

[Cite as *Hardy v. Hardy*, 2015-Ohio-695.]

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
MONTGOMERY COUNTY**

NANCY HARDY	:	
	:	
Plaintiff-Appellant	:	C.A. CASE NO. 26140
	:	
v.	:	T.C. NO. 02LS03
	:	
LAWRENCE R. HARDY	:	(Civil appeal from Common Pleas
	:	Court, Division of Domestic Relations)
Defendant-Appellee	:	
	:	

.....  
**OPINION**

Rendered on the 27th day of February, 2015.

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JON PAUL RION, Atty, Reg. No. 0067020 and NICOLE RUTTER-HIRTH, Atty. Reg. No. 0081004, 130 W. Second Street, Suite 2150, P. O. Box 1262, Dayton, Ohio 45402  
Attorneys for Plaintiff-Appellant

LAWRENCE R. HARDY, 23591 Singing Hills Court, Auburn, California 95602  
Defendant-Appellee

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Nancy Hardy, filed

March 21, 2014. Nancy appeals from the February 27, 2014 Decision and Judgment of the Domestic Relations Court that in relevant part required Nancy and her ex-husband, Larry Hardy, to equally divide their retirement income.

{¶ 2} The parties were married on July 12, 1957. On January 23, 2002, Nancy filed a Complaint for Legal Separation. The matter was referred to a Magistrate, and a decision was issued dividing and distributing the parties' property which the court adopted as its interim order. Both parties objected to the magistrate's decision, and the trial court, on December 8, 2004, sustained certain objections and overruled others. In relevant part the trial court determined that pursuant to R.C. 3105.171, Larry is eligible to participate in Nancy's retirement benefits, but that Larry's Social Security income is not divisible. The parties' January 18, 2005 Final Decree and Judgment of Divorce provides in relevant part as follows:

\* \* \*

## 6. RETIREMENT ACCOUNTS

### A. STATE TEACHERS RETIREMENT SYSTEM ACCOUNT

IT IS FURTHER ORDERED that this account is held in the name of the Plaintiff. This account is a marital asset and shall be divided equally. A division of property order (DOPO) shall be divide this plan (sic). Said division of property order shall be prepared and filed with the plan administrator within thirty (30) days of the filing of the Final Judgment and Decree of Divorce. The parties will be equally responsible for the cost of preparation of this division of property orders (sic).

### B. SUNDSTRAND CORP. PENSION

IT IS FURTHER ORDERED that this pension is held in the name of the Defendant. Said account is a marital asset and shall be divided equally. Defendant receives \$2,773.00 per year in income from this pension. A Qualified Domestic Relations Order (QDRO) shall divide this plan. Each party shall receive one-half ( $1/2$ ) of the value of said plan. Said Qualified Domestic Relations Order shall be prepared and filed with the plan administrator within thirty (30) days of the filing of the Final Judgment and Decree of Divorce. Each party will be equally responsible for the costs of the preparation of the Qualified Domestic Relation Order.

{¶ 3} Nancy appealed from the Final Judgment and Decree of Divorce. This Court, on October 14, 2005, noted that while the Magistrate divided Nancy's State Teachers' Retirement System ("STRS") income and Larry's Sunstrand Corp. income equally, no "account was taken of [Larry's] annual Social Security income of \$18,960." *Hardy v. Hardy*, 2d Dist. Montgomery No. 20865, 2005-Ohio-5528, ¶ 7. This Court further noted that Nancy argued as follows:

[The] "decision to split [Nancy's] pension while leaving [Larry's] Social Security untouched is unreasonable in light of the circumstances. [Nancy], because of her participation in STRS, receives a pension in lieu of Social Security. If [Larry's] Social Security is not divided between the parties, then why should [Nancy's] income that she receives in lieu of Social Security be divided(?)".

*Id.*, ¶ 8.

