

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO**

ROSEMARIE O'BRIEN,	:	O P I N I O N
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2008-T-0075
ROBERT E. O'BRIEN,	:	
Defendant-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Domestic Relations Division, Case No. 2007 DR 114.

Judgment: Affirmed.

Rosemarie O'Brien, pro se, 718 State Route 7, N.E., Brookfield, OH 44403 (Plaintiff-Appellee).

Katherine E. Rudzik, 26 Market Street, #904, Youngstown, OH 44503 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Robert E. O'Brien, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, in which the trial court awarded plaintiff-appellee, Rosemarie O'Brien, a final decree of divorce, custody of the couple's minor daughter, and other assets. For the following reasons, we affirm the decision of the trial court.

{¶2} Robert and Rosemarie were married on September 15, 1983, in Trumbull County, Ohio. Two children were born as issue of the marriage; one emancipated child and one minor child, born February 21, 1991.

{¶3} On March 12, 2007, Robert was arrested and charged with Domestic Violence against Rosemarie. He subsequently pleaded guilty and was sentenced to five years community control. On March 13, 2007, Rosemarie filed for divorce.

{¶4} On April 27, 2007, Robert filed a letter with the Trumbull County Clerk of Courts, requesting a continuance because he was “recently released on bond from the Trumbull County Jail,” “currently unemployed and not allowed to work at his business due to a court order,” had “no money to obtain legal counsel (sic),” and “cannot give this hearing [his] full attention due to the mental stress, depression, and anxiety that the above conditions have caused [him].” The request for continuance was subsequently denied.

{¶5} On July 11, 2007, Robert’s counsel made a Motion to Withdraw as Counsel, which the court granted on July 12, 2007. The motion stated that Robert “knowingly and freely assents to such withdrawal” and, further, Robert “was aware of all hearing dates established by the Court” and “notice has been given to [Robert] advising [him] of the upcoming dates [for hearings].”

{¶6} Robert violated his probation in October of 2007. After a probation violation hearing, Robert was sentenced to an 11-month term of incarceration.

{¶7} On November 26, 2007, Robert sent notice to the court that he had retained new counsel. On February 21, 2008, Robert’s counsel made a Motion to Withdraw as Attorney of Record which was ultimately granted by the trial court. This

motion also stated that Robert “knowingly and freely assents to such withdrawal” and, further, Robert “was aware of all hearing dates established by the Court” and “notice has been given to [Robert] advising [him] of the upcoming dates [for hearings].”

{¶8} On May 1, 2008, a hearing was held. The court noted that although Robert was “duly served according to law,” he failed to file a responsive pleading and was not present. The court made the following findings on July 17, 2008:

{¶9} Robert, “at the time of the hearing[,] was incarcerated for Domestic Violence wherein [Rosemarie] was the victim.” Since “February 18, 2007, [Robert] has failed to financially support his spouse and has also failed to provide child support for the minor child.” Rosemarie and Robert owned an unincorporated business in Brookfield, Ohio, which Rosemarie was obligated to “attempt to operate the business by herself due to the neglect and abandonment of the business” by Robert. Due to this neglect, the business was forced to cease operation.

{¶10} Rosemarie and Robert own a home, currently listed for sale, located in Brookfield, Ohio, which was appraised for \$86,000; \$56,671.87 is still owed on the mortgage. The household goods within the home are valued at less than \$1000.

{¶11} The parties own two other properties appraised at \$47,000 combined. The parties owe \$54,320.86 to First National Bank for the financing of sale for these two properties. The parties own a 2002 Ford Mustang, valued at \$8,455, which Rosemarie testified was a gift from Robert for her fortieth birthday. The parties also own a Volkswagen Beetle, appraised at \$5,720. The parties had a 2004 Suzuki Grand Vitara, which was repossessed; the balance owed at the time of repossession was \$21,030.88. Robert has a 401(k), containing \$26,620.94, as of January 31, 2008.

{¶12} The parties currently owe the Internal Revenue Service \$4,471.92. Rosemarie has previously paid \$6,000 toward their IRS debt. The parties also owe \$1,140.14 for accounting services provided by J. Newman Levy and Company.

{¶13} The court found that Robert “committed financial misconduct[,] in that he abandoned the parties’ pizza business and left [Rosemarie] with no financial support for either herself or her children.” Further, the trial court found the date of termination of the marriage to be May 1, 2008.

{¶14} Based on the testimony of Rosemarie and a witness, as well as the documents filed, the court awarded Rosemarie a divorce on the grounds of neglect of duty and extreme cruelty; custody of the parties’ minor child; child support in the amount of \$225 per month; all household goods and furnishings in the marital residence; the Volkswagen Beetle; Robert’s 401(k) up through the date of termination of the marriage; and all remaining assets of the parties’ business. Robert was ordered to assume and hold Rosemarie harmless and immune from any liability for all debt associated with the 2004 Suzuki Grand Vitara; all debt associated with any State, Local, or Federal Income or Sales Tax; and all debt associated with J. Newman Levy and Company.

