneous assets. The parties entered into stipulations regarding the value of

the majority of the marital assets.

The relevant facts for the two (2) issues raised by Richard are as follows:

During the marriage, Mary inherited funds from the passing of her Aunt. Mary's brother was the executor of the estate. Mary inherited \$265,450.00. She deposited these monies into a KeyBank account. Subsequently, those monies were withdrawn by Richard and used from unknown purposes. At trial Mary claimed that those monies were her separate property. She presented evidence in the form of documents as well as her testimony and that of her brother. The trial court agreed that Mary had traced her separate property and she was therefore awarded said property apart from the marital estate. This was subsequently affirmed by the trial court.

Secondly, an issue arose during the underlying divorce litigation surrounding an asset of the marriage which Richard did not disclose. Specifically, a real estate investment, for the sake of expedience termed Ashford Park. The evidence at trial clearly indicated that Richard invested \$350,000 in this real estate venture. The evidence at trial further clearly indicated that Richard did not disclose this asset during the discovery process. He did not disclose it in his discovery responses, nor on his asset disclose statement as filed by the Court. The asset was discovered by Mary's counsel. In response to the "discovery", Richard's reply was to claim that it was a "failed" investments. Richard, however, failed to provide any documentation on the asset. The trial court, in its decision, clearly did not believe Richard's testimony. The trial court property weighed Richard's credibility, and found it extremely wanting. The issue of credibility of a witness is the sole responsibility and charge of the trial court. In light of Richard's obfuscation on this issue, the Court awarded Richard the asset and assigned the only value presented to it, that of the initial investment of \$350,000. This decision was upheld by the trial court.

Now, both of these issues come before this Court on the question of Constitutionality and Great Public Interest. Neither issue comes close to either threshold for this Court to grant a review. As detailed herein, this is simply a boondoggle which must not be countenanced by the Court.

III. ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITION OF LAW.

- A. Appellant's Proposition of Law No. 1: **A SPOUSE THAT RECEIVES AN INHERITANCE IN 1990, DOES NOT MEET HER BURDEN OF PROOF IN CLAIMING SAID ASSET AS HER SEPARATE PROPERTY WHEN AT TRIAL IN 2011 SHE PRODUCES CONFLICTING EVIDENCE AS TO INTENT, THE FUNDS HAD BEEN COMMINGLED, AND SHE FAILS TO TRACE AND IDENTIFY THE CURRENT LOCATION OF SAID INHERITED ASSET.**

Appellant goes on in a subsection to state that: A Spouse Claiming a Separate Property Interest in an Ohio Divorce has an Absolute Statutory Duty to Trace and Identify a Separate Property Interest at the Time of Trial, Otherwise the Asset Loses its Character as Separate Property.

The issue that Richard focuses on is the Trial Court awarding Mary her separate property interest in the amount of \$265,450.00. This award was upheld by the Court of Appeals, which found that the Wife had met her burden of tracing the funds to her separate property by a preponderance of the evidence because both she (Mary) and her brother, the executor of the estate, established that these funds came from the estate. (Decision at P 79). Further, the Court of Appeals found that Mary's testimony was credible in stating that she deposited the money in a KeyBank account and that Husband withdrew said funds. (Id.). The Court therefore properly concluded that the Trial Court did not abuse its discretion pursuant to *Accord Tochtenhagen v. Tochtenhagen*, 11th Dist., No. 2009-T-001, and *Iacampo v. Oliver-Iacampo*, 11th Dist., No. 2011-G-3026.

Richard, however, claims that there are conflicting decisions on the issue of tracing separate property and that this Court should accept jurisdiction to address this conflict. Richard

is grossly inaccurate in his recitation of the law in the State of Ohio on this matter. To wit, the Court of Appeals found that Mary had sufficiently traced the asset in question, both by her testimony and that of her brother. That Richard didn't *like* the decision by the trial court and the Court of Appeals, does not create a conflict.

Contrary to Appellant's assertions, the Court of Appeals was completely correct in its Decision. Further, neither Appellant's constitutional rights were violated, nor is this issue one of great public interest.

