

2015 IL App (3d) 140263

Opinion filed May 29, 2015

Modified upon denial of rehearing February 11, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

<i>In re</i> MARRIAGE OF)	Appeal from the Circuit Court
LINDA ROBERTS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois.
Petitioner-Appellant,)	
)	Appeal No. 3-14-0263
and)	Circuit No. 11-D-851
)	
DAVID E. ROBERTS,)	
)	Honorable
Respondent-Appellee.)	Katherine Gorman,
)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court, with opinion.
Presiding Justice O'Brien concurred in the judgment and opinion.
Justice McDade specially concurred, with opinion.

OPINION

¶ 1 After 37 years of marriage, petitioner, a teacher, filed a petition for dissolution of marriage against respondent, a disabled pharmacist. The trial court divided the property of the parties and awarded each party a one-half interest in petitioner's pension from the Teachers' Retirement System (TRS). Petitioner appeals, arguing that the trial court should have awarded her pension solely to her or, alternatively, should have granted her maintenance in an amount

equal to the payments respondent would receive from her pension. We reverse and remand, finding that the trial court erred in denying petitioner maintenance.

¶ 2 Petitioner, Linda Roberts, and respondent, David Roberts, married in 1974. Petitioner filed a petition for dissolution of marriage in 2011. The petition stated that there were “no arrangements between the parties concerning maintenance or the allocation of the property held by the parties.” Plaintiff requested that she “be awarded a just and equitable portion of the marital property” and “be granted such other and further relief as may be appropriate under the evidence and circumstances.” Respondent filed a response to the petition, as well as a petition for temporary maintenance. The parties filed cross-petitions for dissipation of assets.

¶ 3 Testimony presented at trial established that the parties had three children during their marriage. All of the children are now emancipated adults. At the time of trial, petitioner was 62 years old and working as a middle school science teacher. She had submitted her retirement notice and had two more years to work before it took effect. Respondent was 61 years old and worked as a pharmacist from 1974 to 2009. In 2009, he was found to be disabled and began receiving Social Security disability benefits. In 2013, he was receiving disability benefits of \$2,386 per month.

¶ 4 In 1992, petitioner was hired as a teacher for Bartonville School District No. 66. Prior to that, she worked as a nurse for several years and contributed to Social Security. From 1992 on, she contributed to a TRS pension instead of Social Security. When she retires, her TRS pension will pay \$2,056 per month. Her Social Security income at age 62 will be \$282 per month.

¶ 5 Both parties submitted financial affidavits. According to respondent’s financial affidavit, his monthly expenses total \$2,235.61. According to petitioner’s second-amended financial

affidavit, her monthly expenses total \$4,064.36. In 2012, petitioner's net income was \$37,694.52, and respondent's net income was \$27,319.40.

¶ 6 In her closing statement to the court, petitioner requested that all of the parties' retirement accounts, except for her TRS pension, be equally divided between the parties. She requested that her TRS pension be awarded solely to her.

¶ 7 After hearing the evidence and testimony, the trial court announced its oral ruling on the petition for dissolution and motions filed by the parties. The court equally divided the parties' retirement accounts, which had a value of over \$300,000. The court also ordered that petitioner's TRS pension be divided equally between the parties by a "Qualified Illinois Domestic Relations Order" (QILDRO). The court ordered that the parties pay their own debts and their own attorney fees. The court denied respondent's request for maintenance and found no dissipation of marital assets by either party. The court equally divided the cash assets between the parties.

¶ 8 After the court announced its ruling, petitioner asked the court to allow her to pay respondent one-half of the current value of her TRS pension instead of dividing future payments between her and respondent and issuing a QILDRO in favor of respondent. The court declined, stating: "[T]here's no way to actually ascertain what the value is. I mean, so I'm going to stick with my original order and ask that it be QILDRO'd [*sic*]."

¶ 9 Petitioner filed a motion to reconsider the court's ruling, arguing that the court erred in dividing her TRS pension and failing to award her maintenance because, upon her retirement, she will receive a total of \$1,310 per month from her pension and Social Security, while respondent will receive monthly income of \$3,414.90 from half of her pension and his Social Security disability payments. At the hearing on the motion, petitioner requested that the court

either (1) award her TRS pension solely to her, or (2) order respondent to pay monthly maintenance equal to the amount he would receive from her TRS pension upon her retirement. The trial court denied petitioner's motion.

¶ 10 I

¶ 11 Petitioner first argues that the trial court should have awarded her entire pension to her to equalize the parties' incomes after she retires.

