

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JAMES W. BROWN	:	JUDGES:
	:	William B. Hoffman, P.J.
	:	John W. Wise, J.
Plaintiff-Appellee	:	Julie A. Edwards, J.
	:	
-vs-	:	Case No. 2008 CA 0111
	:	
	:	
M. SUSAN BROWN	:	<u>OPINION</u>
	:	
Defendant-Appellant	:	

CHARACTER OF PROCEEDING:	Civil Appeal from Licking County Court of Common Pleas, Domestic Relations Division, Case No. 06DR01643
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	September 16, 2009
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APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
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Edwards, J.

{¶1} Appellant, M. Susan Brown, appeals a divorce judgment of the Licking County Common Pleas Court Domestic Relations Division finding the appreciation in her separate commercial property to be marital property and ordering her to pay child support to appellee James W. Brown in the amount of \$585.85 per month.

STATEMENT OF FACTS AND CASE

{¶2} In 1990, appellee began working for appellant at Avante, her gymnastics and dance school located at South 22nd Street in Heath, Ohio. Appellee was responsible for the financial operations of the business and did routine maintenance or arranged for someone to perform maintenance on the building.

{¶3} Appellant's marriage to her former husband, Kenneth Yost, was dissolved on August 28, 1991. The dissolution decree awarded the building in which Avante was located to appellant, and the parties stipulated at that time to a value of \$296,000.00. The building was appraised for \$270,000.00 in January, 1991, in connection with the divorce proceedings. The balance due on the mortgage at that time was \$216,258.00; however, the court accepted a payoff amount of \$212,500.00 based on an agreement between appellant and Kenneth Yost.

{¶4} Appellant and appellee were married on September 6, 1991. One child, Kathryn Brown, was born on October 20, 1991. Throughout the marriage appellee continued to work at Avante full-time.

{¶5} The parties separated in January of 2004. Appellee filed a complaint on October 19, 2006, seeking a divorce on the basis of incompatibility and gross neglect of

duty. The parties stipulated to several issues relating to the property division and to naming appellee as the residential parent of their daughter.

{¶6} The case proceeded to trial on March 3, 2008, on the issues of the division of the appreciation of the Avante property and child support.

{¶7} The court found that at the time the parties married in 1991, appellant had approximately \$54,000.00 in non-marital equity in the Avante property. The court found that when appellee quit working in the business in August, 2004, the property had a fair market value of \$400,000.00 and a mortgage payoff of \$87,200.00. The court found equity in the property in the amount of \$312,800.00. The court gave appellant credit for her \$54,000.00 in equity which she had at the time of the marriage and \$30,000.00 in non-marital funds which she used to reduce the mortgage during the marriage. The court therefore determined the amount of marital equity to be \$228,800.00. The court further held that the real estate had been maintained through the joint efforts of the parties from 1991-2004 which kept the property from losing value and there should be no apportionment of value between active and passive appreciation. The court found the entire equity of \$228,800.00 to be marital property.

{¶8} Based on the evidence presented by appellee concerning the amount of money received from Avante which the parties had available to spend during the marriage, the court found that appellee's income from Avante was \$56,040.00. The court used this income figure in calculating child support.

{¶9} Appellant assigns seven errors:

{¶10} "I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THERE SHOULD BE NO SEPARATE ALLOCATION OF VALUE OF THE APPRECIATION TO

THE NON-MARITAL EQUITY OF APPELLANT'S SEPARATE REAL PROPERTY AND THAT THERE SHOULD BE NO APPORTIONMENT OF VALUE BETWEEN ACTIVE AND PASSIVE APPRECIATION OF THAT PROPERTY.

{¶11} "II. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE MARITAL EQUITY IN APPELLANT'S SEPARATE REAL PROPERTY WAS \$228,800.

{¶12} "III. THE TRIAL COURT ERRED WHEN IT FOUND THE VALUE OF APPELLANT'S SEPARATE PROPERTY AS OF THE DATE OF THE MARRIAGE TO BE \$270,000.

{¶13} "IV. THE TRIAL COURT ERRED WHEN IT FOUND THE MORTGAGE BALANCE ON THE APPELLANT'S SEPARATE PROPERTY AT THE BEGINNING OF MARRIAGE WAS \$216,000 AND \$87,200 AT THE END OF THE MARRIAGE.

{¶14} "V. THE TRIAL COURT ERRED WHEN IT ADMITTED OVER APPELLANT'S OBJECTIONS APPELLEE'S EXPERT APPRAISER'S TESTIMONY CONCERNING HIS LEGAL CONCLUSIONS REGARDING THE APPLICATION OF O.R.C. §3105.171(A)(3)(a)(iii) AND §3105.171(A)(6)(a)(iii).