Specifically, it is the trial court that must make a determination as to whether property is marital or separate. The characterization of property as separate or marital is a mixed question of law and fact, and that characterization must be supported by credible evidence. *Kelly v. Kelly* (1996), 111 Ohio App.3d 641; *McCoy v. McCoy* (1995), 105 Ohio App.3d 651.

R.C. 3105.71 defines marital and separate property and governs the division of assets in divorce proceedings. Under *R.C. 3105.171 (A)(6)(a)(I)*, separate property includes any interest in property that was inherited by one spouse during the course of the marriage. Pursuant to *R.C. 3105.171(A)(6)(b)*, the commingling of separate property with other property does not destroy the separate property status-as long as the separate property *can be traced*.

Further, it is axiomatic that the means for determining whether an asset is separate or marital property is the traceability of the asset. *Bell v. Bell* (October 11, 2002), Montgomery County App. No. 02 CA 13, unreported. An asset that falls under the definitions of "separate property" under the statutory provisions of *R.C. 3105.171(A)(6)(a)(I-vii)*, is presumed to be "separate property"-- unless proven otherwise. *Middendorf v. Middendorf*(1998), 82 Ohio St. 3d 397. A determination of traceability- which is required to single an asset out as separate property-is a finding of fact. *James v. James* (1995), 101 Ohio App. 3d 668.

In the trial, Mary provided actual documentary evidence, which was fully supported by the competent credible testimony of Mary and her brother, Louie T. Des Champs. The trial court correctly found that Mary met her burden in regard to this separate property claim. Mary presented evidence at trial that she received an inheritance in the amount of \$264,450 from the estate of Doris Des Champs. Mary demonstrated that she received a check in the amount of \$264,450 on or about December 12, 1990, representing her inheritance from her mother's and aunt's estates. Mary testified that she deposited the estate funds in a bank account but that Richard, unilaterally and without her knowledge, withdrew the funds and Mary was never able to get an accounting of the funds from Richard.

In order to trace the inheritance funds, Mary called her brother, Louie T. Des Champs, as a witness. Mr. Des Champs, a lawyer, came from Texas to testify in this matter. Mr. Des Champs testified that he handled the administration of the estate of Doris Des Champs and the estate of their aunt, Martha Langley, and corroborated Mary's testimony that Mary received \$264,450 as her share of inheritance from her mother and aunt lists Mary's name, "Mary Martha Gratehouse Gentile."

Mr. Des Champs's testimony specifically detailed the transaction which produced the sizeable funds for Mary's inheritance. Mr. Des Champs testified that the \$264,450 was Mary's share of the net proceeds from the real estate transactions in Texas and Arkansas. The property was divided among Mary and her siblings and Mary participated in the transaction which was an auction of the real estate that contained considerable timber holdings. The evidence at trial clearly indicated that Mary obtained an interest in the real estate set forth in the Partition Deed and Agreement. The evidence at trial revealed that Mr. Des Champs had a discussion with Richard regarding the proceeds and that Richard *acknowledged that he took the funds*

from Mary's account. Richard failed to present any evidence, even on direct examination, to contradict the overwhelming evidence submitted by Mary.

Richard's primary complaint, both Constitutional and that of public policy, seems to center on Mary's alleged lack of "tracing". However, as noted by both Lower Courts, oral testimony without documentary evidence may suffice to identify specific property as the separate property of one spouse. *Gosser v. Gosser* (2007), Trumbull App. No. 2006-T-0029, 2007- Ohio-3201.

In *Wylie v. Wylie* (May 30, 1996), 4th Dist. No. 05CA18, in that matter, the Court of Appeals held that the husband's brother's testimony was sufficient to "establish a nexus between the deposits and the inheritance distributions." This case is directly on point with the facts and circumstances of this matter and Mary's inheritance.

Further, in *Putman v. Putman* (2009), Clermont App. No. CA2008-03-029, 2009-Ohio-97, the court of appeals found that the husband had traced his separate property interest in the marital residence by presenting evidence of the sale of stock options which were acquired prior to the marriage.

