

IN THE COURT OF APPEALS OF OHIO  
FOURTH APPELLATE DISTRICT  
SCIOTO COUNTY

Tina Marie O'Rourke,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA3253
v.	:	
	:	<u>DECISION AND JUDGMENT ENTRY</u>
Steven Michael O'Rourke,	:	
	:	
Defendant-Appellant.	:	<b>Released 3/19/10</b>

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APPEARANCES:

Jerry L. Buckler, Buckler Law Office, Portsmouth, Ohio, for Appellant.

Steven L. Mowery, Mowery and Blume, Wheelersburg, Ohio, for Appellee.

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Harsha, J.

{¶1} Steven O'Rourke appeals the trial court's judgment in this divorce action, contending that the court erred in its division of the marital property because it miscalculated the value of the parties' interest in his heating business. He claims that the court erroneously assumed that his partner was willing to give up his 50% share of the business in exchange for a company truck. So instead of valuing the marital interest in the company as 50% of its net value (assets – liabilities), the trial court found that the marital interest constituted the company's net value less the value of the truck.

{¶2} We agree that the court erred in its valuation of the business. It is undisputed that Mr. O'Rourke only owned 50% of the business. While Mr. O'Rourke and his partner had tentatively discussed the terms of a buy-out, they never consummated a deal. Thus, the trial court should have valued the marital interest in the business as 50% of the company's net value. And because the trial court erred in its

valuation of the business, we are unable to determine whether the court made an equitable division of the marital property. Thus, we must remand this cause to the trial court for it to make an equitable division of the marital property based on a correct valuation of the marital interest in Scioto Valley Heating.

{¶3} Mr. O'Rourke also contends that the trial court abused its discretion in awarding Mrs. O'Rourke \$900 per month in indefinite spousal support because the court failed to consider her resources, ability and potential to be self-supporting, and the necessary statutory factors. However, before the trial court was permitted to make any spousal support award, it was required to make an equitable division of the marital property. Because we have remanded the matter to the trial court to make a correct valuation of the heating business, we do not reach the merits of Mr. O'Rourke's arguments concerning the court's spousal support award.

{¶4} Finally, Mr. O'Rourke contends that the trial court abused its discretion in ordering him to pay Mrs. O'Rourke's attorney fees. Prior to making an award of attorney fees, the trial court was required to determine that such an award was equitable, and in making that determination, the value of the parties' assets is a relevant consideration. Again, because of our remand, we are unable to review the court's attorney fees award, and thus we do not reach the merits of Mr. O'Rourke's arguments on that issue.

#### I. Facts

{¶5} The relevant facts of the case are largely undisputed. During the marriage, Mr. O'Rourke worked as an instructor at Shawnee State University and had a "side-job" with Scioto Valley Heating, Inc. for a combined annual income of

approximately \$54,778. Mrs. O'Rourke, who was generally a stay-at-home mother during the marriage, provided day care in her home for a period of time, had a newspaper route, and worked a few other jobs. The parties agree that upon their separation in July 2005, Mrs. O'Rourke worked at RehabCare Group, Inc. Mrs. O'Rourke testified that she initially worked part time, earning \$3,288 in 2005 and \$16,401.88 in 2006. She testified that after receiving a raise in September 2006, she earned \$8.24 per hour. By September 2007, she was working 40 hours a week at \$8.50 per hour, earning approximately \$17,680 per year.

{¶16} Mr. O'Rourke testified that he was part owner of Scioto Valley Heating, a heating and cooling business that was incorporated about 10 years ago, i.e., 1997. He testified that he owns 50% of the corporation's stock and that Tony Wolfe, his business partner, owns the other 50%. He introduced tax records that indicated he was president of the "S" corporation. Mr. O'Rourke testified that Mr. Wolfe had since left the business and was "no longer drawing a check." He testified that while Mr. Wolfe wanted to negotiate a sale of his part of the business, they had not reached an agreement.

{¶17} Mr. O'Rourke also introduced an appraisal report of Scioto Valley Heating. According to his appraisal, the fair market value of the personal property owned by the corporation totaled \$23,565 and the fair market value of its real property, i.e., a one-acre lot located at Patriot Ridge Drive, Wheelersburg, Ohio, was \$22,500. Mr. O'Rourke also introduced various exhibits and testified concerning certain bank accounts and debt associated with the business. He concluded that the net value of the business was \$14,063.13 and that his interest would be one-half of that amount, i.e., \$7,031.56.