{¶ 4} This Court noted that the trial court held that "Pursuant to R.C. 3105.171

defendant (Lawrence) is eligible to participate in the retirement benefits of the plaintiff (Nancy). Social Security benefits are not [so] divisible.” *Id.*, ¶ 9. This Court determined that, pursuant to *Harshbarger v. Harshbarger*, 158 Ohio App.3d 121, 2004-Ohio-3919, 814 N.E.2d 105 (2d Dist.), the trial court “abused its discretion when it overruled Nancy’s objection without consideration of a *Harshbarger* offset of [Larry’s] Social Security retirement benefit before dividing the balance of Nancy’s STRS pension benefit as marital property,” Hardy at ¶ 15, and the matter was remanded to the trial court for consideration of the amount of Larry’s Social Security benefit and to recalculate the amount of Nancy’s pension benefit to which Larry should be entitled.

{¶ 5} Following remand, the Magistrate issued a decision, Nancy filed objections, and on September 18, 2008, the trial court issued its Decision and Judgment. The court noted that the Magistrate ordered that the “parties shall equalize their annual social security benefits and retirement benefits. The magistrate determined that plaintiff would owe defendant a onetime payment of \$7,824 for the tax year 2006 to effectuate the equalization of the retirement benefits.” The court then noted as follows:

Plaintiff’s second objection is that the magistrate found that she was in receipt of a social security benefit of \$5,625 annually. Upon review of the exhibits in this matter, the Court finds that the magistrate incorrectly attributed this social security benefit to the plaintiff. The \$5,625 is in fact the amount plaintiff spent in providing survivor benefits under STRS retirement plan for the benefit of the defendant. This error requires the Court to adjust the equalization of the retirement benefits received by the parties.

At the time of the hearings, plaintiff was receiving \$32,152 annually in retirement from STRS. Defendant was entitled to receive \$22,128 in social security benefits. However, he was only receiving \$19,488 annually as a result of a prior overpayment of social security benefits. The Social Security Administration has reduced his current benefit to extinguish this overpayment. As stated above, both parties are entitled to receive \$1,386 annually from defendant's Sunstrand retirement account.

Plaintiff is currently receiving \$33,538 (\$32,152 plus \$1,386) in retirement benefits. Defendant is currently receiving \$23,514 (\$22,128 plus \$1,386) in retirement and social security benefits. As a result of all of the retirement benefits accrued during the parties' marriage, each party is entitled to one-half of the total benefits. Therefore, each party is entitled to receive \$28,526 ( $\$33,538 + \$23,514$  divided by 2) in retirement benefits for tax year 2006.

As a result of this equalization, plaintiff must pay defendant \$5,012 ( $\$28,526 - \$23,514$ ) for tax year 2006.

The equalization of the parties' retirement/social security benefits should be adjusted annually due to potential cost of living adjustments to their respective benefit plans. Consequently, each party will provide the other with copies of documents that reflect an increase in annual benefits from their respective retirement or social security. \* \* \*

Plaintiff's second objection as to the characterization of plaintiff's social security benefits and the equalization of retirement benefits is

sustained.<sup>1</sup>

{¶ 6} On August 5, 2010, Larry filed “Defendant’s Motion for Contempt and Request for Attorney Fees,” in which he asserted that Nancy failed to comply with the trial court’s order to pay to him the sum of \$5,012.00 to equalize the parties’ retirement income for the tax year 2006. On October 6, 2010, Nancy filed a “Motion to Show Cause and for Attorney Fees,” in which she asserted that Larry failed to equalize the parties’ retirement benefits. On June 20, 2012, the Magistrate issued an Order that provides in part that a hearing was held on June 7, 2012, and that at the close of the evidence, Nancy “was instructed to produce her tax returns for 2008-2011,” and that she failed to do so. The Order provides that Nancy “shall submit her tax returns with all supporting documentation for 2008-2011 to the assigned magistrate no later than July 7, 2012. The returns will be marked and admitted as exhibits.”