Similar to the decisions in *Gosser* and *Putnam*, Mary presented documentary evidence and un rebutted testimony that she received \$264,450.00 from her family as inheritance. Both Lower Court's concurred with Mary's argument.

If Richard's argument is correct, then it would be permissible for a spouse to intentionally transmute the separate property of another spouse without that spouse's consent, thereby depriving that spouse of their separate property. Keep in mind that the only reason that Mary could not provide the trial court with the current whereabouts of her separate property was that Richard had removed it from her account and had invested it without her permission. This is the definition of

inequitable, for which Richard was (properly) not rewarded. There is no conflict of cases on this issue. There is no great public interest in rewarding a spouse for intentionally trying to deprive another spouse of her separate property and there certainly is no Constitutional conflict on that issue. As such, jurisdiction must be denied.

B. **Appellant's Proposition of Law No. 2: A SPOUSE, WHEN CONFRONTED DURING DISCOVERY CONCERNING A POTENTIAL ASSET, SHOULD NOT BE PENALIZED IN EQUITABLE DISTRIBUTION OF ASSETS, WHEN SAID ASSET HAS BEEN LOST AS A RESULT OF A FAILED INVESTMENT, AND DOCUMENTATION OFFERED AS EVIDENCE TO CORROBORATE HIS TESTIMONY IS REBUFFED.**

Again, Appellant adds another subsection stating: A spouse should not have a worthless asset \$350,000 placed into his asset listing at the time of final distribution by the Court nor be precluded from introducing evidence which helps establish the validity of the investments existence, when the un-controverted evidence is that the asset no longer exists due to a failed investment.

The issue is the Court of Appeals finding that Richard should be charged with \$350,000 in the division of the marital estate on what Richard claimed was a "failed real estate investment".

In denying the issue on Appeal, the Court of Appeals found that:

Valuing property involves factual inquiries, requiring an appellate court to apply a manifest weight of the evidence standard of review. *Kapadia*, 8th Dist. No. 94456, 2011-Ohio-2255. An appellate Court will not reverse a trial court's valuation if it is support by some competent credible evidence. (Id). In this matter, the trial court noted that there was no evidence regarding the present value of the \$350,000 "Centurion Development/Ashford Park LLC" investment, other than husband's contention that the investment had no value. The (trial) court was highly skeptical of the husband's claims regarding this asset and observed that it "is inconceivable that anyone could

invest \$350,000 without any paperwork or prospectus indicating what the investment was or how much he had actually invested.” The trial court then found it to be an asset of the marriage with a value of \$350,000, which was the cash put into the project. The Court of Appeals concluded that there was ample competent and credible evidence support the trial court’s valuation of this asset. Richard, of course, disagrees.

As this Court is well aware, *R.C. 3105.171* governs the division of property in domestic relations proceedings. *R.C. 3105.171(B)* sets forth the following in pertinent part:

...[I]n divorce proceedings, the Court shall . . . determine what constitutes marital property and what constitutes separate property. In either case, upon making such a determination, the court shall divide the marital and separate property equitably between the spouses, in accordance with this section.

Trial courts have broad discretion to determine what property division is equitable in a divorce proceeding, and its division of property will not be disturbed on appeal, absent abuse of discretion. As set forth by this Court in *Branden v. Branden* (February 26, 2009), Cuyahoga App. No. 91453, 2009-Ohio-866:

"Appellate review of a trial court's division of marital property is governed by an abuse of discretion standard. *Martin v. Martin* (1985), 18 Ohio St.3d 292. *R.C. 3105.171(C)(I)* mandates an equal division of marital property, unless such would be inequitable under the circumstances. In dividing marital assets, and in deciding whether to order an unequal award, a trial court must consider all relevant factors, including those listed in *R.C. 3105.171(F)*. The trial court also must make written findings of fact to support its decision to divide the marital property equitably. See *R.C. 3105.171(G)* . . . The court is required to set forth the basis of its award in sufficient detail to permit the reviewing court to determine that the award is fair. *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, paragraph two of the syllabus."

