

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

CURTIS W. BENSON III,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-12-304
- vs -	:	<u>OPINION</u>
	:	9/7/2010
JENNIFER L. BENSON,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DR09-03-0202

Kristen L. Campbell, 205 Dayton Street, Hamilton, Ohio 45011, for plaintiff-appellee

Vicki L. Richmond, 1238 Nilles Road, Suite 7, Fairfield, Ohio 45014, for defendant-appellant

BRESSLER, P.J.

{¶1} Defendant-appellant, Jennifer L. Benson (Wife), appeals from the decision of the Butler County Court of Common Pleas, Domestic Relations Division, classifying and dividing assets following her divorce from plaintiff-appellee, Curtis W. Benson III (Husband). For the reasons outlined below, we reverse and remand for further proceedings.

{¶2} Husband and Wife were married on June 29, 2002. The couple have two

children, Jasmine, born August 7, 2001, and Jessica, born May 24, 2005. On March 28, 2009, Husband filed for divorce. On November 9, 2009, after conducting a two-day final divorce hearing, the trial court issued a decision classifying and dividing property, designating Husband as residential parent and legal custodian of the parties' minor children, and ordering Wife to pay child support. On December 1, 2009, the trial court incorporated its decision into a judgment entry and decree of divorce.

{¶3} Wife now appeals the trial court's decision classifying and dividing property, raising five assignments of error. For ease of discussion, Wife's fourth and fifth assignments of error will be addressed together.

{¶4} At the outset, we note the trial court never stated that an equitable division of the property was appropriate, and therefore, we look to see if the court divided the property equally. See, generally, *Ghai v. Ghai*, 182 Ohio App.3d 479, 2010-Ohio-2449, ¶53.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN FINDING THAT [HUSBAND] HAD A NON-MARITAL INTEREST IN THE VANGUARD 401K."

{¶7} In her first assignment of error, Wife argues that the trial court erred by not classifying the entire value of Husband's 401K savings plan as marital property because, according to her, Husband failed to properly trace a portion of the asset to his separate property. While we may find some support for her claim, we find ourselves unable to reach the merit of Wife's argument for the trial court left a number of issues regarding Husband's 401K savings plan unanswered.

{¶8} For example, although the trial court's decision did allocate \$16,642 to Husband as his premarital portion, the same amount he rolled over into the account in 2005, the court did not account for any gains or losses to such funds, nor did it provide for the value of the

savings plan as of April 30, 2008, the valuation date.¹ In addition, the record indicates that the trial court failed to address the impact, if any, of Husband assuming a \$7,736 loan on the 401K savings plan following the couple's separation. Therefore, without rendering an opinion as to the merits of Wife's claim, we reverse and remand the trial court's decision as it relates to the classification and division of Husband's 401K savings plan. Accordingly, Wife's first assignment of error is sustained.

{¶9} Assignment of Error No. 2:

{¶10} "THE TRIAL COURT ERRED WHEN IT DID NOT EQUALLY DIVIDE [HUSBAND'S] GEORGIA PACIFIC PENSION."

{¶11} In her second assignment of error, Wife argues that the trial court erred by not dividing Husband's pension account equally. Husband concedes, and we agree, "that Wife's second assignment of error be sustained for clarification * * *."² Accordingly, Wife's second assignment of error is sustained and this matter is remanded to the trial court for further clarification regarding the disbursement of Husband's pension account.

{¶12} Assignment of Error No. 3:

{¶13} "THE TRIAL COURT ERRED WHEN IT FOUND [WIFE'S] DOWN PAYMENT ON 6796 LOGSDON ROAD AS A GIFT TO BOTH PARTIES AND NOT CONSIDERED [WIFE'S] PREMARITAL SEPARATE PROPERTY INTEREST."

{¶14} In her third assignment of error, Wife argues that the trial court erred by finding the \$15,000 down payment on the couple's marital residence was a gift given to both parties by Wife's grandmother for the purchase of their home. In support of her argument, Wife

1. We also note that the record contains some evidence indicating a portion of Husband's "pre-marital monies" were actually earned during the marriage.

2. The trial court's November 9, 2009 decision, as well as its December 1, 2009 judgment entry, merely states that "any other pension account/retirement account, of [Husband] shall be divided equally between the parties." The trial court's decision does not contain any further information regarding this disbursement.

claims the money used for the down payment could not be classified as marital property for it "clearly came from [her] separate account" and "was never gifted to [Husband]." We agree.