{¶ 7} On February 5, 2013, a “Magistrate Decision and Permanent Order” was issued. Regarding Larry’s motion of August 5, 2010, the Magistrate noted as follows:

The court ordered equalization of the parties “Social Security benefits and retirement benefits received annually” [Decision and Judgment, September 18, 2008]. Defendant was awarded \$5,012.00 from plaintiff for tax year 2006. This was calculated by adding all of plaintiff’s annual retirement benefit from STRS and adding defendant’s retirement benefits and Social Security benefits and dividing the total. The total was \$57,052.00 [\$33,538.00 (plaintiff) + \$23,514.00 (defendant)] divided by 2

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<sup>1</sup> We note that Nancy filed a Notice of Appeal regarding an issue not relevant to this appeal, and that this Court affirmed in part, reversed in part, and remanded the matter for further proceedings. *Hardy v. Hardy*, 2d Dist. Montgomery No. 22964, 2010-Ohio-561.

results in \$28,526.00. To equalize, plaintiff has to pay defendant the sum of \$5,012.00, so defendant would have \$28,526.00 for 2006. Plaintiff has not paid defendant that amount and still owes him \$5,012.00.

Plaintiff is found in contempt for failing to pay the retirement equalization payment for 2006.

**{¶ 8}** Regarding Nancy's motion of October 6, 2010, the Magistrate found as follows:

Plaintiff asserts that she is owed monies from defendant for equalizing the parties' retirement benefits. In 2008, plaintiff was found to owe defendant for the 2006 tax year. Now, plaintiff asserts defendant owes her for 2006 and thereafter (at least through 2009 as the motion was filed in 2010).

The court's 2008 decision required equalization of Social Security benefits and retirement benefits received annually. The parties were to exchange documents at the end of each year to ascertain the annual equalization.

Plaintiff produced at hearing a statement from STRS as to her retirement benefits from 2005 – May 2012. Defendant requested her tax returns. Plaintiff refused to produce her tax documents. The undersigned magistrate ordered their production post hearing. These documents were produced in August 2012 - they are marked and admitted as Exhibit D.

Defendant had provided his tax documents from 2005-2011 (Exhibits 8-14) to plaintiff. It is unclear if, and when, plaintiff produced her

1099's from STRS to defendant.

At no time did plaintiff produce the required documents with which the equalization could be calculated as the Court had done for tax year 2006. Defendant had insufficient data with which to assist him to calculate any differential in benefits. Defendant cannot be found in contempt when plaintiff made it impossible for the equalization to be calculated. There is no finding of contempt.

For the sake of avoiding the likely filing of motions about the amounts of equalization, an attempt will be made using the data now presented to the magistrate [plaintiff's recently produced documents will be referred to as Exhibit D].

In 2006, defendant received from plaintiff's STRS retirement benefits of \$15,742.00 [Exhibit 7;  $\$23,742 \div 18 \times 12$ ]. Plaintiff's Exhibit 5 [STRS 1099] shows retirement benefits for 2006 of \$23,084.66; this is contradicted by the court's previous finding that her retirement benefits were \$32,152.00.

For 2007, plaintiff asserts she receives only \$23,727.50 per her Exhibit 5. She does not acknowledge the \$1,387.00 from a Sundstrand pension. It is unclear why she received, per her assertion, \$32,152 annually in 2006 but \$9,000.00 less in 2007. Plaintiff's 2007 tax return shows retirement benefits of \$98,434 plus Social Security of \$17,093.00 [Exhibit D]. Exhibit D is plaintiff's joint tax return with her current spouse. There are no supporting documents as to the source and payee for the retirement and Social Security income.



Because of plaintiff's lack of veracity in other areas, and the absence of explanation as to how/why the state benefits decreased by more than \$9,000.00 in a year's time, plaintiff's assertion is neither reasonable nor believable.

Due to the lack of any probative, competent, or credible evidence of plaintiff's retirement benefits received, no calculation of any equalization can be attempted.

