

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

BARBARA A. KOHMESCHER,	:	APPEAL NO. C-080391
	:	TRIAL NO. DR-0501303
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
PAUL H. KOHMESCHER,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

The parties to this appeal were married on September 8, 1990. During the course of their marriage, the couple had four children. Plaintiff-appellant Barbara A. Kohmescher filed for divorce on June 3, 2005. The couple had been living apart since defendant-appellee Paul H. Kohmescher left the marital home on December 31, 2003. During the course of the litigation below, the issues of child custody and child and spousal support were settled by agreement, and only the property issues remained for trial. After several days of hearings, the magistrate decided that the marriage had effectively ended on August 1, 2004, and reached a decision on the property issues. The trial court adopted the decision. Barbara appeals, raising six assignments of error.

Barbara first argues that the trial court abused its discretion when it set the de facto termination date for the marriage in this case, noting that “the fact that wife wore her wedding ring in July of 2004 is not a reason to establish the termination date of the marriage on August 1, 2004.”

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

A trial court may use the date of the final hearing in a divorce case as the date that the marriage ends.² But if the trial court determines that the date of the final hearing would be inequitable, and that a de facto termination of the marriage occurred at an earlier time, the trial court has the discretion to select a date that it considers equitable.³

In this case, Paul moved out of the marital residence on December 31, 2003. The magistrate noted that “[f]or the first 6-7 months of the parties’ separation, there was no direct conversation between the parties as to the status of the marriage.” Paul sent a letter in February 2004, which discussed, in part, a list of things he needed to do to keep the relationship alive. While the letter mentioned getting lawyers to help divide the property, it closed by saying, “I want a happy marriage * * * I want to raise my family and be a major part of their lives * * * I want to grow old with you.” Barbara testified that she did not know what the future of the marriage was during this time. Both parties wore their wedding rings during this time, and Paul continued to maintain the marital residence, even though he no longer resided there. In late July or early August, Barbara asked Paul for a divorce. Based on this evidence, it was not an abuse of discretion to determine that the marriage ended on August 1, 2004. We overrule the first assignment of error.

Barbara argues in her second assignment of error that the trial court abused its discretion when it adopted the valuation of a restaurant, owned by the couple, that was based on the appraisal done by the accounting firm hired by Paul. She argues that the accountant improperly included the restaurant’s “potential” in the valuation, rather than limiting its analysis to its “actual value.”

² *Fisher v. Fisher* (Mar. 22, 2002), 3rd Dist. No. 7-01-12, 2002-Ohio-1297, citing R.C. 3105.171(A)(2); *Eberly v. Eberly* (Jun. 13, 2001), 3d Dist. No. 7-01-04, 2001-Ohio-2228.

³ *Fisher*, supra, citing R.C. 3105.171(A)(2)(b); see, also, *Heary v. Heary* (Nov. 30, 2000), 8th Dist. Nos. 76833, 77049, and 78180; *Gullia v. Gullia* (1994), 93 Ohio App.3d 653, 666, 639 N.E.2d 822; *Berish v. Berish* (1982), 69 Ohio St.2d 318, 432 N.E.2d 183.

In support of that argument, she cites the decision *James v. James* from the Second Appellate District.⁴ But that case is distinguishable. In that case, the appraisal did not take into account that the shares of the company were subject to a buy-sell agreement with the other owners for a fixed amount. If the party had wanted to sell, they would have had to offer the shares to the other owners for \$10 each, even if a valuation of the business would justify a share price of much more on the open market. In other words, if the party had 10 shares, and their part of the business was \$1 million dollars on the open market, they would still have to offer to sell to the other partners for \$100. The *James* court found that it was an abuse of discretion not to take this into account.

There is nothing in this case that would so artificially limit the value of the business. When determining the value of marital assets, a trial court is not confined to the use of a particular valuation method, but can make its own determination as to valuation based on the evidence presented.⁵ The record contains no evidence indicating that there was anything wrong with the methodology used by Paul's accountant. Therefore, relying on the report was not an abuse of discretion,⁶ and we overrule the second assignment of error.

In her third assignment of error, Barbara argues that the trial court abused its discretion when it determined that two promissory notes payable to Barbara by the restaurant were marital assets. We disagree.

According to the record, the money came from Barbara after she had refinanced her condominium, which was her separate property. Barbara and Paul each had condominiums that were their separate property. Both had been

⁴ (1995), 101 Ohio App. 3d 668, 681, 656 N.E.2d 399

⁵ *Cronin v. Cronin*, 2nd Dist. Nos. 02-CA-110, 03-CA-75, 2005-Ohio-301, ¶11, citing *James v. James* (1995), 101 Ohio App.3d 668, 681, 656 N.E.2d 399; *Focke v. Focke* (1992), 83 Ohio App. 3d 552, 554, 615 N.E.2d 327; *Zeefe v. Zeefe* (1998), 125 Ohio App.3d 600, 612, 709 N.E.2d 208.

⁶ *Id.*, citing *James*, *supra*.

refinanced several times, and the proceeds were used for various marital purposes. The magistrate noted that “the parties used the refinances to accomplish particular financial goals in the marriage at that time, pay off debts, invest money like the loan to Willie’s and contributions to IRAs and they also used these funds to start PK Vending and purchase supplies for that business, as well as at one point pay dues to join Wetherington Golf Club. * * * Based on the conduct of the parties regarding their condominiums and their use of them for their marital financial planning the Court finds that the two promissory notes are marital assets to be divided between the parties.” This decision was not an abuse of discretion, and we overrule the third assignment of error.

Barbara claims in her fourth assignment of error that she incurred an increased tax liability because Paul misreported the sale price of his separate vehicle. In her brief, she wrote that “Husband agreed to file an amended tax return and pay 100% of any additional tax liability * * * the trial court’s failure to order Husband to reimburse Wife for that tax liability” was an abuse of discretion.

But the parties had signed an agreed entry that stated that Barbara would file an amended tax return. The agreement stated that Paul would pay any increased tax liability, interest, and penalties due. If he has not done so, the remedy is to file a motion for contempt. At this point, the record does not reflect the error Barbara claims, and we overrule the assignment of error.

In her fifth assignment of error, Barbara argues that there was no evidence to support the trial court’s conclusion that money given by Paul’s father to Paul was a loan, as opposed to a gift.

In this case, the money from Paul’s father was used to finance a business that was run during the marriage. Paul testified that it had been a loan. When the business was sold, part of the money was repaid to Paul’s father. The magistrate

noted that “Wife also testified that Husband’s father never gave any money to the parties that [Paul’s father] did not expect to get back.”

Barbara cites one case in support of her proposition. That case held that, under similar circumstances, it was not an abuse of discretion to call such money a gift.⁷ But that is not the same as holding that it would have been an abuse of discretion to call it a loan. In this case, it was not an abuse of discretion to construe this transaction as a loan. Therefore, we overrule the fifth assignment of error.

In her sixth and final assignment of error, Barbara argues that the trial court should have ordered Paul to sell or refinance his condominium because the current loan was in her name. There is no legal authority for this proposition. The decree orders Paul to make the payments and to hold Barbara harmless as to the debt and other liabilities on the condominium. If he fails to do so, she can file a motion for contempt against him. Like the tax-liability issue, this is not a question that can be resolved in this appeal, and we overrule the assignment of error.

Therefore, we affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on March 25, 2009

per order of the Court _____
Presiding Judge

⁷ *O’Donnell v. O’Donnell*, 12th Dist. No. CA2003-05-119, 2004-Ohio-2484.