

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

R. KELLS LINDSEY III
Plaintiff-Appellant

-vs-

BONNIE LINDSEY
Defendant-Appellee

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

Case No. 08AP090062

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County Court
of Common Pleas, Domestic Relations
Division Case No. 2007TM030124

JUDGMENT:

Affirmed, in part; Reversed, in part,
and Remanded

DATE OF JUDGMENT ENTRY:

June 2, 2009

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

JAMES J. ONG
206 West High Avenue
P.O. Box 992
New Philadelphia, Ohio 44663

DAVID K. SCHAFFNER
132 Fair Avenue N.W.
New Philadelphia, Ohio 44663

Hoffman, J.

{¶1} Plaintiff-appellant R. Kells Lindsey appeals the August 29, 2008 Judgment Entry of the Tuscarawas County Court of Common Pleas, Domestic Relations Division. Defendant-appellee is Bonnie Lindsey.

STATEMENT OF THE FACTS AND CASE

{¶2} The parties were married on September 3, 1966. The children born of the marriage are now emancipated.

{¶3} R. Kells Lindsey (hereinafter “Husband”) is retired, and receives \$1,513.50 per month in Social Security benefits. Bonnie Lindsay (hereinafter “Wife”) works approximately 30 hours per week at a funeral home the parties sold to their children, and receives \$400.00 per month in Social Security benefits.

{¶4} During the marriage, the parties owned two businesses, a convenience store and a funeral home. Prior to the final hearing in this matter, the parties had divided the proceeds from the sale of the two businesses, a joint savings account, the proceeds from the sale of a bulldozer and a 2006 Federal Income Tax refund. For the years of 2008, 2009 and 2010, both parties would receive equal amounts per year from the sale of the funeral home and convenience store.

{¶5} The parties own their marital residence and land. Husband has three Smith-Barney accounts with a total value of \$599,857.88, and Wife has a certificate of deposit with a value of \$25,146.06.

{¶6} On March 14, 2008, the magistrate, via Magistrate’s Decision, divided the marital property, and awarded Wife spousal support.

{¶17} On August 29, 2008, the trial court adopted and approved the Magistrate's Decision with regard to the division of property and the award of spousal support.

{¶18} Husband now appeals, assigning as error:

{¶19} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SPOUSAL SUPPORT TO APPELLEE.

{¶10} "II. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO EQUALLY DIVIDE THE MARITAL PROPERTY BETWEEN THE PARTIES.

{¶11} "III. THE TRIAL COURT ERRED BY ORDERING APPELLANT TO REPAY MONEY USED FOR APPELLANT'S PERSONAL EXPENSES FROM THE JOINT CHECKING ACCOUNT, WHILE FAILING TO ORDER APPELLEE TO REPAY MONEY USED FOR APPELLEE'S PERSONAL EXPENSES FROM THE JOINT CHECKING ACCOUNT."

I.

{¶12} In the first assignment of error, Appellant argues the trial court abused its discretion in awarding Wife spousal support.

{¶13} A review of a trial court's decision relative to spousal support is governed by an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293. We cannot substitute our judgment for that of the trial court unless, when considering the totality of the circumstances, the trial court abused its discretion. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 541 N.E.2d 597. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶14} R.C. 3105.18(C)(1)(a) through (n) sets forth the factors a trial court must consider in determining whether spousal support is appropriate and reasonable and in determining the nature, amount, terms of payment and duration of spousal support.

These factors are:

{¶15} “(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;

{¶16} “(b) The relative earning abilities of the parties;

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

{¶18} “(d) The retirement benefits of the parties;

{¶19} “(e) The duration of the marriage;

{¶20} “(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;

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

{¶22} “(h) The relative extent of education of the parties;

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

{¶24} “(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;

{¶25} “(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;

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

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

{¶28} “(n) Any other factor that the court expressly finds to be relevant and equitable.”

{¶29} A trial court need not acknowledge all evidence relative to each and every factor listed in R.C. 3105.18(C), and we may not assume the evidence was not considered. *Barron v. Barron*, Stark App. No.2002CA00239, 2003-Ohio-649 at paragraph 25. The statute directs the court to consider all fourteen factors, and a reviewing court will presume the trial court did so absent evidence to the contrary. *Cherry v. Cherry* (1981) 66 Ohio St.2d 348, 421 N.E.2d 1293. The court must only set forth sufficient detail to enable a reviewing court to determine the appropriateness of the award. See, for example, *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 518 N.E.2d 1197.