{¶15} The Mustang was found to be Rosemarie’s separate property. The property that the parties owned was to continue being listed for sale; the court retained jurisdiction over the property to make a determination as to the division upon the sale.

{¶16} Robert timely appeals and raises the following assignments of error:

{¶17} “[1.] The trial court erred and abused its discretion by proceed[ing] with the final divorce hearing without the appellant or his representative present even after

appellant requested a continuance because he was unable to attend and in the process of finding new counsel.

{¶18} “[2.] The trial court erred and abused its discretion by dividing the marital property in such a one-sided fashion as to be the equivalent of a default judgment.”

{¶19} Robert first argues that “[t]he letter written to the court was a pro se motion for a continuance that the court never ruled on.” He asserts that he was incarcerated at the time he made “his motion” and his previous attorney had withdrawn “only days before his final pre-trial.”

{¶20} Robert contends that his letter, filed March 19, 2008, was a pro se motion for continuance. This letter was addressed to the “Domestic Relations Court, Clerk of Courts” and stated the following:

{¶21} “Dear Sir: I need help from the court. I am incarcerated. I have had no contact with my wife since Feb., 2007. I am aware that she has filed for divorce. I have no legal representation in this case.

{¶22} “Now I have been told by family that a hearing will be held in May, 2008. I will not be prepared to deal with that hearing from here.

{¶23} “I need copies of the documents that were filed in this case. How can I receive copies? I will ask the men here about filing a motion for representative (sic) since I am integert (sic). I have no funds to hire a representative.

{¶24} “Thank you for your help.”

{¶25} Local Rule 32.10 of the Trumbull County Court of Common Pleas, Domestic Relations Division, provides in relevant part as follows:

{¶26} “Requests will be considered only after notice to all parties involved and no case will be continued on the day of the scheduled hearing except for good cause shown. *** All requests for continuances or advancements must: be in writing; state the reason for the request; contain a space for insertion of the new date for the rescheduled hearing; contain the filing date of the present case; if the request for continuance is being made due to a conflict with another case, contain the other case’s caption, type of case (civil or criminal), the Judge and County name where said case is to be heard, and when the conflicting case was assigned for trial; contain an affirmation that opposing counsel was contacted and does/does not have an objection to the continuance; and contain specific language as to the type of proceeding being continued, i.e., final divorce, motion for temporary orders, etc.” (Emphasis omitted.)

{¶27} It is apparent that the letter did not comply with the local rules. More importantly, the letter failed to explicitly ask for a continuance from the court. Additionally, it is apparent from the record that Robert knew how to properly file a motion for continuance as he had previously filed one on April 27, 2007, which was ultimately denied by the trial court. The March 19, 2008 letter was not a pro se motion for continuance as Robert suggested. Therefore, the trial court did not abuse its discretion in failing to rule upon this “motion”.

{¶28} Robert next contends that the trial court “did not equally divide the marital property of Robert and Rosemarie.” Further, “the court did not take into account that Robert was incarcerated for a great deal of [the time he committed the alleged financial misconduct].”

{¶29} “A trial court has broad discretion in making division of property in domestic cases.” *Dottore v. Feathers*, 11th Dist. No. 2007-P-0073, 2009-Ohio-539, at ¶11 quoting *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 1998-Ohio-403, citing *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. “A reviewing court will not disturb the trial court’s decision unless it finds that the trial court abused its discretion. *Id.* (citations omitted). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219 (citations omitted).

{¶30} The basic rule in Ohio is that “the division of marital property shall be equal. If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable.” R.C. 3105.171(C)(1).

{¶31} Pursuant to App.R. 9(B), Robert had a duty to file the relevant transcripts with this court. Robert has failed to file a transcript of the divorce hearing. In addition, Robert has not filed a statement of the evidence pursuant to App.R. 9(C). “[T]his court has previously held that ‘if appellant cannot demonstrate the claimed error then we presume the regularity of the trial court proceedings and affirm the judgment.’” *Patterson & Simonelli v. Silver*, 11th Dist. No. 2003-L-055, 2004-Ohio-3028, at ¶31 (citations omitted). “[T]he duty to provide a transcript for appellate review falls upon the appellant. *** This is necessarily so ‘because an appellant bears the burden of showing error by reference to matters in the record.’” *Tally v. Patrick*, 2008-T-0072, 2009-Ohio-1831, at ¶18 (citations omitted).

{¶32} As noted above, Robert failed to file a responsive pleading and was not present during the final divorce hearing. Although Robert was pro se during this hearing, “pro se litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors.” Id. at ¶15 (citation omitted). Due to the absence of the transcript from the hearing, this court is unable to review Robert’s arguments relating to the evidence presented at the hearing. Consequently, since there is no evidence to review, we must find that the trial court did not abuse its discretion in dividing the assets of the parties.

{¶33} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, Domestic Relations Division, granting a decree of divorce and dividing the parties’ assets, is affirmed. Costs to be taxed against appellant.

MARY JANE TRAPP, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.