{¶ 9} Nancy' filed objections to the Magistrate's decision on April 25, 2013. Therein, she asserted that she "has never received any of Defendant's social security benefits or Sunstrand." She asserted as follows:

I. Equalization of Incomes

\* \* \* Defendant has been receiving ½ of Plaintiff's STRS benefits since 2005 to the tune of \$114,000 (again, now it is much higher). Yet, at the age of 78, Plaintiff has not received one penny from Defendant's Social Security or Sunstrand. Eight years have passed, yet no equalization has occurred. Despite being presented with incomes for both parties from 2005 until 2012, the Magistrate failed to equalize the incomes \* \* \*.

A) Improper Factual Findings

First, the Magistrate made improper findings of fact on this issue which are not supported by the record. The Magistrate was unclear why Plaintiff received STRS in the amount of \$32,152 in 2006 but \$9,000 less in 2007. \* \* \* There was no testimony as to any decrease in benefits and the Magistrate had the STRS statements in court, which do not show a

decrease of benefits of \$9,000. Plaintiff testified that she received STRS as the time of the divorce, she cannot receive Social Security, and Defendant began receiving his half of her STRS benefits in 2005. When asked by the court why her annual benefits decreased, Plaintiff had no knowledge of any decrease but speculated that any decrease in her benefits would be due to Defendant receiving his portion of her STRS. It appears that the Magistrate misunderstood the testimony, or failed to consider that any decrease is due to Defendant receiving benefits, and instead implied Plaintiff was unable to properly explain that decrease. \* \* \*

Additionally, the Magistrate improperly found Plaintiff received retirement benefits of \$98,434 in 2007 plus social security of \$17,093 \* \* \*. Plaintiff does not receive social security at all; her husband does. Exhibit D that the Magistrate references is Plaintiff's joint tax return with her current husband. The Magistrate appears to be improperly attributing the Social Security benefits from Exhibit D to Plaintiff, when they were received by her husband.

Further, the Magistrate improperly concluded that she could not equalize income because of "Plaintiff's lack of veracity." As argued above, the Magistrate improperly questions Plaintiff's veracity and entirely disregards the fact that Plaintiff has received nothing from Defendant while he has received monthly benefits for eight years. This has resulted in a \$114,000 disparity between the parties, which is still unaddressed (again, now a \$131,000 disparity).

Still further, Plaintiff did not refuse to disclose her tax records as the Magistrate found \* \* \*. She did not want to disclose them to Defendant as her tax records included personal information for her husband, which is entirely unrelated to these issues. Plaintiff did disclose them to the magistrate after court for an *in camera* inspection, and did so willingly. She also disclosed her STRS 1099's to Defendant, which were presented at the hearing as exhibits.

All of these factual errors resulted in the court failing to equalize the incomes, and placed the blame on Plaintiff. These findings must be rejected by this court.

B) Improperly Failed to Equalize the incomes

\* \* \* It is fundamentally unfair for the Magistrate to refuse to address the equalization order and to sidestep this issue yet again as Plaintiff provided all of the documents necessary for equalization. This allows for Defendant to keep collecting Plaintiff's benefits while Plaintiff receives none of his benefits, with a windfall to Plaintiff's detriment of over \$131,000.

Still further, Plaintiff objects to the court's finding that she has made it impossible for Defendant to calculate equalization yearly. Again, she provided her STRS 1099's, and simply did not want to disclose her tax records because of the private, irrelevant information contained therein. If Defendant were to be responsible for equalization, he could have done so without any of Plaintiff's statements. Defendant knew the amount of STRS he receives and could simply double that amount, which would reflect her

total benefit for equalization purposes. It was Defendant who has the obligation to disclose his income records as Plaintiff has never received any of his benefits and has no information as to the amount he receives from social security or Sunstrand.

\* \* \*

Additionally, Plaintiff is entitled to a credit for all money she has been denied from Defendant's social security. \* \* \* Yet the Magistrate did not order that she receive a credit for any future equalization.