{¶15} "VI. THE TRIAL COURT ERRED IN FAILING TO MAKE A FINDING THAT APPELLANT WAS UNDEREMPLOYED AND TO CONSIDER FACTORS SET FORTH IN O.R.C. §3119.01(C)(11) BEFORE IMPUTING INCOME TO APPELLANT FOR PURPOSES OF CHILD SUPPORT.

{¶16} "VII. THE TRIAL COURT ERRED IN CALCULATING CHILD SUPPORT BY IMPROPERLY IMPUTING INCOME TO APPELLANT AND FAILING TO IMPUTE INCOME TO APPELLEE FOR APPELLEE'S RENTAL PROPERTY."

I

{¶17} In her first assignment of error, appellant argues that the court erred in finding all of the appreciation on the property to be active appreciation and therefore marital property.

{¶18} Generally, our review of a trial court's division of marital property is governed by an abuse of discretion standard. *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294, 480 N.E.2d 1112. In order to find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. In reviewing a determination of whether the increase in value of a business was marital or separate property, the Ohio Supreme Court has held that if there is some competent, credible evidence to support the trial court's decision, there is no abuse of discretion. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575, 1998-Ohio-403.

{¶19} R.C. 3105.171(A)(3)(a)(iii) defines marital property to include "all income and appreciation on separate property, due to the labor, monetary, or in-kind contribution of either or both of the spouses that occurred during the marriage." However, passive income and appreciation acquired from separate property by one spouse during the marriage is separate property. R.C. 3105.171(A)(6)(a)(iii). "Passive income" is defined as income acquired other than as a result of labor, monetary or in-kind contribution by either spouse.

{¶20} The 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. *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734, 645 N.E.2d 1300. When either spouse makes a contribution, whether it is monetary, due to labor, or in-kind, that causes an increase in the value of separate property, the increase in the value is active appreciation and deemed marital property. *Middendorf*, 82 Ohio St.3d at 400. However, appreciation as a result of an increase in the fair market value of separate property due to its location or inflation is considered passive income. *Munroe v. Munroe* (1997), 119 Ohio App.3d 530, 536, 695 N.E.2d 1155.

{¶21} Appellant cites to several cases in support of her proposition that mere routine maintenance of the property is not the type of contribution that constitutes active rather than passive appreciation. See *Cyrus v. Cyrus* (November 29, 1995), Lorain App. No. 95CA006040, unreported (regular maintenance such as painting does not cause appreciation to convert from separate to marital property); *Henley v. Henley*, Wayne App. No. 05CA0053, 2006-Ohio-3336 (no evidence was presented to demonstrate that pole barn constructed on the property increased the value of the property); *Meister v. Meister* (October 12, 2000), Cuyahoga App. No. 77110, unreported (routine maintenance such as painting, replacing carpeting, and some carpentry work was not the type of labor that converts appreciation from separate to marital property); *Neeley v. Neeley* (August 28, 1998), Montgomery App. No. 16721, unreported (cleaning and repairs constitute ordinary maintenance that does not convert appreciation to marital property), *Smith v. Smith*, Franklin App. No. 07AP-717, 2008-Ohio-799 (no testimony was presented as to any time or financial resources the parties invested in the home after the marriage).

{¶22} Appellee relies on *Bugos v. Bugos* (October 15, 1999), Trumbull App. No. 98-T-0141 (record demonstrated that improvements were made, even though the record was devoid of evidence as to what improvements were done, and the appellant failed to prove by a preponderance of the evidence that the appreciation was separate property); *Hyslop v. Hyslop*, Wood App. No. WD-01-059, 2002-Ohio-4656 (some evidence supported the court's finding that appreciation was marital where appellee gave appellant money to re-carpet the house and provided labor such as cleaning and doing yard work for 13 years); *Bizjack v. Bizjack*, Lake App. No. 2004-L-083, 2005-Ohio-7047 (if there is no evidence of the amount of appreciation that is passive, the court should not speculate on the cause of appreciation and conclude without any evidence that some of the appreciation must be passive).

{¶23} Appellant had the burden of proving the appreciation was separate property and presented no evidence that the appreciation was passive. Appellee presented the testimony of Steve Layman, a real estate appraiser, who testified that the building was built for a special use, but is not a "special use" building as the term is defined in the industry. Tr. 21. He testified that the property has features which are special purpose features, such as the gymnastics pits and the dance floor, but these features are not onerous to convert to another use for the building. Id. He further testified that 1991-2004 is a long enough period of time that if no maintenance had been done on the building, its value probably would have stagnated and potentially could have decreased. Tr. 22.

