

[Cite as *Haynes v. Haynes*, 2009-Ohio-5360.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92224

ANNETTE HAYNES

PLAINTIFF-APPELLANT

vs.

VICTOR HAYNES

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED IN PART,
REVERSED IN PART, REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-307588

BEFORE: Gallagher, P.J., Rocco, J., and Boyle, J.

RELEASED: October 8, 2009

**JOURNALIZED:
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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellant/cross-appellee, Annette Haynes (“Annette”), appeals the divorce judgment of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, entered on September 10, 2008. Appellee/cross-appellant, Victor Haynes (“Victor”), has filed a cross-appeal. For the reasons stated herein, we affirm in part, reverse in part, and remand the matter for further proceedings.

{¶ 2} The parties were married on August 27, 1983. Annette filed a complaint for divorce on November 22, 2005. Victor filed an answer and counterclaim for divorce. An agreed temporary support order was issued on June 22, 2006.

{¶ 3} Various motions and intermittent rulings were made during the course of the proceedings below. Following an extended period of hearing dates, a magistrate’s decision on the divorce, with findings of fact and conclusions of law, was issued on April 23, 2008. Annette filed objections to the magistrate’s decision. Thereafter, the trial court issued a final judgment entry on August 29, 2008, granting the parties’ divorce, overruling Annette’s objections, and adopting the recommendations of the magistrate with modifications.

{¶ 4} Both parties have appealed the judgment of the trial court. Annette raises six assignments of error, and Victor raises three assignments of error for our review. We shall consider the assignments of error together

where appropriate. Relevant facts shall be discussed as they pertain to the assignments of error below.

{¶ 5} For their first assignments of error, Annette and Victor each raise the following: “The trial court erred in the valuation of the license bureau.”

{¶ 6} Both parties challenge the trial court’s valuation of the University Heights/South Euclid license bureau under their assigned errors.

{¶ 7} Since 1999, Annette has operated her own license bureau as a deputy registrar for the state of Ohio. Each party retained an expert to value the license bureau. At the time the business valuations were conducted, the license bureau was located in South Euclid. Each expert valued the business as of December 31, 2004.

{¶ 8} Annette’s expert was Neal Barkett, a business broker who had conducted twenty different business evaluations, although none had involved a license bureau. As the court magistrate found in his decision: “Mr. Barkett’s significant concern is the inability of a deputy registrar to transfer her license to a potential buyer. Plaintiff is not the owner of this business but operates this as a deputy registrar at the discretion of the State of Ohio. If a seller cannot provide the cash flow, the customer base, and the good will associated with an enterprise, then any premium above the net value of the tangible assets would be diminished or eliminated. Based on this ‘asset valuation’ method, Mr. Barkett valued the license bureau at \$83,444.”

{¶ 9} Victor’s expert was Bernard I. Agin, a CPA and certified valuation analyst. With respect to Mr. Agin, the court magistrate recognized as follows: “Mr. Agin chose the excess earning method. Under this method, value is ascertained where the selling price of the business is equal to the adjusted net asset value plus goodwill based on the capitalization of normalized profits after adjustments for reasonable officer compensation and other expenses. * * * When adding the value of goodwill to the net assets * * * using a 10% discount for lack of marketability results in his calculated value of \$393,000.”

{¶ 10} The court magistrate recognized that Annette relocated the license bureau in December 2006,¹ but the evidence presented was in the form of expert valuations that were done as of December 31, 2004. Ultimately, the magistrate found that “the inability to sell or transfer this enterprise makes [Victor’s] valuation unrealistic. The value of the University Heights/South Euclid License Bureau as of December 31, 2004 is found to be \$83,444.”

{¶ 11} Annette objected to this determination, arguing that her own expert’s calculations were erroneous and that it was improper to use the financial information regarding the South Euclid license bureau to determine the value of the new location in University Heights. The trial court

¹ Victor represents that the license bureau was moved across the street.

overruled the objection and adopted the magistrate's determination regarding the valuation of the University Heights/South Euclid license bureau.

{¶ 12} On appeal, Annette claims that it was error to use the experts' valuations of the South Euclid license bureau to determine the value of the University Heights location; that because the license bureau cannot be transferred to a third party, the value of the license bureau should be limited to the value of the furniture and equipment; and that half of the interest in the license bureau could not be awarded to Victor.

{¶ 13} Victor argues in his cross-appeal that the weight of the evidence supports a finding that the license bureau has a value of \$393,000 and that the excess earnings method provides a better valuation of the business.