C) Prayer for Relief on Income Equalization

Plaintiff is requesting this court appoint an expert/receiver to conduct the income equalization from 2005 forward. Plaintiff's counsel suggests appointment of Attorney Keith Kearney, who has agreed to accept this task. Plaintiff requests that both parties be ordered to provide all income information, full tax returns, and statements from STRS, Sunstrand and Social Security to Mr. Kearney, who can calculate the amount owed between the parties for equalization every year from 2005 forward. Plaintiff also requests after (sic) a report of monies owed every year from 2005 until 2012, and a report of all money already paid by Plaintiff to Defendant. Plaintiff requests Defendant pay her ½ of his Social Security and Sunstrand pension since 2005.

Finally, Plaintiff requests that Defendant's Social Security benefits be divided before his Medicare premium is subtracted from it, as Plaintiff should not have to bear the burden of paying ½ of his monthly premium

because Defendant does not pay ½ of her insurance premium.

**{¶ 10}** Nancy asserted that it “is inequitable to find Plaintiff in contempt for failing to pay \$5,012 for 2006 equalization.” According to Nancy:

Still further, that \$5,012 figure is incorrect. This Honorable Judge issued that order on September 18, 2008, as a result of an objection to the original divorce decree. When this Honorable Court issued that order, it was based upon testimony from hearing held (sic) years earlier, at which time neither party was receiving the retirement benefits of the other. However, by the end of 2005, Defendant had received six months of STRS benefits, while Plaintiff had received nothing. Thus, this order seemed proper at the time based upon the testimony before this court on objections; however it is now improper because the circumstances have changed. Therefore to find Plaintiff in contempt for failing to pay \$5,012 is inequitable and contrary to the evidence presented at this hearing. In fact, Defendant owes Plaintiff for 2005 and every year thereafter.

**{¶ 11}** On April 3, 2013, Larry, pro se, filed a “Motion to Conclude Subject Case,” and on May 7, 2013, he responded to Nancy’s objections. Larry asserts that he “agrees to an accurate equalization of retirement incomes.” According to Larry:

Five weeks ago Plaintiff’s attorney, Matthew Barbato, and I agreed via telephone that we could easily compute the equalization of the parties['] retirement incomes. I suggest one or two hours, at the most, would be required for this simple calculation. Subtracting the offset summary owed the Defendant as calculated by Magistrate Stoermer would indicate the final

settlement amount owed the Plaintiff.

There is no reason to pay a third party considerable money for this simple calculation. Enough funds have been expended during the past decade.

**{¶ 12}** In its Decision and Judgment, the trial court in relevant part determined that the “the court erred when it required that the equalization of retirement income be subject to an annual review to adjust for potential cost of living adjustments.” The court further found as follows:

Based upon a review of the evidence submitted in this matter, the court finds that both the STRS retirement benefits and the Social Security retirement benefits are automatically adjusted for cost of living when authorized. According to the evidence presented, the Sunstrand retirement benefit is fixed at a specific rate with no cost of living adjustments. The division of the STRS via a division of property order (DOPO) and Sunstrand via a qualified domestic relations order (QDRO) will resolve the cost of living adjustment for those benefits.

The Court finds the fair and equitable division of defendant’s annual Social Security retirement benefits and the annual equalization of retirement benefits shall be resolved in the following manner. Each year the Social Security administration sends the retiree (defendant) a statement reflecting the total benefits s/he will receive the following year. Defendant will provide plaintiff a copy of that statement within 14 days of receipt from the Social Security Administration. Defendant will then send plaintiff, via

electronic transfer, her one half share of the monthly benefit.

The court finds this process will best disentangle the financial dealings of the parties.

