

**IN THE COURT OF APPEALS OF OHIO  
ELEVENTH APPELLATE DISTRICT  
ASHTABULA COUNTY**

DOUGLAS L. BLANCHARD,

Plaintiff-Appellee,

- v -

MINA B. BLANCHARD,

Defendant-Appellant.

**CASE NO. 2021-A-0003**

Civil Appeal from the  
Court of Common Pleas

Trial Court No. 2019 DR 00110

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**OPINION**

Decided: January 24, 2022

Judgment: Affirmed

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*Gary S. Okin*, Dworken & Bernstein Co., LPA, 60 South Park Place, Painesville, OH 44077 (For Plaintiff-Appellee).

*R. Russell Kubyn*, Kubyn & Ghaster, 8373 Mentor Avenue, Mentor, OH 44060 (For Defendant-Appellant).

THOMAS R. WRIGHT, P.J.

{¶1} Appellant, Mina B. Blanchard (“Wife”), appeals the trial court’s judgment overruling her objections to the magistrate’s decision, granting the parties a divorce, ordering spousal support, and dividing property between the parties. We affirm.

{¶2} Wife and appellee, Douglas L. Blanchard (“Husband”), married in 1995. In 2017, Husband filed a complaint for divorce. In 2019, the 2017 case was dismissed by agreement of the parties, and Husband refiled his complaint for divorce.

{¶3} The trial court set the matter for final hearing before a magistrate. Two days prior to commencement of final hearing, Wife moved for a continuance, which the magistrate denied. Wife did not move to set aside the magistrate's order.

{¶4} The case proceeded to final hearing on November 20, 2019. During the hearing, the parties entered into a series of stipulations regarding assets and liabilities. However, the parties did not reach a consensus regarding division of assets and spousal support. The magistrate heard testimony from the parties and Husband's expert, Jason Bogniard, on these issues.

{¶5} On June 29, 2020, the magistrate issued a decision. Both parties filed objections pursuant to Civ.R. 53. On December 21, 2020, the trial court overruled the objections and independently entered judgment adopting the magistrate's decision, granting the parties a divorce, dividing their assets and liabilities, and ordering spousal support.

{¶6} In her first assigned error, Wife argues:

The court committed reversible error and abused its discretion in its determination to admit into evidence the Bogniard Report (Exhibit 39).

{¶7} Wife's first assigned error pertains to a report entitled "Tracing of Assets During Marriage" that was prepared by Husband's expert. First, Wife maintains that the court erred in denying her motion to continue, in which she alleged that she was not provided the report until October 23, 2019, and that she did not have adequate time to retain an expert to review and respond to the report, to complete Husband's deposition, or to depose Husband's expert.

{¶8} Civ.R. 53(D)(2)(b) allows a party to file a motion to set aside a magistrate's order within ten days after the order is entered. Wife failed to move to set aside the magistrate's order within the ten-day timeframe, which forfeits her right to argue on appeal that the trial court abused its discretion in denying the continuance she requested. *Ganaway v. Ganaway*, 12th Dist. Warren No. CA2016-05-039, 2017-Ohio-1009, ¶ 17. Accordingly, to the extent that Wife maintains the trial court erred in admitting the report without granting her continuance, her first assigned error lacks merit.

{¶9} Wife further maintains that the trial court erred in admitting Bogniard's report because it relied upon facts not in evidence, including an alleged antenuptial agreement into which the parties entered on May 24, 1995.

{¶10} Evid.R. 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by the expert or admitted in evidence at the hearing."

{¶11} Here, no antenuptial agreement was admitted into evidence, and the parties agreed that enforcement of an antenuptial agreement was not being pursued in this case. Bogniard testified that he relied on the antenuptial agreement for a schedule listing the parties' beginning asset values at the time of marriage. Relevant to Bogniard's testimony and report, the schedule included Husband's ownership of 24,985 shares of stock in Plasticolors, Inc., with a value of \$32.50 per share, when the parties married. However, the same fact was entered as a stipulation by the parties. Therefore, the facts on which Bogniard relied were admitted by stipulation. Accordingly, to the extent that Wife argues that the trial court erred in admitting the Bogniard report due to its reliance on the antenuptial agreement, her first assigned error lacks merit.

{¶12} Wife further maintains that the trial court erred in admitting Bogniard's report because it contained legal conclusions. However, in her supporting argument, Wife does not challenge the admissibility of the report but, instead, argues that the trial court erred in agreeing with Bogniard's conclusion that a substantial amount of the growth on the premarital stock prior to its ultimate sale in 2012 was passive growth that constituted separate property. As this argument pertains to the arguments raised in Wife's second assigned error, we address it there.