{¶18} According to their post-trial submissions, the parties generally agreed

concerning the proper value and division of most of the marital assets and liabilities and agreed that the court should order Mr. O'Rourke to pay Mrs. O'Rourke a "distributive award" to equalize the division of marital property. However, they disagreed concerning the amount of that award. Mrs. O'Rourke sought a "distributive award" in the amount of \$19,865.98, while Mr. O'Rourke argued that a \$16,494.88 "distributive award" was fair. The \$3,371.10 difference related primarily to the value of Scioto Valley Heating.

{¶19} Mrs. O'Rourke argued that Mr. O'Rourke's valuation of Scioto Valley Heating was wrong because he did not include assets such as cash, work in progress, and accounts receivable, and because his calculation of the company's liabilities did not include accounts payable. She also argued that the court's valuation of the business should take into account that Mr. O'Rourke's business partner was "apparently" willing to give up his interest in the business in exchange for a company truck. By Mrs. O'Rourke's calculation, the net value of the marital interest in the business was \$21,339.

{¶10} In his post-trial memorandum, Mr. O'Rourke emphasized that he was merely a co-owner of Scioto Valley Heating and that his interest was therefore only one-half of its total value. Also, he requested that spousal support be reduced from the agreed temporary spousal support amount, i.e., \$800 per month, to \$400 per month for a period not to exceed 60 months. He argued that Mrs. O'Rourke had increased her annual income by \$5,000 since the time of the agreed temporary orders. Mr. O'Rourke also requested that both parties pay their own attorney fees.

{¶11} Mrs. O'Rourke requested spousal support in the amount of "\$900 per month for 108 months." However, in her reply memorandum she noted that due to the

“long term marriage without the opportunity \* \* \* to increase her earnings ability due to her marital responsibilities (four children),” the court “could and arguably should” order permanent spousal support subject to modification. Mrs. O’Rourke also requested attorney fees.

{¶12} Ultimately, the trial court divided the marital property in accordance with the parties’ general agreement and awarded the marital home and Scioto Valley Heating to Mr. O’Rourke. The court adopted Mrs. O’Rourke’s calculation of the marital interest in the business, i.e., a net value of \$21,339. Then, to “equalize” the property division, the court ordered Mr. O’Rourke to pay Mrs. O’Rourke a \$19,866 “distributive award.” The court awarded Mrs. O’Rourke \$900 per month in indefinite spousal support and ordered Mr. O’Rourke to pay Mrs. O’Rourke’s attorney fees in the amount of \$5,421. After the trial court issued its final judgment and divorce decree, Mr. O’Rourke filed this appeal.

## II. Assignments of Error

{¶13} Mr. O’Rourke presents the following assignments of error for our review:

### ASSIGNMENT OF ERROR NO. 1:

The Trial Court’s award of \$900.00 per month in continuing spousal support was 1) an abuse of discretion because the court failed to properly consider the appellee’s resources, ability and potential to be self-supporting and other factors set forth in O.R.C. § 3105.18; and 2) against the manifest weight of the evidence.

### ASSIGNMENT OF ERROR NO. 2:

The Trial Court abused its discretion in miscalculating the division of assets and liabilities as said division is against the manifest weight of the evidence.

### ASSIGNMENT OF ERROR NO. 3:

The Trial Court abused its discretion in ordering Appellant to pay Appellee's attorney fees.

For ease of analysis, we will address Mr. O'Rourke's assignments of error out of order.

### III. Equitable Division of Marital Property

{¶14} In his second assignment of error, Mr. O'Rourke contends that the trial court erred in its division of the marital property because its "distributive award" to Mrs. O'Rourke was based upon an incorrect valuation of the marital property. Specifically, he argues that the court "miscalculated" the value of Scioto Valley Heating because it assumed that he was the full owner of the business. He points to the fact that the court ordered him to secure the award by a mortgage on the real estate owned by the business, an act he claims he could not effectively take if there was a co-owner.