¶ 12 Pursuant to section 503(d) of the Illinois Marriage and Dissolution of Marriage Act (Act), marital property must be divided in "just proportions." 750 ILCS 5/503(d) (West 2012); *In re Marriage of Callahan*, 2013 IL App (1st) 113751, ¶ 21. While the distribution need not be mathematically equal, it must be equitable. *Id.*

¶ 13 The trial court has broad discretion in the division of marital assets. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 161 (2005). We will reverse a trial court's division only where it constitutes an abuse of discretion. *Id.* An abuse of discretion occurs when no reasonable person would take the view adopted by the trial court. *Id.*

¶ 14 Pension benefits attributable to contributions made during marriage are considered marital property under the Act and subject to division upon dissolution of the marriage. 750 ILCS 5/503(b)(2) (West 2012); *In re Marriage of Culp*, 399 Ill. App. 3d 542, 546 (2010). However, Social Security benefits are treated differently. *In re Marriage of Mueller*, 2015 IL 117876, ¶ 18. Social Security benefits are not marital property under the Act because they are not guaranteed and not owned in a proprietary sense. *Id.* ¶ 24. As such, they are not subject to division in dissolution proceedings. *Id.* ¶ 25.

¶ 15 While most other states permit trial courts to consider a spouse's current or anticipated Social Security benefits in making an equitable distribution of marital assets, Illinois prohibits

courts from giving any consideration to Social Security benefits when dividing marital property. *Id.* ¶ 22; *In re Marriage of Crook*, 211 Ill. 2d 437, 449-50 (2004). According to our supreme court, considering Social Security benefits in dividing marital property would conflict with federal law, which prohibits the transfer or assignment of Social Security benefits. *Marriage of Crook*, 211 Ill. 2d at 443-53 (citing 42 U.S.C. § 407(a) (2000)). “A trial court dividing assets in a marital-dissolution proceeding should simply not give any consideration to federal social security benefits ***.” *In re Marriage of Rogers*, 352 Ill. App. 3d 896, 898 (2004).

¶ 16 In *Marriage of Crook*, the supreme court suggested that a different rule may apply when one party will receive Social Security benefits and the other party participates in a pension system in lieu of Social Security. See *Marriage of Crook*, 211 Ill. 2d at 452 (refusing to decide whether a spouse who participates in a pension system in lieu of Social Security should be treated similarly as the other spouse who receives Social Security benefits). Courts in other states have held that “a spouse who participates in a pension system in lieu of Social Security must be placed in a position similar to that of the other spouse whose Social Security benefits will be statutorily exempt from equitable distribution.” *Id.* (citing *In re Marriage of Kelly*, 9 P.3d 1046 (Ariz. 2000), *Walker v. Walker*, 677 N.E.2d 1252 (Ohio Ct. App. 1996), and *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa. Super. Ct. 1990)). However, the supreme court recently held that no consideration can be given to Social Security benefits even if one spouse is receiving or is expected to receive Social Security benefits and the other spouse participates in a pension system in lieu of Social Security. *Mueller*, 2015 IL 117876, ¶ 22. The court stated that while “[f]ailing to consider Social Security benefits may paint an unrealistic picture of the parties’ future finances,” Congress intended to keep Social Security benefits out of the division of marital assets in divorce cases. *Id.* ¶ 27.

¶ 17 Here, the trial court properly refused to consider the Social Security benefits that respondent is receiving in its division of marital property. See *id.* The court's equitable division of petitioner's pension benefits was not an abuse of discretion.

¶ 18 II

¶ 19 Petitioner alternatively contends that the trial court should have awarded her maintenance equal to the payments respondent will receive from her TRS pension.

¶ 20 The trial court is allowed broad discretion to determine the propriety, amount and duration of maintenance, and the court's decision will not be disturbed absent an abuse of discretion. *In re Marriage of Rogers*, 352 Ill. App. 3d 896, 899 (2004). The burden is on the party seeking reversal to show an abuse of discretion. *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 168 (2005).

¶ 21 While Social Security benefits cannot be considered in property division, they may be considered in determining a maintenance award. *In re Marriage of Dea*, 2013 IL App (1st) 122213, ¶ 19; *Rogers*, 352 Ill. App. 3d at 898-99. A trial court may properly consider a party's receipt of Social Security benefits in determining a party's obligation to pay maintenance as well in determining whether a party is entitled to an award of maintenance. *Wojcik*, 362 Ill. App. 3d at 166-67. In fact, a trial court commits an abuse of discretion if it fails to consider the monetary value of a party's current Social Security benefits when determining an appropriate maintenance award. See *Dea*, 2013 IL App (1st) 122213, ¶ 20.