{¶13} In her second assigned error, Wife maintains:

The court committed reversible error and abused its discretion in its determination to characterize and award as separate property to husband property that should have been determined to be marital property and equally divided.

{¶14} R.C. 3105.171 states in pertinent part:

(B) In divorce proceedings, the court shall \* \* \* determine what constitutes marital property and what constitutes separate property. \* \* \* [T]he court shall divide the marital and separate property equitably between the spouses, in accordance with this section. \* \* \*

\* \* \*

(C)(1) Except as provided in this division or division (E) of this section, 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. In making a division of marital property, the court shall consider all relevant factors, including those set forth in division (F) of this section.

\* \* \*

(D) Except as otherwise provided in division (E) of this section or by another provision of this section, the court shall disburse a spouse's separate property to that spouse. \* \* \*

{¶15} Property that was acquired during the marriage is presumed to be marital in nature. *Speece v. Speece*, 2021-Ohio-170, 167 N.E.3d 1, ¶ 35 (11th Dist.). Property acquired prior to marriage is separate property. R.C. 3105.171 (A)(3)(b) and (A)(6)(a)(ii). Separate property additionally includes any passive income or appreciation on premarital property accrued during the marriage. R.C. 3105.171(A)(6)(a)(iii). R.C. 3105.171(A)(4) provides that “passive income” refers to “income acquired other than as a result of the labor, monetary, or in-kind contribution of either spouse.” “The comingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable.” R.C. 3105.171(A)(6)(b). “[T]he party seeking to have a particular asset classified as separate property has the burden of proof, by a preponderance of the evidence, to trace the asset to separate property.” *Speece* at ¶ 35, quoting *O’Grady v. O’Grady*, 11th Dist. Trumbull No. 2003-T-0001, 2004-Ohio-3504, ¶ 48, quoting *Smith v. Smith*, 11th Dist. Ashtabula No. 98-A0034, 1999 WL 1488950, \*4 (Oct. 15, 1999).

{¶16} Here, prior to and during the marriage, Husband worked as the CFO and treasurer at Plasticolors, Inc., a corporation founded by his father. As set forth in our discussion of Wife’s first assigned error, the parties stipulated that, prior to the marriage, Husband owned 24,985 shares of Plasticolors with a value of \$32.50 per share. Husband retired from Plasticolors on August 31, 2007. However, Husband continued with the corporation on its board of directors until 2012, when Plasticolors was sold to Chromaflo. Husband testified that the board of directors initially met four times, and later three times, per year. At the board meetings, each lasting one-half to three-quarters of a day, management would advise the board of the status of the company. Husband maintained

that he had no authority as a board member. When Plasticolors was sold in 2012, Husband opened an Ameritrade account to receive proceeds from the sale of his stock, totaling \$4,881,907.11.

{¶17} Bogniard testified that he traced certain expenditures from the sale of the stock shares in 2012 to certain presently held assets of the parties. Bogniard opined that 46.8 percent of the value of these items resulted from passive appreciation on the stock, and 53.2 percent of the value resulted from active appreciation. In reaching these percentages, Bogniard explained that he compared the value of the company at the commencement of the marriage through the date of Husband's retirement to determine active appreciation. Bogniard testified that this approach was conservative to preserving the marital interest, as it assumed *all* appreciation during this time was associated with Husband's efforts as a member of the management team. Bogniard then evaluated the value of the company at the time of sale in 2012. Bogniard designated the appreciation that occurred between Husband's retirement and the sale of the stock as passive appreciation. Bogniard explained that he labeled this appreciation as passive because Husband's position as a board member would not affect the value of the stock on a day-to-day basis. Bogniard explained that he utilized the company value as opposed to the value of the stock in reaching the percent values of appreciation due to a stock split.

{¶18} Bogniard testified that he was able to trace Husband's stock sale proceeds from the Ameritrade account to the parties' Key Bank account and then to the purchase of the following assets: a condominium in Florida with an address of 4141 Bay Beach Lane, Unit 4p3; a 2010 Lamborghini; another condominium in Florida, with an address of 4253 Bay Beach Lane, Unit E5; a 2008 Ferrari; and a 2010 Rolls Royce. Bogniard

indicated that use of the passive and active appreciation percentages applied above to the current value of the assets would yield the appropriate value of the assets attributable to active and passive appreciation.