{¶15} Trial courts must divide marital property equitably between the spouses. R.C. 3105.171(B). In most cases, this requires that marital property be divided equally. *Id.* at (C)(1). However, if the trial court determines that an equal division would produce an inequitable result, it must divide the property in a way it deems equitable. *Id.* Because the trial court possesses great discretion in reaching an equitable distribution, we will not reverse its ultimate division of property absent an abuse of discretion. *Harrington v. Harrington*, Gallia App. No. 08CA6, 2008-Ohio-6888, at ¶21, citing *Knight v. Knight* (Apr. 12, 2000), Washington App. No. 99CA27, 2000 WL 426167, at \*4.

{¶16} However, before a court can distribute property, the court must value it. Indeed, a trial court must place a monetary value on every contested asset of the parties in a divorce proceeding. *Knight* at \*4, citing *Pawlowski v. Pawlowski* (1992), 83 Ohio App.3d 794, 799, 615 N.E.2d 1071; and *Goode v. Goode* (1991), 70 Ohio App.3d 125, 132, 590 N.E.2d 439. "In any order for the division or disbursement of property or

a distributive award made pursuant to [R.C. 3105.171], the court shall make written findings of fact that support the determination that the marital property has been equitably divided[.]” R.C. 3105.171(G). Further, the trial court must make findings “in sufficient detail to allow for meaningful appellate review of its decision.” *Knight* at \*4.

{¶17} Because the valuation of a specific asset in a divorce case is a question of fact, we review that issue under a manifest weight of the evidence standard. *Covert v. Covert*, Adams App. No. 03CA778, 2004-Ohio-3534, at ¶6, citing *Brown v. Brown*, Pike App. No. 02CA689, 2003-Ohio-304, at ¶13. Consequently, we will not reverse the trial court’s valuation as long as it is supported by some competent, credible evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at syllabus. “This standard of review is highly deferential and even ‘some’ evidence is sufficient to sustain the judgment and prevent a reversal.” *Barkley v. Barkley* (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989.

{¶18} Initially, we need to clarify the meaning of certain terms. A “distributive award” means “any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code.” R.C. 3105.171(A)(1). A court may order a distributive award from separate property in accordance with R.C. 3105.171(E) if it is equitable to do so. *Swartz v. Swartz* (1996), 110 Ohio App.3d 218, 222, 673 N.E.2d 972. Under R.C. 3105.171(E), a distributive award may be made to facilitate, effectuate, or supplement a division of marital property, or in lieu of a division of marital property to achieve equity between the

spouses, or to compensate one spouse for the financial misconduct of the other spouse. *Marcum v. Marcum* (1996), 116 Ohio App.3d 606, 610, 688 N.E.2d 1085.

{¶19} Here, the court divided the marital property in accordance with the parties' general agreement and awarded Scioto Valley Heating to Mr. O'Rourke. To "equalize" the property division, the court then ordered Mr. O'Rourke to pay Mrs. O'Rourke \$19,866 and characterized the award as a "distributive award." However, the parties agreed and the court found that the parties' interest in Scioto Valley Heating was marital property. Thus, the court's award was not a distributive award made from Mr. O'Rourke's separate property, but an award to equalize the division of the marital property. Regardless of its characterization, however, we must determine whether the trial court erred in making the award.

{¶20} The trial court did not place an explicit value on Scioto Valley Heating in the April 2008 divorce decree. However, in a January 2008 decision, the court "agree[d] with the findings made in [Mrs. O'Rourke's] Post Trial Memorandum as to the values of Scioto Valley Heating." The court explained that it found her valuation "more accurate" than Mr. O'Rourke's because it included the value of "cash, work in progress, and accounts receivable."