{¶24} Appellee testified that his job at Avante involved handling the financial affairs of the business, looking after the maintenance of the building, and accompanying

appellant and her students at dance competitions. Tr. 46. He testified that he was basically acting as appellant's partner in the business. Id.

{¶25} Appellant testified that appellee did as little maintenance as possible. Tr. 122. She testified that he did some maintenance himself, and hired other people to do things, but there wasn't money to do all the things that needed to be done. Tr. 123. She testified that he didn't tell her what maintenance he did because, "It wasn't any of my business." Tr. 123. She testified that there were no improvements done to the property during the marriage but appellee "replaced a furnace or two." Tr. 128-29.

{¶26} Based on the unique facts of this case, we cannot find that the court abused its discretion in finding all of the appreciation to the property to be marital. Appellant presented no evidence that any part of the appreciation was passive. The parties acted in partnership in operating the business during the marriage, and appellee was solely responsible for making sure the building was maintained, whether he did such maintenance himself or hired the work done. The only expert testimony presented on the issue of appreciation was Layman's testimony that the value of the building would have stagnated or possibly even decreased had the building not been maintained during the marriage. Accordingly, the court did not abuse its discretion in finding the appreciation to be marital property.

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

II

{¶28} In her second assignment of error, appellant argues that the court erred in filing to apportion the appreciation of the property between separate and marital property using the formula set forth in *Munroe v. Munroe* (1997), 119 Ohio App.3d 530,

695 N.E.2d 1195. In *Munroe*, the Eighth District used a mathematical formula to apportion the amount of appreciation in the property which was traceable to the husband's separate property in the form of the down payment he made on the property prior to the marriage.

{¶29} However, as discussed in assignment of error one above, appellant presented no evidence that any of the appreciation was passive, and she had the burden of proof to trace her separate property. In the absence of evidence that appreciation was passive, the formula used by the court in *Munroe* cannot be applied. See *Dietrich v. Dietrich*, Cuyahoga App. No. 90565, 2008-Ohio-5740, ¶31 (appellant failed to establish the amount of passive appreciation on his initial investment in the home and *Munroe* cannot be applied); *Bizjak*, supra, ¶23 (before dividing property pursuant to *Munroe*, the court must determine whether the party has met his burden in tracing the appreciation as separate; the court should not conclude without evidence that some of the appreciation is passive). Because appellant failed to meet her burden of proving any of the appreciation was passive in nature, the court did not err in failing to use the formula set forth in the *Munroe* case to divide appreciation.

{¶30} The second assignment of error is overruled.

III

{¶31} Appellant argues that the court erred in assigning a value of \$270,000.00 to the Avante property as of the date of the marriage in 1991. The court valued the property at \$270,000.00 based on the January 30, 1991, appraisal of Steve Layman. Appellant argues the court should have valued the property at \$296,000.00, the value

agreed to by appellant and her former husband in their separation agreement in the August 28, 1991, dissolution.

{¶32} R.C. 3105.171, which governs property distribution, sets forth no specific manner for the trial court to determine valuation of property. *Crim v. Crim*, Tuscarawas App. No. 2007AP060032, 2008-Ohio-5367, ¶36, citing *Focke v. Focke* (1992), 83 Ohio App.3d 552, 555, 615 N.E.2d 327. An appellate court's duty is not to require the adoption of any particular method of valuation, but to determine whether, based upon all the relevant facts and circumstances, the court abused its discretion in arriving at a value. *Id.*, citing *James v. James* (1995), 101 Ohio App.3d 668, 680, 656 N.E.2d 399. A trial court must have a rational, evidentiary basis for assigning value to marital property. *Id.*, citing *McCoy v. McCoy* (1993), 91 Ohio App.3d 570, 576-578, 632 N.E.2d 1358.

{¶33} Appellant argues that the court abused its discretion in setting the value of the property because where there is an arms-length transaction setting a value, an appraisal is not needed or warranted, citing *Rhodes v. Hamilton County Board* (2008), 117 Ohio St.3d 532, 535, 885 N.E.2d 236. In *Rhodes*, the Ohio Supreme Court concluded that a recent, arm's length sale between a willing buyer and a willing seller was the best evidence of the value of the real property at issue in that case. *Id.*

{¶34} Appellant cites no authority for the proposition that a transfer of property between the parties to a divorce action constitutes an arm's-length transaction between a willing buyer and a willing seller. The 1991 Yost separation agreement specifically provides:

{¶35} “WHEREAS, it is the purpose and intent of the parties hereto to divide their property in the manner which conforms to a just and right standard, with due regard to the rights of each party. Such division of existing marital property is not intended by the parties to constitute in any way a sale or exchange of assets except as so specifically provided herein.”

