

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

Gail F. Dowling

Court of Appeals No. L-08-1129

Appellant

Trial Court No. DR 2007-0449

v.

W. Thomas Dowling

DECISION AND JUDGMENT

Appellee

Decided: October 16, 2009

* * * * *

Jay E. Feldstein, for appellant.

John L. Straub, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals the terms of a divorce decree entered in the Lucas County Court of Common Pleas, Domestic Relations Division. For the reasons that follow, we affirm.

{¶ 2} Appellant, Gail F. Dowling, and appellee, W. Thomas Dowling, were married in 1964. The couple had three children, all of whom are now adults. Both parties are now retired.

{¶ 3} Appellant and appellee separated in 2005. In 2006, appellant sued for divorce. The original suit was dismissed and refiled in 2007.

{¶ 4} The parties owned two homes: a 5,100 square foot home on four acres on Corey Road in Lucas County, Ohio, and a 1,700 square foot cottage on Devil's Lake in Michigan.

{¶ 5} After separation, the parties alternated residency at the Lucas County home. Appellee would spend a week in Lucas County and a week at Devil's Lake. Appellant would spend the alternate week in Lucas County and the other week, initially at a hotel, later at a rented apartment near grandchildren in Columbus, Ohio.

{¶ 6} Prior to trial, the parties agreed to incompatibility as the ground for divorce. The matter proceeded to a final hearing on economic issues only.

{¶ 7} Following the hearing, the court found that the parties had accumulated approximately \$550,000 in retirement benefits and ordered these funds divided equally. Each party also maintained separate property from which he or she derived some income.

{¶ 8} The court found that appellee received \$2,055 monthly Social Security benefits while appellant received \$817 monthly. The court ordered that appellee pay to appellant \$500 monthly spousal support until the death of either party or appellant's

remarriage. The court retained jurisdiction to modify. Appellee was also ordered to pay appellant's medical insurance premium until she reached the age of Medicare eligibility.

{¶ 9} Concerning the parties' real property, the court found that the appraised value of the Lucas County property ranged from \$800,000 to \$625,000, depending on whether it was sold as configured or broken up. The court also noted that these figures were substantially below a similar appraisal from a year earlier.

{¶ 10} The Devil's Lake property was destroyed by fire during the pendency of these proceedings. The parties stipulated that the value of the land at Devil's Lake was \$242,500. At the time of the final hearing, insurance proceeds from the fire totaled \$203,393, with the parties pursuing a claim against the insurer for further funds.

{¶ 11} The court ordered the insurance proceeds from the Devil's Lake property divided equally. The Devil's Lake land itself was awarded to appellee. The court directed that the Lucas County property be sold, with the first \$242,500 of the net proceeds to go to appellant, the remainder to be divided equally. Appellant was to be permitted to live in the Lucas County property until sold.

{¶ 12} After certain adjustments, the court ordered that each party be responsible for his or her own attorney fees and costs.

{¶ 13} From this judgment, appellant brings this appeal, setting forth the following three assignments of error:

{¶ 14} "First Assignment of Error

{¶ 15} "The trial court abused its discretion and committed reversible error in its spousal support award in not equally allocating the Social Security benefits of appellant and appellee.

{¶ 16} "Second Assignment of Error

{¶ 17} "The trial court abused its discretion and committed reversible error in its division of marital property in awarding the Michigan lot to appellee free and clear of any interest of appellant and ordering the Corey Road home to be sold."

{¶ 18} "Third Assignment of Error

{¶ 19} "The trial court abused its discretion and committed reversible error in not awarding appellant attorney fees in connection with this proceeding."

{¶ 20} A trial court has broad discretion both in the division of marital property and in fashioning a spousal support award. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, paragraph two of the syllabus; *Forbis v. Forbis*, 6th Dist. Nos. WD-04-056, WD-04-063, 2005-Ohio-5881, ¶ 33. Absent an abuse of that discretion, the court's decision will not be disturbed. An abuse of discretion is more than an error of law or judgment, the term implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218.

{¶ 21} In determining property division and spousal support, the court is initially bound by statutory considerations. With respect to property division, R.C. 3105.171(C) mandates that, with certain exceptions, "* * * 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."

{¶ 22} To fashion an equitable division, the court must consider all relevant factors, including:

{¶ 23} "(1) The duration of the marriage;

{¶ 24} "(2) The assets and liabilities of the spouses;

{¶ 25} "(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

{¶ 26} "(4) The liquidity of the property to be distributed;

{¶ 27} "(5) The economic desirability of retaining intact an asset or an interest in an asset;

{¶ 28} "(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

{¶ 29} "(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

{¶ 30} "(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

{¶ 31} "(9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;

{¶ 32} "(10) Any other factor that the court expressly finds to be relevant and equitable." R.C. 3105.171(F).