{¶21} In her post-trial memorandum, Mrs. O'Rourke argued that the net value of the marital interest in Scioto Valley Heating was \$21,399 (\$77,848 in assets minus \$56,449 in liabilities). According to Mrs. O'Rourke, her approach mirrored that used in Mr. O'Rourke's appraisal except that she included the value of cash, work in progress, and accounts receivable as assets, and she included accounts payable as a liability. In valuing the company's assets, Mrs. O'Rourke also reduced the total assets by \$4,000 to

reflect the value of a company truck Mr. Wolfe was “apparently” willing to take for his 50% interest in Scioto Valley Heating.<sup>1</sup>

{¶22} Thus by adopting Mrs. O’Rourke’s valuation of the company,<sup>2</sup> the trial court implicitly determined that the evidence supported a finding that Mr. Wolfe had agreed to relinquish his 50% share of the business – which using Mrs. O’Rourke’s figures, was valued at \$12,699.50<sup>3</sup> – in exchange for a \$4,000 truck. But this conclusion is not supported by the evidence. When Mr. O’Rourke testified at trial, the following exchange occurred on direct examination:

- Q. Part of your arrangement as to what happened to Tony ... since Tony’s no longer drawing a check but is still a partial owner, did he ... have you ... are you negotiating a ... a settlement with him to have him leave the business?
- A: No. I have so many irons in the fire right now we haven’t discussed what we’re gonna do there yet. I know Tony would like to sell his part of the corporation but, no, we haven’t discussed any financial matters.
- Q. Well, has he taken anything from the business as part of the division of the assets?
- A. He’s driving his truck. We no longer had a use for it. We haven’t replaced him as an employee so the truck that he was driving previous to him leaving the company, he has in his possession.
- Q. Is it owned by Scioto Valley?

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<sup>1</sup> In her post-trial memorandum, Mrs. O’Rourke also indicates that the truck was worth \$4,400, but this appears to be a typographical error since she also stated that Mr. O’Rourke provided the sources for her figures, and his appraisal report valued the truck at \$4,000.

<sup>2</sup> We note that the trial court made a finding in the divorce decree that is inconsistent with Mrs. O’Rourke’s valuation of the business. In her post-trial memorandum, Mrs. O’Rourke found that the business had credit card debt totaling \$2,268. However, in the divorce decree, the trial court noted that the debt for one of the company cards, a Mastercard ending in 0146, totaled \$4,740. We believe this was a typographical error given the similarity this figure bears to a personal credit card debt the parties had. Moreover, the evidence supports Mrs. O’Rourke’s figure for the total business credit card debt, so a finding that the business owed \$4,740 on this Mastercard would be against the manifest weight of the evidence.

<sup>3</sup> \$4,000 truck + \$77,848 in other assets - \$56,449 = net business value of \$25,399. Mr. Wolfe would be entitled to half of this amount, i.e., \$12,699.50.

A. Correct.

\* \* \*

Q. \* \* \* you have said that previously you thought Tony would settle for Ten Thousand or the value of that truck?

A. Right.

Q. For his half?

A. Right

Q. If you assume all the liability?

A. Right. \* \* \*

{¶23} On cross-examination, the following exchange occurred:

Q: You and [Tony] are negotiating a buy out of his fifty percent (50%)?

A: Actually, we haven't set down to really negotiate yet.

Q: Well, our information is ... the plan is he'll take distribution of a truck that he's used in the business in return for his fifty percent (50%) of the business. Is that what you believe?

A. We ... we have talked about that.

Q. Alright.

A. We have talked about many things . . .

Q. Okay.

A. . . . but there's no formal . . .

\* \* \*

Q. \* \* \* But he's gonna be bought out. Right?

A. Actually, not sure. \* \* \*

In addition, Mr. O'Rourke testified as follows:

Q. Your former partner, Tony Wolfe, will accept his truck to get out of

[the business]?

A. I'm . . .

Q. You testified about that before. Isn't that correct?

A. I'm not sure.

**{¶24}** Mr. O'Rourke's testimony at best shows that his partner had contemplated leaving the business, and they had tentatively discussed Mr. Wolfe taking a company truck in exchange for his 50% share of the business. But there is no evidence that such a deal was ever consummated. Therefore, the court's adoption of Mrs. O'Rourke's valuation of the company, which assumes Mr. Wolfe relinquished his share of the business for approximately one-third of its worth, was against the manifest weight of the evidence. Because Mr. Wolfe owned 50% of Scioto Valley Heating, only 50% of the company's net value could be classified as a marital asset in this case. And because the trial court improperly valued Scioto Valley Heating, we are unable to meaningfully review its decision to make an equalization award. Therefore, we sustain Mr. O'Rourke's second assignment of error, in part, without expressing any opinion as to whether the trial court abused its discretion in making the equalization award. We remand this cause to the trial court to make an equitable division of the marital property based on a proper valuation of Scioto Valley Heating.