{¶15} In a divorce proceeding, a trial court must determine what constitutes marital property and what constitutes separate property. R.C. 3105.171(B); *Brown v. Brown*, Madison App. No. CA2008-08-121, 2009-Ohio-2204, ¶11. A trial court's decision classifying property as either marital or separate must be supported by the manifest weight of the evidence. *Zollar v. Zollar*, Butler App. No. CA2008-03-065, 2009-Ohio-1008, ¶10, citing *Kevdzija v. Kevdzija*, 166 Ohio App.3d 276, 2006-Ohio-1723, ¶6. An appellate court will not reverse a trial court's decision classifying property as marital or separate so long as its finding is supported by some competent and credible evidence. *Nichols-Ross v. Ross*, Butler App. No. CA2008-03-090, 2009-Ohio-1723, ¶9; *Montgomery v. Montgomery*, Brown App. No. CA2003-04-008, 2004-Ohio-3346, ¶20.

{¶16} At the final divorce hearing, after being called as if on cross-examination by Husband's trial counsel, Wife testified that the money used for the down payment came "[f]rom [her] grandmother." When asked to further explain the down payment, Wife testified as follows:

{¶17} "[HUSBAND'S TRIAL COUNSEL]: * * * [L]et me back up and make sure I'm clear about this. The money came from your grandmother. Did it come to a check to you or do you know exactly how it got to you?

{¶18} "[WIFE]: It was in a * * * bank account with my mother's and my name on it but it was my money.

{¶19} "[HUSBAND'S TRIAL COUNSEL]: Okay. So it was from a bank account that you and your mother had together?

{¶20} "[WIFE]: Right."

{¶21} Wife continued by testifying on direct examination regarding the down payment as follows:

{¶22} "[WIFE'S TRIAL COUNSEL]: Okay. And there was a down payment made, is that right?

{¶23} "[WIFE]: Yes.

{¶24} "[WIFE'S TRIAL COUNSEL]: * * * [W]ho made that down payment?

{¶25} "[WIFE]: I did.

{¶26} "[WIFE'S TRIAL COUNSEL]: And where did you have that money for the down payment?

{¶27} "[WIFE]: It was from my grandmother."

{¶28} Wife then testified that even though the account was held jointly with her mother, the account only contained money she received from her grandmother and that Husband never contributed to the account.

{¶29} Also at trial, Husband testified that the money "came from some money that [Wife] had throughout the family. I don't know how – it's an inheritance that her grandmother gave her is what – the way I was understood." Husband continued by testifying that the money Wife used for the down payment "came from her account that supposedly her grandma gave her."

{¶30} In addition, Wife's mother, Shelby Gluff, testified that Wife's grandmother "had, before her death, had given all of her grandchildren money each year. And [Wife's] money was in this account that my mother had given her." Thereafter, although she could not remember the exact amount Wife's grandmother had originally given, when asked if the money used for the down payment was Wife's, Gluff testified affirmatively.

{¶31} After a thorough review of the record, we find the trial court's decision finding

"the \$15,000 gift by the grandmother for the purchase of the home in 2000, which was prior to the actual marriage, is a gift to both of the parties and will not be considered as a premarital interest," is not supported by the record as there is simply no evidence that Wife's grandmother gave any money to both of the parties for the purchase of their home. Instead, as noted above, the evidence indicates that the money Wife used to pay the \$15,000 down payment was given to her by her grandmother before her death. Therefore, because the trial court erred by finding the money Wife used to pay the \$15,000 down payment was gift to both parties, the trial court's decision finding Wife was not entitled to these funds as her premarital interest in the home is reversed. Accordingly, Wife's third assignment of error sustained.

{¶32} Assignment of Error No. 4:

{¶33} "THE TRIAL COURT ERRED WHEN IT ORDERED THE PROCEEDS OF THE SALE OF 6976 LOGSDON ROAD BE 'DIVIDED BETWEEN THE PARTIES' IF THE RESIDENCE MUST BE SOLD."

{¶34} Assignment of Error No. 5:

{¶35} "THE TRIAL COURT ERRED WHEN IT FAILED TO CREDIT [WIFE] WITH THE INCREASE IN VALUE IN 6976 LOGSDON ROAD THAT WAS CREATED BY THE IMPROVEMENTS FUNDED BY HER PARENTS."

{¶36} In her fourth and fifth assignments of error, Wife argues that the trial court erred by classifying and dividing the equity interest in the couple's marital residence. In light of our decision in Wife's third assignment of error, we find that all remaining issues regarding the classification and division of the parties' marital residence are rendered moot. Accordingly, Wife's fourth and fifth assignments of error are sustained.

{¶37} Based on our decision in Wife's five assignments of error, we remand this

matter to the trial court for further proceedings so that it may determine how these assets should now be classified and allocated.

{¶38} Judgment reversed and remanded for further proceedings.

POWELL and RINGLAND, JJ., concur.

[Cite as *Benson v. Benson*, 2010-Ohio-4212.]