Further, when determining property distributions upon divorce, trial courts are guided by principles of *equitable* distribution. *Shaffer v. Shaffer* (1996), 109 Ohio App.3d 205. A court is obligated to make a division based on principles of *equitable* distribution, but this does not

necessarily mean equal distribution, but only fair and equitable distribution. *Walther v. Walther* (1995), 102 Ohio App.3d 378; *Spychalski v. Spychalski* (1992), 80 Ohio App.3d 10 (a domestic relations court is required, after granting a divorce, to *equitably* divide and distribute the marital property . . . [i]n this context, the term "equitable" *does not mean "equal"*). (Emphasis added.)

At trial Richard claimed he did not keep any record of the \$350,000 investment and claimed there were no records or reports. Richard intentionally concealed the Ashford Park investment, and boldly stated he did not have any obligation to inform Mary of the investment. A review of Richard's answers to interrogatories, Richard's responses to Mary's request for production of documents, Richard's pretrial statement, and Richard's September 2011 pretrial statement demonstrates that Richard failed to identify or disclose the Ashford Park investment. Further, it was clear that Richard's testimony to the trial court was deceitful.

At no point in time did Richard demonstrate where the funds came from for the investment. Mary, however, presented evidence of checks made payable to Ashford Park in the amount of \$65,000 and \$50,000 from the parties' Vanguard account. Additionally, Mary presented Richard's Keybank statement dated February 29, 2008, which revealed a wire transfer in the amount of \$25,000 to Centurion Development

To be clear, there were no K-1s or other tax documents evidencing Richard's investment in Ashford Park provided by Richard during discovery. Mary's counsel discovered the investment by reviewing thousands of banking transactions contained in Richard's bank account record.

Richard's extremely brief argument on this points is essentially: the Court of Appeal's Decision on this issue was not equitable and therefore this Court should accept review. There is no real public policy in this argument. Richard essentially states that the parties were married for

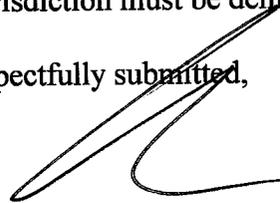
over 25 years and she (Mary) received a substantial property division and that what the Lower Court's decided on his attempt to conceal an asset just "wasn't fair".

Richard continues to ignore his actions and their direct nexus to the decision of the two Lower Courts. He failed to disclose the asset in multiple discovery responses and failed to disclose the asset on his filings with the Court. His defense to this failure was that "he forgot" about it. The trial court simply did not believe Richard when he testified that he forgot he made a \$350,000 (which is more than what Richard was arguing was his annual salary) investment. Simply put: Richard would have any Court believe that he "forgot" about making an investment that exceeded his representation of his annual salary. The trial court didn't buy this testimony, with ample reason. Therefore, the asset was property attributed to Richard at the only value available in evidence: \$350,000. There is no public policy interest in permitting a spouse to conceal an asset and then profit from this concealment. Jurisdiction must therefore be denied.

IV. CONCLUSION.

For the reasons stated herein, Appellee submits that this Honorable Court deny to accept jurisdiction in this matter. Appellant has failed to provide this Court with any basis for review. There is no conflict in the underlying jurisdiction on either the issue of tracing separate property nor allocation of an asset that a litigant failed to disclose. There is no Constitutional question that Appellant has demonstrated for this Court to review. Finally, there is no public policy which would support a review of Appellee's claims. Therefore, jurisdiction must be denied.

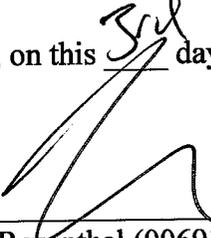
Respectfully submitted,



Scott S. Rosenthal (0069135)
Counsel for Appellee, Mary Gentile

CERTIFICATE OF SERVICE

A true copy of the foregoing was served upon Christopher P. Lacich, attorney for Appellant, at Roth, Blair, Roberts, Strasfeld & Lodge, LPA, 100 East Federal Street, Suite 600, Youngstown, Ohio 44503 by regular U.S. Mail, postage prepaid, on this 3rd day of June, 2013.



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