**{¶25}** On remand, it would be helpful for the trial court to review its valuation of all the marital assets and liabilities and place those figures in a single document to simplify appellate review. We noticed in our review, among other things, that the court did not indicate in the divorce decree the amount of debt owed on the parties' "Citicredit Card," and the parties listed different values for that debt in their post-trial memoranda.

#### IV. Spousal Support

{¶26} In his first assignment of error, Mr. O'Rourke contends that the trial court abused its discretion in awarding Mrs. O'Rourke \$900 per month in indefinite spousal support because it failed to consider her resources, ability and potential to become self-supporting, and the necessary statutory factors. He also contends that the manifest weight of the evidence supports a specific termination date. Finally, he suggests that the amount of the award was unreasonable because the trial court failed to consider his ability to pay the award without a change in his lifestyle.

{¶27} We will not reverse a court's decision to award spousal support absent an abuse of discretion. See *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24, 550 N.E.2d 178. However, under R.C. 3105.171(C)(3), trial courts must "provide for an equitable division of marital property \* \* \* prior to making any award of spousal support to either spouse under section 3105.18 of the Revised Code and without regard to any spousal support so awarded." Furthermore, R.C. 3105.18(B) provides that trial courts may award reasonable spousal support to either party "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[.]"

{¶28} Thus, the trial court was required to make an equitable division of the marital property under R.C. 3105.171 before it could make an award of spousal support. As we have already determined, the trial court erred when it valued Scioto Valley Heating, and thus we are unable to determine whether the trial court made an equitable division of the marital property. Because we are unable to review the trial court's property division and have remanded the matter to the trial court, we do not address the

merits of Mr. O'Rourke's arguments concerning the spousal support award at this time.

#### V. Attorney Fees

{¶29} In his third assignment of error, Mr. O'Rourke contends that because the trial court "miscalculated" the value of the parties' marital assets, i.e., Scioto Valley Heating, it erred in ordering him to pay Mrs. O'Rourke's attorney fees. He argues that establishing an amount of attorney fees would necessarily require a proper finding of the amount of assets and liabilities used in calculating the "distributive award." He also argues that the court erred when as a basis for the award it found that Mrs. O'Rourke "was either unemployed or earning minimum wage during the pendency of this divorce action." He argues that Mrs. O'Rourke was actually employed with an annual income of \$17,680 and that she also received temporary spousal support.

{¶30} The trial court ordered Mr. O'Rourke to pay Mrs. O'Rourke's attorney fees in the amount of \$5,421. The decision to award attorney fees in a divorce action is vested in the sound discretion of the trial court and we will not reverse it absent an abuse of that discretion. *Parker v. Parker*, Franklin App. No. 05AP-1171, 2006-Ohio-4110, at ¶36. An abuse of discretion implies that the trial court's attitude in making its award is arbitrary, unreasonable or unconscionable. *Blakemore*, supra, at 219, quoting *Adams*, supra, at 157.

{¶31} Prior to making its award of attorney fees, the trial court was required to find that such an award was equitable. See R.C. 3105.73. A relevant consideration in making that determination is the value of the parties' assets. *Id.* We have already concluded that the court erred when it valued the parties' interest in Scioto Valley Heating. Because the value of this marital asset is a relevant consideration in

determining whether an award of attorney fees was equitable and because we have remanded the matter for a proper valuation of Scioto Valley Heating, we are unable to determine whether the trial court abused its discretion in making the award of attorney fees. Accordingly, we do not address the merits of Mr. O'Rourke's arguments concerning the court's attorney fees award at this time.

#### VI. Conclusion

{¶32} Therefore, we sustain Mr. O'Rourke's second assignment of error, in part, and remand this case for further proceedings consistent with this opinion. Based on our resolution of his second assignment of error, we do not reach the merits of Mr. O'Rourke's first and third assignments of error at this time.

JUDGMENT REVERSED IN PART  
AND CAUSE REMANDED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS REVERSED IN PART and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Common Pleas Court to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

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

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: \_\_\_\_\_  
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**