**{¶ 13}** Regarding the “Sunstrand Retirement Equalization,” the court determined as follows:

Upon detailed review of the evidence in this matter, the Court finds that a QDRO for the division of the Sundstrand retirement benefit has never been filed. The final decree of divorce filed January 15, 2005 required equal division of defendant’s \$2,773.00 annual pension. At the June 7, 2012 hearing, plaintiff exhibit 15, a monthly statement from Sundstrand pension, that reflects a monthly distribution of \$231.08 was introduced into evidence. \* \* \* That Exhibit indicated that defendant is receiving the full amount of the Sundstrand pension. The Court finds that defendant shall pay plaintiff the sum of \$12,593.86 representing 109 months (February 2005 through February 2014) at \$115.54 per month for plaintiff’s share of the Sundstrand pension. Further, defendant shall take action to prepare and filed the necessary QDRO for the division of said pension within 30 days of the filing of this decision. Until plaintiff receives her share of the Sundstrand pension directly, the defendant shall pay the plaintiff each month \$115.54.

**{¶ 14}** We note that on May 8, 2014, Nancy filed a “Motion for Limited Remand,” in which she requested “an evidentiary hearing at the trial level to address equalization of incomes as it relates to distribution of retirement benefits and address past due retirement

benefits to which she is entitled. Appellant would also like the opportunity to ensure proper preparation of all retirement division orders, i.e. a DOPO and QDRO.” This Court overruled the motion on June 10, 2014. On October 31, 2014, Nancy filed a “Motion to Strike Appellee’s Brief,” asserting that Larry’s brief “appears to include documents and legal arguments that are not part of this appellate record.” On December 29, 2014, this Court overruled Nancy’s motion to strike.

{¶ 15} Nancy asserts one assignment of error herein as follows:

THE TRIAL COURT ERRED IN FAILING TO ADDRESS EQUALIZATION OF THE PARTIES’ INCOMES, DESPITE PRESENTATION OF SUFFICIENT EVIDENCE TO DO SO.

{¶ 16} As this Court has previously noted:

In accordance with Civ.R. 53, the trial court must conduct an independent review of the facts and conclusions contained in the magistrate's report and enter its own judgment. *Dayton v. Whiting* (1996), 110 Ohio App.3d 115, 118, 673 N.E.2d 671. Thus, the trial court's standard of review of a magistrate's decision is de novo.

An abuse-of-discretion standard, however, is the appellate standard of review when reviewing a trial court's adoption of a magistrate's decision. Claims of trial court error must be based on the actions taken by the trial court itself, rather than the magistrate's findings or proposed decision.

*State Farm Mut. Auto. Ins. Co. v. Fox*, 182 Ohio App. 3d 17, 2009-Ohio-1965, 911 N.E.2d 339, ¶ 10-11 (2d Dist.).

{¶ 17} As this Court has further noted:



“Abuse of discretion” has been defined as an attitude that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeons, Inc.*, 19 Ohio St.3d 83, 482 N.E.2d 1248 (1985). A decision is unreasonable if there is no sound reasoning process that would support that decision. *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 553 N.E.2d 597 (1990).

*Feldmiller v. Feldmiller*, 2d Dist. Montgomery No. 24989, 2012-Ohio-4621, ¶ 7.

{¶ 18} The record reflects that at the hearing on June 7, 2012, Nancy testified that since August, 2005, Larry has been receiving half of her STRS pension. She testified that she has not received any income from Larry’s Sundstrand retirement account. Nancy further stated that she has never received any of Larry’s Social Security income.

{¶ 19} Nancy stated that she does not dispute the trial court’s determination that she is entitled to receive \$1,386.00 annually from Larry’s Sundstrand retirement account. Counsel for Nancy indicated in response to a question from the magistrate that a qualified domestic relations order was “in the process” for the Sundstrand account.

{¶ 20} Nancy identified Exhibit 1, a statement reflecting that she received a total of \$26,037.00 in 2011 from STRS. Nancy identified Exhibit 8, Larry and Barbara Ann Hardy’s 2011 Form 1040 income tax return, which was provided by Larry in discovery. Exhibit 8 reflects Social Security benefits in the amount of \$24,090.00. Nancy identified Exhibit 2, her 2010 Form 1099-R, which reflects that she received a gross distribution of \$25,459.56 from STRS. Nancy identified Exhibit 9, Larry and Barbara Ann Hardy’s 2010 Form 1040 income tax return, which reflects Social Security benefits in the amount of \$24,090.00. Nancy identified Exhibit 3, her 2009 Form 1099-R, which reflects that she