{¶30} Upon our review of the trial court's findings of fact, we find there is sufficient detail to enable us to determine the appropriateness of the spousal support award. The trial court found spousal support appropriate based upon the totality of the circumstances, but further found it would be more efficient to simply allocate a larger portion of assets to Wife in lieu of spousal support. The trial court made findings as to

the parties' education, retirement benefits, expenses, present and future incomes and the duration of the parties' marriage. The trial court found Wife was working on a limited basis, and had monthly expenses of \$3,036.00, while Husband had monthly expenses of \$1,822.00. Based on the above, the trial court did not abuse its discretion in awarding Wife spousal support.

{¶31} The first assignment of error is overruled.

II.

{¶32} In the second assignment of error, Husband maintains the trial court abused its discretion in failing to divide the parties' marital property equally.

{¶33} A trial court enjoys broad discretion in fashioning an equitable division of marital property. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 218, 481-482, 450 N.E.2d 1140, 1141. To find an abuse of that discretion, the record must show more than an error of judgment on the trial court's part; the trial court's decision must be unreasonable, arbitrary, or unconscionable. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028.

{¶34} However, in determining a division of marital property, the trial court must consider and address the factors listed in R.C. 3105.171. *Focke v. Focke* (1992), 83 Ohio App .3d 552, 554, 615 N.E.2d 327, 328; *Layne v. Layne* (1992), 83 Ohio App.3d 559, 562, 615 N.E.2d 332, 333-334. Failure to consider these mandatory statutory factors, even in an uncontested divorce action, is an abuse of discretion. *Didick v. Didick*, Carroll App. No. 01APO760, 2002-Ohio-5182; See, also, *Kaechele*, supra. Further, in order for this Court to review the allocation of property between parties to a divorce, the "trial court must indicate the basis for its award in sufficient detail to enable

a reviewing court to determine that the award is fair, equitable and in accordance with the law.” R.C. 3105.171(G), *supra*; *Kaechele*, 35 Ohio St.3d at 93, paragraph two of the syllabus. See, also, *Layne*, 83 Ohio App.3d at 564. This includes assigning a value to the parties’ major assets and debts, e.g. *Raff v. Raff*, Stark App. No.2004CA00251, 2005-Ohio-3348.

{¶35} As noted in our analysis and disposition of Husband’s first assignment of error relative the trial court’s award of spousal support, the trial court allocated a larger portion of assets in the division of marital property to Wife in lieu of spousal support. The allocation was achieved in the division of the proceeds of the sale of the marital residence. We find no abuse of discretion in the division of marital assets as it pertains to the marital residence.

{¶36} Husband also argues the trial court erred in dividing the marital property based upon the valuation of the parties’ GMC Yukon vehicle. The value of the vehicle was found to be approximately \$18,845.00, and awarded to Wife. Husband was awarded the Ford truck with a value of \$9,890.00. Wife cites Husband’s testimony the vehicle was a “lemon,” and states he did not discount the value thereof. However, despite Husband’s testimony the vehicle was a “lemon,” there is no indication the trial court discounted the value of the vehicle or that the vehicle was included as part of Wife’s lump sum spousal support award. Therefore, the matter is remanded to the trial court for further proceedings relative to the division of marital property with regard to the allocation of the vehicles with appropriate monetary adjustment.

{¶37} The second assignment of error is sustained, in part, and overruled, in part.

III.

{¶38} In the third assignment of error, Husband asserts the trial court erred in ordering Husband to repay money used for his personal expenses from the parties' joint checking account, while failing to order Wife to repay money used for her personal expenses from the joint checking account. Husband maintains Wife utilized the funds to pay expenses such as prescription and medical bills, food, donations, postage, clothing and long term care insurance premiums. Husband asserts he paid such expenses from his personal funds.

{¶39} Upon review of the trial court's August 29, 2008 Judgment Entry the trial court found:

{¶40} "****Bonnie Lindsey used the joint account to pay joint expenses, including property taxes, home insurance, a medical bill for Kells Lindsey, home maintenance and pool maintenance expenses, and Kells Lindsey's insurance. The money used by Bonnie Lindsey from the joint account was money spent during the marriage, not subject to temporary order and not subject to division at final divorce."

{¶41} Upon review of the record and the trial court's judgment entry above, we do not find the trial court abused its discretion in not ordering Wife to repay the money used from the joint checking account.

{¶42} Husband's third assignment of error is overruled.

{¶43} The August 29, 2008 Judgment Entry of the Tuscarawas County Court of Common Pleas, Domestic Relations Division is affirmed, in part; reversed, in part; and remanded for further proceedings.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Sheila G. Farmer
HON. SHEILA G. FARMER

s/ W. Scott Gwin
HON. W. SCOTT GWIN