{¶36} Therefore, it is clear from the separation agreement that the parties agreed the division of property was not to constitute a sale. Further, the Yost separation agreement provides as follows regarding the valuation of real property:

{¶37} “WHEREAS, each of the parties has had the real estate appraised and the parties have agreed that the appraisals are to be averaged and the average value is that set for on ‘Exhibit A.’”

{¶38} It appears from the language of the separation agreement that the valuation of \$296,000.00 was the average of separate appraisals of the Avante property obtained by appellant and her former husband at the time of the 1991 divorce. However, at the time of trial in the instant case, appellant had no memory of how they decided on the \$296,000.00 figure. She testified that she believed the value came from the office of Steve Schaller, her attorney in the prior divorce. Tr. 132. Appellee presented the testimony and the written appraisal of Steve Layman valuing the property at \$270,000.00 as of January 30, 1991. The court did not abuse its discretion in accepting this appraisal as the value of the property at the time of the marriage.

{¶39} The third assignment of error is overruled.

IV

{¶40} Appellant first argues that the court erred in using \$216,000.00 as the balance due on the mortgage on the Avante property on the date of the marriage. Appellant argues that the court abused its discretion in not using the \$212,500.00 figure agreed upon by her and her former husband in their 1991 separation agreement, entered shortly before her marriage to appellee.

{¶41} Appellant presented no evidence as to how she and Kenneth Yost arrived at the \$212,500.00 payoff figure on the property in 1991. The only documentary evidence presented to the court concerning the amount due on the Avante mortgage in 1991 was a statement from Central Trust Company for the period ending March 3, 1991, showing the balance due on the mortgage to be \$216,257.98. Plaintiff's Exhibit 14. When appellant was questioned concerning this exhibit, she testified that the statements were mailed to them every three months and they couldn't find anything closer to the date of the marriage than this statement. Tr. 136. However, appellant presented no evidence other than the agreed figure from the separation agreement as to the mortgage balance on the date of the marriage, and appellant did not explain how the parties arrived at the figure agreed upon in the 1991 dissolution. The court did not abuse its discretion in setting the value of the mortgage due on the property on the date of the marriage at \$216,000.00.

{¶42} Appellant also argues that the court erred in valuing the mortgage at the end of the marriage as of August 10, 2004, rather than January 1, 2004, which the court had found to be the de facto end of the marriage.

{¶43} Generally the court must choose a specific date for purposes of valuation and use it consistently; a party cannot pick and choose what dates to value certain items of marital property. *Frohman v. Frohman*, Trumbull App. No. 2001-T-0021, 2002-Ohio-7274. However, in certain cases it may be necessary for the trial court to use different dates for valuation purposes. *Id.* However, this exception is very limited in scope, and when using different valuation dates, the court must clearly set forth its reasons for doing so. *Id.*

{¶44} The court found at page 16-17 of the July 25, 2008, judgment entry:

{¶45} “The Court specifically finds that the parties jointly participated in the business from the date of the marriage until plaintiff quit working in August of 2004. The Court further finds that this is real estate with a special purpose and that it had been and is being used for what it was designed. The Court further finds that the real estate has been maintained through the joint effort of the parties from 1991 through 2004 and that this joint effort has kept said property from losing value.”

{¶46} Based on the court’s finding that appellee worked in the business with appellant through August 2004, and the building was used for a special purpose in conjunction with this business, the court did not err in using that date as the end of the marriage for purposes of valuing the property connected to the business.

{¶47} The fourth assignment of error is overruled.

V

{¶48} Appellant argues that the court erred in admitting, over her objection, Steve Layman’s testimony that from a real estate appraisal point of view, there is no logic in attributing separate values to the interests of the parties before 1991, and the

interest of the parties in 2004. Tr. 26. Appellant argues that the question called for a legal conclusion on the logic of applying the Ohio Revised Code sections regarding passive appreciation and separate property.

{¶49} Judges are presumed in a bench trial to rely only on relevant, material, and competent evidence. *State v. Fox* (1994), 69 Ohio St.3d 183, 189, 631 N.E.2d 124. Further, a trial court judge is presumed to know the law and apply it accordingly. *State v. Turner*, Ashtabula App. No. 2004-A-0005, 2004-Ohio-5632, ¶15, citing *State v. Eley* (1996), 77 Ohio St.3d 174, 180-181, 672 N.E.2d 640.