{¶ 14} In a divorce proceeding, a trial court must divide the marital property of the parties equitably. R.C. 3105.17.1(B); *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 355, 421 N.E.2d 1293. In order to divide property equitably, the trial court must place a value on each contested item of property. *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794, 799, 615 N.E.2d 1071. Valuing property involves factual inquiries, requiring an appellate court to apply a manifest weight of evidence standard of review. *Wright v. Wright* (Nov. 10, 1994), Hocking App. No. 94CA02. An appellate court will not reverse a trial court's valuation if it is supported by some

competent, credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 15} As an initial matter, the magistrate recognized the parties stipulated that the license bureau could not be devised or transferred. However, the value of the business could be considered in making an equitable division of marital assets. The trial court's judgment provided that Annette was to retain her interest in the license bureau, but was required to pay Victor one-half of the value of the business in annual installments.

{¶ 16} The evidence presented at trial offers two different values for the license bureau. The trial court considered each valuation, the experts' credentials, and the methods applied to value the license bureau. Although the license bureau was relocated during the course of the trial, the only evidence before the trial court pertaining to its value was the experts' valuations for the business as of December 31, 2004. The trial court accepted the valuation of Annette's own expert. The court was entitled to accept Mr. Barkett's valuation as written and to reject Mr. Agin's valuation. We conclude that the trial court's determination regarding the value of the University Heights/South Euclid license bureau was supported by competent, credible evidence, and thus, the determination was not an abuse of discretion.

{¶ 17} Annette’s first assignment of error is overruled, and Victor’s first assignment of error is overruled.

{¶ 18} Annette’s second assignment of error provides as follows: “The trial court committed error in its inequitable division of the parties’ marital assets.”

{¶ 19} Victor’s second assignment of error provides as follows: “The trial court erred in the division of property.”

{¶ 20} R.C. 3105.171(C)(1) mandates an equal division of marital property, or if an equal division is inequitable, the court must divide the marital property equitably. See *Neville v. Neville*, 99 Ohio St.3d 275, 277, 2003-Ohio-3624. To determine what is equitable, a trial court must consider the factors set forth in R.C. 3105.171(F). *Id.* A trial court has broad discretion in the allocation of marital assets, and its judgment will not be disturbed absent an abuse of discretion. *Id.*

{¶ 21} Annette argues that the trial court made an unequal and inequitable distribution of marital property and that the trial court did not take the marital debt and liabilities into consideration when it divided the marital assets. Victor argues that the trial court miscalculated his “equalization” payment.

{¶ 22} A review of the magistrate’s decision reflects that the trial court considered the marital debt and liabilities of the parties. The magistrate

found that much of the alleged marital debt was lacking evidentiary support. The court specifically found that “neither plaintiff nor defendant provided any documentary evidence regarding the debt on the Lexus or Silverado or the current market value of any vehicle.” The court also recognized that some of the alleged debt related to Victor’s father, and that Victor had agreed to take all of his credit card debt. With respect to the marital home on Spatterdock Lane, the trial court used the stipulated equity in the property in its accounting of the division of marital assets. The equity in the property was valued at \$80,973.92.

{¶ 23} A review of the trial court’s judgment reflects that the Spatterdock Lane property was awarded to Annette in the first instance and that the equity was not divided between the parties. As a result, Annette’s calculations regarding an unequal distribution are incorrect.

{¶ 24} The judgment reflects that “[Annette] is hereby awarded as division of property [Victor’s] interest in the real estate located at 35386 Spatterdock Lane, Solon, Ohio.” The trial court offset this award with other assets and an “equalization” payment of \$12,054.06. Victor states that, based on his calculations, the equalization amount should have been \$17,063.28.

{¶ 25} The trial court further indicated that if Annette was unable to obtain financing, the property would be awarded to Victor and “he shall pay

[Annette] the sum of \$40,486.96, minus the \$12,054.06 owed to him by [Annette].” It appears this portion of the trial court’s award would result in an inequitable distribution because the equity in the home was valued at \$80,973.92.

{¶ 26} It also appears from the record that Victor was awarded half the value of the University Heights/South Euclid license bureau, as well as half of the interest in the checking account linked to the license bureau. The trial court should consider the issue of whether Victor was awarded twice from the same source upon remand.

{¶ 27} Because we find errors exist with respect to the distribution of marital property, we remand the matter to the trial court to perform a proper distribution. The trial court shall recalculate any necessary “equalization” payment for an equitable distribution upon remand.