received a gross distribution of \$24,882.14 from STRS. Nancy identified Exhibit 10, Larry and Barbara Ann Hardy's 2009 Form 1040 income tax return, which shows Social Security benefits of \$24,089.00 were received. Nancy identified Exhibit 4, her 2008 Form 1099-R, which reflects that she received a gross distribution of \$24,304.82 from STRS. Nancy identified Exhibit 11, Larry and Barbara Hardy's 2008 Form 1040 income tax return, which reflects Social Security benefits in the amount of \$22,769.00. Nancy identified Exhibit 5, her 2007 Form 1099-R, which reflects gross income from STRS in the amount of \$23,727.50. Exhibit 5 also reflects Nancy's 2006 Form 1099-R, indicating that she received a gross distribution from STRS in the amount of \$23,084.66. Nancy identified Exhibit 12, Larry and Barbara Hardy's 2007 Form 1040 income tax return, which reflects Social Security benefits in the amount of \$22,257.00. Nancy identified Exhibit 13, Larry and Barbara Hardy's 2006 Form 1040 income tax return, reflecting Social Security income in the amount of \$21,519.00. Nancy identified Exhibit 6, her 2005 Form 1099-R, reflecting STRS income in the amount of \$25,950.52. Nancy identified Exhibit 14, Larry Hardy's 2005 Form 1040 income tax return reflecting Social Security income in the amount of \$20,870.00. Finally, Nancy identified Exhibit 7, correspondence dated May 22, 2012, to Nancy from the Benefit Claims Coordinator at STRS which provides, "I am writing to confirm the division of property order (DOPO) benefits which have been deducted from your monthly benefit payments and paid to your former spouse." The letter reflects a "breakdown of the total gross DOPO benefits paid" to Larry by month, including a total amount through May 1, 2012 of \$114,444.03.

**{¶ 21}** On cross-examination, Larry identified his Form 1040 income tax returns from 2005 through 2011. Larry testified that his current wife does not receive any Social

Security benefits, and that the Social Security income reflected on his income tax returns is his alone. Larry stated that his current wife also receives a pension from STRS, and that the amount of the pension reflected in his Form 1040 income tax returns is the combination of his current wife's pension and his portion of Nancy's pension.

{¶ 22} As this Court previously noted, to achieve an equitable division of Larry's Social Security income, pursuant to *Harshbarger*, Larry's Social Security income should be offset against Nancy's STRS income, with the net balance of Nancy's benefit divided between the parties as marital property. In ordering Larry to provide Nancy with a yearly statement reflecting his Social Security income along with one half of the benefit received by him, the trial court failed to properly equalize the parties' STRS and Social Security incomes. Having reviewed the evidence submitted, we conclude that we cannot calculate an accurate equalization of the parties' incomes from the documents before us. For example, we note that the amount of *taxable* Social Security income reflected on Larry's income tax returns may not reflect the gross amount of Social Security income received by him. Additionally, while Nancy testified that Larry has been receiving half of her STRS income since August, 2005, Plaintiff's Exhibit 7 reflects that Larry has received less STRS income each year than the amounts Nancy received in those years as reflected on her Forms 1099-R. Accordingly, we have no choice but to remand the matter to the trial court for the proper consideration of Larry's Social Security income from 2005 through 2012. Given that the record contains insufficient evidence to properly equalize Larry's Social Security income and Nancy's STRS income, and in the interest of finality, we urge the trial court judge to resolve this issue pursuant to Civ.R.53(D)(4)(d) and "hear additional evidence." Since an abuse of discretion is demonstrated, the judgment of the

trial court is reversed and vacated, and the matter is remanded to the trial court judge for proceedings consistent with this opinion.

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HALL, J. and WELBAUM, J., concur.

Copies mailed to:

Jon Paul Rion  
Nicole Rutter-Hirth  
Lawrence R. Hardy  
Hon. Denise L. Cross