¶ 22 Maintenance is appropriate where one party is unable to support himself or herself in some approximation to the standard of living enjoyed during the marriage and the other party has the ability to pay. See *Rogers*, 352, Ill. App. 3d at 899. A trial court determines an award of maintenance based on the circumstances disclosed by the evidence at the time of the hearing. *Id.*

However, it is appropriate for a trial court to take a “reserved jurisdiction” approach to maintenance where (1) one party’s present ability to pay maintenance is limited but may be greater in the future, or (2) one party’s income will likely be insufficient in the future to support that party’s needs. See *Wojcik*, 362 Ill. App. 3d at 168.

¶ 23 In this case, as a result of the trial court’s division of marital property, when petitioner retires, she will receive a total monthly income of \$1,310, consisting of her Social Security benefits and her half of her pension, while respondent will receive monthly income of \$3,414.90, consisting of his Social Security benefits and his half of petitioner’s pension. The parties’ financial affidavits show that petitioner’s monthly expenses are \$4,064.36, and respondent’s are \$2,235.61. Thus, petitioner will be left with a monthly deficit of \$2,700, while respondent will enjoy a monthly surplus of \$1,100.

¶ 24 The evidence presented at trial shows that when petitioner retires, she will be unable to support herself, while respondent will have the ability to pay. Under these circumstances, the trial court should have reserved the issue of maintenance until petitioner’s impending retirement. See *id.* Since the evidence shows that petitioner will be in need of maintenance and respondent will have the ability to pay, the trial court abused its discretion in denying petitioner maintenance outright and not reserving the issue of maintenance until a later date.

¶ 25 We reverse the trial court’s order denying petitioner maintenance and instruct the court to enter an order reserving jurisdiction over the case until petitioner retires. Upon petitioner’s retirement, the court must consider the value of respondent’s Social Security benefits in determining the amount of maintenance that petitioner should receive. See *Dea*, 2013 IL App (1st) 122213, ¶ 20; *Wojcik*, 362 Ill. App. 3d at 166-67.

¶ 26 The judgment of the circuit court of Peoria County is reversed, and the cause is remanded.

¶ 27 Reversed and remanded.

¶ 28 JUSTICE McDADE, specially concurring.

¶ 29 The opinion in this case affirms the refusal of the trial court to consider the exemption of respondent's Social Security benefits in order to similarly exempt petitioner's TRS benefits from equitable division as marital property. The trial court's decision is fully consistent with the supreme court's decision in *In re Marriage of Mueller*, 2015 IL 117876, and I concur.

¶ 30 I also specially concur in the decision to reverse the trial court's denial of maintenance for petitioner and to remand for entry of an order reserving jurisdiction to consider the issue when petitioner retires. I write separately on this second portion of the decision to acknowledge the possibility that the broad prohibition of "consideration of social security benefits" may be construed to extend to the award and calculation of maintenance. At issue here is the reach of the prohibition recognized in *In re Marriage of Crook*, 211 Ill. 2d 437 (2004), and in *Mueller*.

¶ 31 Our decision relies heavily on three appellate court cases decided after *Crook*, but prior to *Mueller*: *In re Marriage of Rogers*, 352 Ill. App. 3d 896 (2004), *In re Marriage of Wojcik*, 362 Ill. App. 3d 144 (2005), and *In re Marriage of Dea*, 2013 IL App (1st) 122213. Those cases generally stand for the proposition that while social security benefits cannot be considered in property division, they may be considered in determining a maintenance award.

¶ 32 The majority in *Mueller*, citing its decision in *Crook*, stated:

"We summarized that *Hisquierdo* establishes two important points: Social Security benefits may not be divided directly *or used as a basis for an offset during state dissolution proceedings.*"

Crook, 211 Ill. 2d at 449-50. Those points led us to reject analyses from cases in other states permitting trial courts to consider anticipated Social Security benefits as a factor in making an equitable distribution of marital property. *Id.* at 449-51." (Emphasis added.) *Mueller*, 2015 IL 117876, ¶ 22.

¶ 33 While I am in general agreement that social security maintenance is not "disposition of property" as contemplated in the statute, I am disquieted by the *breadth* of the concluding paragraph of *Mueller's* majority decision, in which the court states:

"A more coherent approach is to adhere to *Crook*, and *Hisquierdo*, and hold that *Congress intended to keep Social Security benefits out of divorce cases*. Failing to consider Social Security benefits may paint an unrealistic picture of the parties' future finances, but 'it is not the province of this court *** to interfere with the federal scheme, no matter how unfair it may appear to be.' *Crook*, 211 Ill. 2d at 452. The decision of the trial court not to consider Shelley's Social Security benefits and reduce Christopher's pension benefits by hypothetical Social Security benefits was correct." (Emphasis added.) *Mueller*, 205 IL 117876, ¶27.

¶ 34 The emphasized language from *Mueller* appears broader than the statement of the prohibition in *Crook*. *Supra* ¶ 32. I wonder if that apparent expansion reaches maintenance.