{¶50} The court's judgment reflects that the court understood the law regarding marital and separate property and did not rely on Mr. Layman's opinion about the application of the law to this case from a real estate appraiser's view. Appellant has not demonstrated any prejudice from the admission of the testimony.

{¶51} The fifth assignment of error is overruled.

VI

{¶52} Appellant argues that the court erred in imputing income to her without making a finding that she was underemployed and considering the factors set forth in R.C. 3119.01(C)(11).

{¶53} The trial court made the following finding with regard to appellant's income:

{¶54} "Finally, the Court has imputed to the defendant the amount of income that she earned before 2004, and prior to the parties separation. The Court finds that this is equitable." July 25, 2008, Judgment Entry, page 8.

{¶55} While the court uses the word “impute,” it is clear that the court did not impute income to appellant on the basis that she was underemployed as that term is used in R.C. 3119.01(C)(11). Rather, appellee presented evidence that in 2003, the last year he was involved in the business and keeping the financial records for the business, the amount of money they kept as income and spent for family expenses from the business was \$56,040.00. Appellee supported this figure with records from the business and a record of the family’s spending. In using this figure in the child support worksheet calculation, the court was not imputing income to appellant, but using a figure that the court believed closely represented her actual income from the business.

{¶56} The sixth assignment of error is overruled.

VII

{¶57} Appellant argues that the court abused its discretion in using the figure of \$56,040.00 for her income rather than deducting ordinary and necessary business expenses from the gross receipts of the business in calculating her gross income, as required by R.C. 3119.01(C)(9),(13), which provides:

{¶58} “(9)(a) “Ordinary and necessary expenses incurred in generating gross receipts” means actual cash items expended by the parent or the parent’s business and includes depreciation expenses of business equipment as shown on the books of a business entity.

{¶59} “(b) Except as specifically included in “ordinary and necessary expenses incurred in generating gross receipts” by division (C)(9)(a) of this section, “ordinary and necessary expenses incurred in generating gross receipts” does not include

depreciation expenses and other noncash items that are allowed as deductions on any federal tax return of the parent or the parent's business.

{¶60} “(13) “Self-generated income” means gross receipts received by a parent from self-employment, proprietorship of a business, joint ownership of a partnership or closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts. “Self-generated income” includes expense reimbursements or in-kind payments received by a parent from self-employment, the operation of a business, or rents, including company cars, free housing, reimbursed meals, and other benefits, if the reimbursements are significant and reduce personal living expenses.”

{¶61} The evidence submitted by appellant concerning her income from Avante were her tax returns for the years 2003, 2005, 2006, and 2007, showing a net operating loss from the business from 2005-2007. Appellant did not present any documents to back up the information on the tax return. Appellant did not present any evidence to the court to show what expenses were “ordinary and necessary” and what expenses were noncash items allowed on the tax return but not to be considered by the court in calculating her income. Appellant presented no evidence of her actual take-home pay from Avante other than her tax returns, the most recent of which for 2007 showed her adjusted gross income as \$4,439.00.

{¶62} In contrast, appellee presented testimony and documentation to show the amount of income the business generated and the actual amounts of their expenditures as a family from their income from the business. This evidence from 2003 was the only evidence before the court tending to show the actual receipts of the business less the

ordinary business expenses. The court did not abuse its discretion in accepting appellee's estimation of what appellant had earned in the past from the business. While appellant testified that gross receipts were down because the number of dance students, which produce more income than gymnastics students, had decreased, she did not present any evidence as to her actual income from the business and her ordinary and necessary expenses.

{¶63} Appellant also argues that the court erred in not imputing rental income to appellee in the amount of \$400.00 a month. Appellee owned a home which he at one time rented for \$400.00 a month. At the time of trial he allowed his son to live in without paying rent.

{¶64} The evidence presented by appellant was a gross rental figure, and did not take into account the expenses incurred in renting the property. Appellee's tax returns show that he did not receive rental income from the property in 2000 or 2001. In 2002, he received rental income of \$1,455.00, but with deductions for utilities, taxes, and repairs, he lost \$2,666.00 on the rental of the property. Appellant did not present any evidence as to the actual amount appellee could earn from renting the property at \$400.00 a month, and the court did not abuse its discretion in failing to impute rental income to appellee.

{¶65} The seventh assignment of error is overruled.

{¶66} The judgment of the Licking County Common Pleas Court, Domestic Relations Division, is affirmed.

By: Edwards, J.

Hoffman, P.J. and

Wise, J. concur

JUDGES

JAE/r0909