{¶ 33} Spousal support is any payment made to or for the benefit of a former spouse for sustenance or support. It does not include any division or distribution of property of a distributive award under R.C. 3105.171. R.C. 3105.18(A). In determining whether, how much and for how long spousal support is to be awarded, the court is directed to consider:

{¶ 34} "(a) The income of the parties, from all sources, * * *

{¶ 35} "(b) The relative earning abilities of the parties;

{¶ 36} "(c) The ages and the physical, mental, and emotional conditions of the parties;

{¶ 37} "(d) The retirement benefits of the parties;

{¶ 38} "(e) The duration of the marriage;

{¶ 39} "(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;

{¶ 40} "(g) The standard of living of the parties established during the marriage;

{¶ 41} "(h) The relative extent of education of the parties;

{¶ 42} "(i) The relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties;

{¶ 43} "(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;

{¶ 44} "(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;

{¶ 45} "(l) The tax consequences, for each party, of an award of spousal support;

{¶ 46} "(m) The lost income production capacity of either party that resulted from that party's marital responsibilities;

{¶ 47} "(n) Any other factor that the court expressly finds to be relevant and equitable." R.C. 3105.18(C).

I. Property Division

{¶ 48} In her second assignment of error, appellant complains that the trial court's division of property was inequitable, because appellee received the Devil's Lake property free and clear, while appellant's cash setoff for the Michigan property was delayed pending sale of the Lucas County property.

{¶ 49} Appellant concedes that the trial court's division of property is equal. Nevertheless, she insists, it is inequitable in application.

{¶ 50} Appellant hypothesizes that, once appellee obtains clear title to the Michigan land, he could immediately sell it – possibly for a higher value than the

stipulated appraisal – leaving appellant with nothing until the Lucas County property is sold. Meanwhile, appellant is burdened with staying in the Lucas County home and preparing it for sale, while being locked out of any potential windfall appellee might obtain in the sale of the Michigan land.

{¶ 51} Both parties have access to sufficient separate property, retirement funds and insurance settlement funds that neither should want while the Lucas County property is sold. At trial, appellee expressed a desire to rebuild the Devil's Lake cottage. Appellant indicated an interest in relocating to the Columbus area, near the grandchildren. The trial court's disposition of the real property permits each party to pursue his or her own desires. It also avoids speculation on the real value of the property in a volatile real estate market. Moreover, while appellant is provided with a subsidized place to live while the property is sold, appellee must make his own arrangements. In the whole scheme of things, this seems to be a reasonable trade-off.

{¶ 52} Consequently, we conclude that the trial court acted within its discretion when it divided the parties' property. Accordingly, appellant's second assignment of error is not well-taken.

II. Spousal Support

{¶ 53} In her first assignment of error, appellant maintains that the trial court abused its discretion in failing to equalize the amount of Social Security benefits each party receives.

{¶ 54} In its judgment entry, the trial court found that appellee had begun receiving a monthly Social Security benefit of \$2,055. Appellant was receiving \$817 per month. In the entry, the court reproduces the R.C. 3105.18(C) factors and found that each party was retired and expressed no interest in future employment, each has a modest income from separate property, each will have approximately \$275,000 in retirement benefits, and each will share in insurance and property sale proceeds, likely in excess of \$1 million . On consideration of this, the court ordered appellee to pay appellant \$500 per month spousal support until either party's death or appellant's remarriage. The court also ordered appellee to continue to pay appellant's medical insurance premium until she becomes eligible for Medicare on July 1, 2009.

{¶ 55} Appellant insists that the court underestimated the amount of Social Security benefits that appellee would receive and should have adjusted for exact parity: a figure appellant maintains should have been \$695 per month, not \$500.

{¶ 56} It is clear that the trial court considered all of the statutory factors that it is supposed to consider when determining an amount for spousal support. Appellant directs us to no authority that requires an exact parity adjustment for Social Security benefits. There is some discussion in the judgment and among the parties of *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, but this case seems of limited utility as it involves the value of future Social Security benefits in a division of marital assets.

{¶ 57} We note that for exact parity of benefits, given the facts found by the trial court, there would be a transfer of \$619 from appellee to appellant. We also note that the

court ordered appellee to continue paying appellant's health insurance premium for approximately 15 more months at a minimum amount of \$330 per month and possibly as much as \$1,250 per month, if she could no longer be insured under appellee's business policy. Appellee was also ordered to pay to appellant a previously agreed \$1,750 per month until December 2008. The trial court could have reasonably concluded that these payments equitably offset any disparity remaining in Social Security benefits. Accordingly, appellant's first assignment of error is not well-taken.

III. Attorney Fees

{¶ 58} "In an action for divorce * * * a court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' marital assets and income, any award of temporary spousal support, the conduct of the parties, and any other relevant factors the court deems appropriate." R.C. 3105.73(A). Although there have been some recent changes in the manner in which attorney fees may be awarded in a divorce action, see former R.C. 2105.18(H); *Moore v. Moore*, 175 Ohio. App.3d 1, 2008-Ohio-255, ¶ 81, the decision to award attorney fees remains within the sound discretion of the court. *Id.* at ¶ 80.

{¶ 59} In this matter, the court expressly found that each party had sufficient assets to pay his or her own attorney fees and costs. We construe this as a finding that it was equitable that the responsibility for attorney fees and costs remain with the party who incurred them. There is evidence in the record to support this. Accordingly, the court did

not abuse its discretion in refusing to award either party attorney fees and costs.

Appellant's third assignment of error is not well-taken.

{¶ 60} On consideration, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. It is ordered that appellant pay the court costs of this proceeding, 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.

Arlene Singer, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Charles D. Abood, J.
CONCUR.

JUDGE

Judge Charles D. Abood, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

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>.