{¶ 28} Annette’s second assignment of error and Victor’s second assignment of error are sustained in part.

{¶ 29} Annette’s third and fourth assignments of error provide as follows:

{¶ 30} “The trial court erred in failing to consider [Victor’s] financial misconduct in the division of property.”

{¶ 31} “The trial court erred in finding that [Annette] engaged in financial misconduct.”

{¶ 32} Victor’s third assignment of error provides as follows: “The trial court abused its discretion by not adopting the magistrate’s recommendation to award [Victor] \$25,000 as a distributive award.”

{¶ 33} Annette argues that the trial court failed to attribute a dollar amount to Victor’s financial misconduct and to account for all of his alleged financial misconduct. Annette also claims that the trial court erred in finding that she engaged in financial misconduct because she gambled.

{¶ 34} Victor argues that the trial court’s failure to adopt the recommendation of the magistrate to award him a \$25,000 distributive award without addressing the reasoning of the magistrate was arbitrary and an abuse of discretion.

{¶ 35} R.C. 3105.171(E)(3) provides that “if a spouse has engaged in financial misconduct, including, but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.” “The burden of proving financial misconduct is on the complaining spouse. Financial misconduct implies some type of wrongdoing in that the offending spouse will either profit from the misconduct or intentionally defeat the other spouse’s distribution of marital assets.” Internal citations omitted. *Bostick v. Bostick*, Cuyahoga App. No.

90711, 2008-Ohio-5119. The decision whether to make an award under R.C. 3105.171(E)(3) is reviewed for an abuse of discretion. Id.

{¶ 36} The trial court determined that both parties had engaged in financial misconduct during the course of their marriage. The evidence before the court reflected that both parties used funds from separate business entities to pay for personal expenses.

{¶ 37} Although Annette claimed that many of the checks written on her business accounts were for moving the business and other business purposes, the magistrate determined that she failed to produce any documents to substantiate her claim that the checks were business related. The magistrate detailed the checks and charges relating to the accounts and determined that “[Annette] cannot credibly state that the large amount withdrawn from her business account to fund her gambling was simply recreation.” The magistrate further found that “[f]rom June 2005 through June 2007, [Annette] spent more than \$125,000 in charges and checks at Mountaineer Park, Seneca Niagara, San Manuel and drafts written directly to [herself]. [Annette] has engaged in a systematic and deliberate process to remove cash that would otherwise be considered marital.” The magistrate also recognized that Victor acknowledged gambling with Annette during the course of the marriage, but his testimony was that they gambled at much lower amounts and it was before “she got big time.”

{¶ 38} With respect to Victor's financial misconduct, the magistrate detailed checks that Victor had written on the Wade Park business checking account. The magistrate determined that Victor used his father's financial resources to fund his own separate business ventures, as well as his own lifestyle, and that this conduct had harmed Victor's father more than Annette. However, the magistrate also recognized that "[Victor] acknowledged incurring a great deal of debt during the marriage without [Annette's] knowledge" and that the parties had "refinanced the Oakwood Village property in March 2003 to pay off [Victor's] credit cards, which totaled \$56,899.78."

{¶ 39} The magistrate found that there was a significant difference between the actions of the parties and that the effect of their financial misconduct was vastly different. The magistrate determined that "[Victor] should be compensated with a distributive award of marital property in the amount of \$25,000. Had [Annette] allowed the more than \$125,000 to remain in the marital accounts, both parties would have received at least \$62,500. This award represents less than 40% of what [Victor] might have actually received. This award has been reduced after consideration given to the additional debt which [Victor] incurred during the marriage; that debt has been rolled into the mortgage on the Solon property which will be paid by [Annette]."

{¶ 40} Despite finding both parties had engaged in financial misconduct, the trial court did not adopt the distributive award recommended by the magistrate or otherwise impose a distributive award. Although we find no abuse of discretion in the trial court's determination that both parties had engaged in financial misconduct during the marriage, the trial court's determination regarding the distributive award is problematic.

{¶ 41} It is unclear why the trial court disregarded the magistrate's recommendation and chose to make no distributive award. We recognize that Annette filed objections to the magistrate's decision and that she claims that there is further evidence in the record that Victor dissipated marital assets. We also recognize the discretion a trial court has in finding that a spouse has engaged in financial misconduct and, in turn, granting an appropriate and reasonable distributive award or greater share of the marital property. However, "the trial court must indicate the basis for its [decision] in sufficient detail to enable a reviewing court to determine that the award is fair, equitable and in accordance with the law." *Kaechele v. Kaechele* (1988), 35 Ohio St.3d 93, 97, 518 N.E.2d 1197; see, also, *Huener v. Huener* (1996), 110 Ohio App.3d 322, 326, 674 N.E.2d 389. From the judgment entry before us, this court cannot review the distributive award.