{¶19} Bogniard further testified that he traced the funds in Husband's Cornerstone Ameritrade IRA, which was a rollover account from Husband's premarital ESOP at Plasticolors. Bogniard applied the same appreciation method as he used in determining the active and passive appreciation on the stock that Husband owned directly, discussed above, and determined that 46.8% of the appreciation was active appreciation.

{¶20} The trial court concluded that Husband had met his burden of proving by a preponderance of the evidence that he held a 53.2% separate property interest in the above assets.

{¶21} Wife argues that the trial court should have determined that all increase in the value of Husband's shares occurred after the marriage as a direct result of his efforts and should have been categorized as marital. However, as set forth above, Husband had no interest in the stock at the time of final hearing, with the sale of Plasticolors having occurred in 2012. Nonetheless, we construe Wife's arguments in this assigned error, as well certain arguments made in her first assigned error, as challenging the allocation of assets purchased with the proceeds received from the sale of stock.

{¶22} Wife maintains sales of stock between 2000 and 2010 were not taken into consideration when tracing Husband's premarital shares, and because the real estate of the parties is jointly titled and was acquired during the marriage, the real estate was entirely marital in nature. However, Husband is not attempting to assert a separate ownership interest in assets acquired as a result of stock sales between 2000 and 2010,

and he did not acquire additional stock shares during the marriage, except for 4100 shares gifted to him by his parents and those received due to the stock split. See R.C. 3105.171(A)(6)(a)(vii) (separate property includes “[a]ny gift of any real or personal property or of an interest in real or personal property that is made after the date of the marriage and that is proven by clear and convincing evidence to have been given to only one spouse”). Further, the joint title of real estate is not determinative of whether the property is separate or marital. See R.C. 3105.171(A)(6)(b). Accordingly, to the extent that Wife argues that the trial court erred in using the marital percentage approach of allocating marital and separate property interests in the above assets, Wife’s assigned error lacks merit.

{¶23} Wife also argues that the trial court erroneously applied the standard of “during the marriage.” R.C. 3105.171(A)(2) provides,

“During the marriage” means whichever of the following is applicable:

(a) Except as provided in division (A)(2)(b) of this section, the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation;

(b) If the court determines that the use of either or both of the dates specified in division (A)(2)(a) of this section would be inequitable, the court may select dates that it considers equitable in determining marital property. If the court selects dates that it considers equitable in determining marital property, “during the marriage” means the period of time between those dates selected and specified by the court.

{¶24} Wife maintains that the trial court should have used a date earlier than the parties’ ceremonial marriage date as a de facto date of marriage. In support, Wife maintains that the parties resided together, commingled assets, and jointly acquired real



estate in January 1995. Later in her brief, Wife maintains that the parties began cohabitating in July 1994, and this date should have been used as the date of marriage. In her reply brief, Wife maintains that the court erred in failing to use January 1995 as a de facto date of marriage.

{¶25} In addressing Wife’s objection relative to a de facto marriage date, the trial court noted that there was no evidence presented to demonstrate that use of the ceremonial marriage date would be inequitable in this case. We agree that Wife did not indicate that the valuation or marital interest allocation of any of the property would have changed were the court to have used a date five months prior to the ceremonial marriage date as the date of marriage. Accordingly, to the extent Wife argues that the trial court erred in failing to utilize a de facto marriage date, Wife’s second assigned error lacks merit.

{¶26} In her third assigned error, Wife maintains:

The court committed reversible error and abused its discretion in failing to characterize financial misconduct in the division of property.

{¶27} R.C. 3105.171(E)(4) provides that “[i]f a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, nondisclosure, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.” Although the statute “does not set forth an exclusive listing of acts constituting financial misconduct, those acts that are listed \* \* \* all contain some element requiring wrongful scienter. Typically, the offending spouse will either profit from the misconduct or intentionally defeat the other spouse’s distribution of marital assets.” *Calkins v. Calkins*,

2016-Ohio-1297, 62 N.E.3d 686, ¶ 15 (11th Dist.), quoting *Hammond v. Brown*, 8th Dist. Cuyahoga No. 67268, 1995 WL 546903, \*3 (Sept. 14, 1995); see also *Gentile v. Gentile*, 8th Dist. Cuyahoga No. 97971, 2013-Ohio-1338, 2013 WL 1384891, ¶ 55. “The burden of proving financial misconduct is on the complaining party.” *Calkins* at ¶ 15, citing *Smith v. Emery-Smith*, 190 Ohio App.3d 335, 2010-Ohio-5302, 941 N.E.2d 1233, ¶ 50 (11th Dist.).