{¶ 42} Accordingly, Annette's third and fourth assignments of error and Victor's third assignment of error are well taken to the extent that the trial

court failed to provide the rationale and basis for disregarding the magistrate's recommendation with respect to the distributive award. We remand the cause to the trial court to make a disposition in accordance with this opinion.

{¶ 43} Annette's fifth assignment of error provides as follows: "The trial court erred by awarding [Victor] spousal support without considering all factors."

{¶ 44} R.C. 3105.18(C)(1) sets forth the factors that the 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. The factors relevant in this case are the income of the parties, including income derived from property divided; the relative earning abilities of the parties; the ages and the physical, mental, and emotional conditions of the parties; the retirement benefits of the parties; the duration of the marriage; the standard of living of the parties established during the marriage; the relative extent of education of the parties; the relative assets and liabilities of the parties, including but not limited to any court-ordered payments by the parties; the tax consequences, for each party, of an award of spousal support; and any other factor that the court expressly finds to be relevant and equitable. See *id.* The trial court enjoys wide latitude in determining the appropriateness as well as the amount of spousal

support. *Bolinger v. Bolinger* (1990), 49 Ohio St.3d 120, 122, 551 N.E.2d 157.

Such an award will not be reversed unless a reviewing court, after considering the totality of the circumstances, finds that the trial court abused its discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67, 554 N.E.2d 83.

{¶ 45} Annette argues that in awarding spousal support, the trial court failed to consider Victor's earning ability, his financial misconduct, and his intentional underemployment. Annette also states that the court failed to consider the division of property in its determination of Victor's income, and that the court used the same money to value the business as it did to calculate Annette's income in calculating spousal support.

{¶ 46} The trial court ordered Annette to pay Victor the sum of \$2,295 per month as spousal support. The magistrate's decision reflects that the trial court considered all of the relevant factors under R.C. 3105.18(C)(1). Among other factors, the court specifically recognized Victor's work history as well as his concession that he had not worked to his maximum potential considering his educational background. The court considered that Victor admitted to having an alcohol or substance abuse problem up until 2007, that he was currently employed as a teacher in the Cleveland Public Schools, and that he was seeking to obtain a master's degree in education. The court also considered the financial misconduct of the parties, but again found that

“[w]hatever funds [Victor] has squandered during their relationship, [Annette] has done more than twice the financial damage.”

{¶ 47} The court considered that Victor could earn \$1,950 per year in interest from the liquid assets awarded to him and that he earns \$36,322 per year as a teacher. The court found Annette’s annual income to be \$155,220. Annette’s income was based in part on her business income.

{¶ 48} Annette claims that the trial court “double dipped” by counting excess business income to value the interest in the business as well as to calculate her income for determining spousal support. However, the business valuation adopted by the court in this case was determined using an “asset valuation” method, rather than the “excess earning” method. Therefore, we are unpersuaded by her argument.²

{¶ 49} Nevertheless, because we are remanding the matter to the trial court with respect to the division of marital assets, the trial court must also ensure that the amount of spousal support remains equitable. Annette’s fifth assignment of error is overruled.

{¶ 50} Annette’s sixth assignment of error provides as follows: “The trial court erred in awarding appellee temporary spousal support.”

² Annette cites *Heller v. Heller*, Franklin App. No. 07AP-871, 2008-Ohio-3296 (finding expected future profits of husband’s brokerage firm could not be treated as both an asset in the division of marital property and as income in the calculation of spousal support).

{¶ 51} As a part of the final judgment entry, the trial court granted permanent spousal support in the amount of \$2,295 per month, which was retroactive to May 14, 2007, the date the temporary spousal support took effect. This award replaced the prior temporary support obligation and reduced the net amount of Annette's expected support obligation.³ Therefore, Annette's argument regarding the temporary spousal support award is moot.

Judgment affirmed in part, reversed in part; case remanded.

It is ordered that appellant and appellee share costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
MARY J. BOYLE, J., CONCUR

³ The spousal support ordered by the trial court was less than the magistrate's recommended amount of \$2,600 per month. The trial court also ordered Annette to pay a monthly sum of \$306.00 on the arrearage of \$28,687.50, in support pendente lite as of May 31, 2008.