{¶28} “While a trial court enjoys broad discretion in deciding whether to compensate one spouse for the financial misconduct of the other, the initial finding of financial misconduct must be supported by the manifest weight of the evidence.” *Calkins* at ¶ 17, citing *Davis v. Davis*, 11th Dist. Geauga No. 2011-G-3018, 2013-Ohio-211, ¶ 77, and *Emery-Smith* at ¶ 50. “Under this standard, the reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine whether the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the decision must be reversed.” *Calkins* at ¶ 17, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), and *Smith v. Smith*, 11th Dist. Geauga No. 2013-G-3126, 2013-Ohio-4101, ¶ 42, citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517.

{¶29} Wife maintains that Husband’s purchase of the luxury cars referenced in our discussion of the second assigned error amounted to financial misconduct, as Husband purchased the vehicles without Wife’s consent, titled them in his own name, and suffered a loss in the value of the vehicles.

{¶30} However, Husband testified that he purchased these vehicles in conjunction with his founding of a business to rent luxury vehicles in Chicago in 2012, years prior to

the first filing for divorce. Although Wife maintained that Husband purchased the vehicles without her knowledge or consent, Wife provided no evidence from which it can be reasonably inferred that Husband intended to defeat her interest in marital property or acted with other wrongful intention contemplated by R.C. 3105.171(E)(4). Accordingly, the trial court's determination that Husband did not engage in financial misconduct was not against the weight of the evidence, and Wife's third assigned error is without merit.

{¶31} In her fourth assigned error, Wife contends:

The court committed reversible error and abused its discretion in the limitation in time and amount applied to the award to wife of spousal support.

{¶32} Wife argues that the award to her of spousal support in the amount of \$7,000.00 per month for 96 months is inadequate.

{¶33} We review a trial court's order of spousal support for an abuse of discretion. *Taylor v. Taylor*, 11th Dist. Trumbull No. 2015-T-0110, 2017-Ohio-2594, ¶ 12. R.C. 3105.18(B) provides that "[i]n divorce and legal separation proceedings, upon the request of either party and after the court determines the division or disbursement of property under section 3105.171 of the Revised Code, the court of common pleas may award reasonable spousal support to either party." In determining whether spousal support is reasonable and appropriate, the trial court must consider the factors contained in R.C. 3105.18(C)(1)(a) through (n). These factors include:

(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.

{¶34} Applying those factors to the present case, Husband testified that he was 68 years old and in very good health. He holds an MBA, worked for Plasticolors for many years as a CFO and treasurer, and retired from employment in 2007. Husband has been receiving social security benefits since turning 65 years old. He has health insurance

through Medicare and a dental plan costing \$80 per month. Husband receives Social Security Retirement benefits of \$28,808. He had not yet begun receiving distributions from his 401(k) account. During the course of the marriage, the parties frequently traveled and dined out.

{¶35} Wife testified that she was 56 years old. Wife received her bachelor's degree in 1986 in Morrocco, and she thereafter studied radiology in Ohio. She met Husband when she began working at Plasticolors. After the parties married, Wife left Plasticolors due to Husband's position as an officer, which created a conflict of interest. She then worked briefly for another company. She has not worked outside the home since 1997, due to her caretaking of Husband's parents. Wife suffers from medical problems associated with her back, ulcers, and anxiety. At the time of hearing, Wife had previously had two surgeries on her back and had another surgery scheduled. Wife further anticipated dental procedures estimated to cost \$15,000. Wife does not have dental insurance and must pay monthly for private health insurance. During the marriage, the parties liquidated Wife's 401(k) and ESOP accounts from employment at Plasticolors. Wife has no retirement accounts or separate sources of income.

{¶36} The court awarded spousal support to Wife in the amount of \$7,000 per month for 96 months, retaining jurisdiction over the amount, but not the term, of spousal support. The trial court reasoned that the eight-year term of spousal support would provide Wife with support until she reaches full retirement age for Social Security purposes. The trial court also deferred to the magistrate's determination that many of Wife's expenses were not substantiated. Moreover, both parties received substantial assets in the property division, including real property that could generate rental income

for Wife. Considering all relevant factors, we cannot say that the trial court abused its discretion in its spousal support award. Accordingly, Wife's fourth assigned error lacks merit.

{¶37} The judgment of the trial court is affirmed.

CYNTHIA WESTCOTT RICE, J.,

JOHN J. EKLUND, J.,

concur.