

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

James O. Harris

Court of Appeals No. L-08-1152

Appellant

Trial Court No. DR2006-1212

v.

Patricia K. Harris

DECISION AND JUDGMENT

Appellee

Decided: August 7, 2009

* * * * *

Jeffrey D. Levy, for appellant.

Theodore B. Tucker, III, for appellee.

* * * * *

WILLAMOWSKI, J.

{¶ 1} Appellant, James O. Harris, appeals a decision and final judgment entry of divorce entered by the Lucas County Court of Common Pleas, Domestic Relations Division. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} Appellant and appellee, Patricia K. Harris, were divorced on April 15, 2008. At the time of the divorce, appellant, a retired barber, was 77 years old, and appellee, a machine operator for General Motors, was 58 years old. The parties had been married for some 36 years. No children were born of the marriage. At the time of trial, appellant had been diagnosed with prostate cancer and chronic obstructive pulmonary disorder.

{¶ 3} Pursuant to the divorce action, the trial court awarded appellant marital assets valued at \$396,965. The trial court awarded appellee marital assets valued at \$401,512. In making this division, the trial court stated that it found the distribution of the marital estate to be equitable based upon the following factors: "the parties have been married for thirty-six (36) years, their ages, the value of the assets awarded to each party, the [appellee's] responsibility for payments of certain debt, all assets are awarded intact, each party is receiving income producing property, the relative tax consequences involved, and the liquidity of assets awarded."

{¶ 4} The trial court additionally awarded to appellant spousal support in the amount of \$1,000 per month, plus the processing fee. The trial court stated that in making this award, it had considered all relevant factors, pursuant to R.C. 3105.18(C)(1), including the parties' income and retirement benefits.

{¶ 5} Taking into consideration appellant's social security retirement payments and income derived from certain rental real estate, interest bearing bank accounts, and life insurance policy proceeds that appellant had been awarded in the division of marital

assets, the trial court found that appellant would have a gross income of approximately \$30,500.

{¶ 6} With respect to appellee, the trial court considered appellee's hourly rate of \$28.17, which amounts to an annual wage income of \$58,594 on a full time basis without overtime. In addition, the trial court considered an interest generating certificate of deposit that appellee had been awarded pursuant to the division of marital assets. Altogether, the trial court determined that appellee would have an annual gross income of approximately \$63,500.

{¶ 7} The trial court likewise considered the monthly living expenses that were claimed by the parties. Appellant claimed living expenses totaling \$4,836 per month, including \$250 in monthly expenses related to the rental real estate, \$1,376 in housing/utilities expenses, \$490 in transportation expenses, and \$552 in enrichment expenses. The trial court noted that "some of the listed expenses appear to be inflated and/or duplicated, specifically food, gasoline and drugs". The trial court also noted that appellant's expenses did not include a mortgage payment, car payment, or any credit card debt.

{¶ 8} Appellee presented living expenses totaling \$4,089 per month, including \$1,367 for housing/utilities, \$915 for a car loan, and \$500 in church donations. In addition, the trial court noted that appellee has personal debts totaling \$51,669.

{¶ 9} The trial court ordered that the spousal support award was "subject to earlier termination upon appellant's death, re-marriage, or cohabitation with another as if

married without the benefit of a ceremonial marriage, or further order of the court". The court further ordered that it retained jurisdiction over the amount and duration of spousal support.

{¶ 10} The court noted, in connection with the order of spousal support, that it was particularly influenced by the duration of the marriage, the ages and health conditions of the parties, their relative earning abilities, the income producing assets awarded to each, the extent of appellee's debt, the parties' respective retirement benefits, and the deductibility of spousal support payments.

{¶ 11} On appeal, appellant raises the following assignments of error:

{¶ 12} I. "THE TRIAL COURT FAILED TO PROPERLY OFFSET THE PARTIES' SOCIAL SECURITY BENEFITS, RESULTING IN AN INEQUITABLE DIVISION OF MARITAL ASSETS."

{¶ 13} II. "THE TRIAL COURT ERRED BY AWARDING [APPELLANT] SPOUSAL SUPPORT IN AN AMOUNT THAT DOES NOT REFLECT THE TRUE INCOME OF THE PARTIES."

{¶ 14} An appellate court reviews a trial court's judgment in a divorce action under an abuse of discretion standard. *Keating v. Keating*, 8th Dist. No. 90611, 2008-Ohio-5345, ¶ 17, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131. The term "abuse of discretion" implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 15} Appellant argues in his first assignment of error that the trial court abused its discretion when, in making the distribution of marital property, it failed to consider appellee's future social security benefits. In a divorce action, an equal division of marital assets is the beginning point for a trial court's analysis; but where an equal division would be inequitable, a trial court may not divide the marital property equally but instead must divide it in such a way as the court determines to be equitable. R.C. 3105.171(C); *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, ¶ 5. To determine what is equitable, a trial court must consider the factors set forth in R.C. 3105.171(F). *Id.* Also, "[i]n making an equitable distribution of marital property in a divorce proceeding, a trial court may consider the parties' future Social Security benefits in relation to all marital assets." *Id.*, at the syllabus.

{¶ 16} The trial court making a marital property distribution "must have the flexibility to make an equitable decision based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension plan, and the reasonableness of the result. Thus, any given pension or retirement fund is not necessarily subject to direct division but is subject to evaluation and consideration * * *." *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 180.

{¶ 17} The record in the instant case reflects that the trial court did, in fact, consider the value of appellee's future benefits, making the following observations:

{¶ 18} "[Appellant's] expert determined the present value of the social security benefits that [appellee] will receive is * * * \$274,325.

{¶ 19} " * * * [Appellant's] expert report erroneously assumes the [appellee's] entire social security benefit was 'earned during the marriage'. * * * In fact, [appellee's] social security earnings began in 1965, six (6) years prior to marriage. * * * Further, [appellant] did not value his own social security benefits currently in pay out status. Nor did [appellant] furnish a value of the spousal benefit he would be entitled to receive (assuming he is living at the time [appellee] receives social security and he has not remarried), as the lower wage earner upon [appellee's] receipt of social security benefits. Without these valuations, no proper offset for [appellant's] social security benefits can be determined even if all of the benefits were earned during the marriage."

{¶ 20} The trial court additionally found that, based upon the nature and amount of the marital assets, an equitable division of the marital property could be achieved without consideration of the value of appellee's future social security benefits.

{¶ 21} Ultimately, the court elected not to consider appellee's future social security benefits in making an equitable division of the marital assets.

{¶ 22} Appellant notes in his brief that his monthly social security payouts total \$12,132 annually. Such is not, however, a valuation consistent with and comparable to the valuation of the future social security benefit of appellee. We additionally note that the receipt of appellee's benefits was not to be immediate, but rather was at least four years away.

{¶ 23} Given the deficiencies in the evidence of valuation and the speculative timing of the future award, we find that the court did not abuse its discretion when it

expressly excluded consideration of the value of appellee's future social security benefits in connection with the division of the marital property. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 24} Appellant argues in his second assignment of error that the trial court erred by awarding spousal support in an amount that does not reflect the true income of the parties. Specifically, appellant argues that the trial court overstated appellant's income, while "greatly understating" appellee's income.

{¶ 25} We note, with respect to this assignment of error, that an appellate court reviewing an award of spousal support may not substitute its judgment for that of the trial court unless, considering the totality of the circumstances, the trial court abused its discretion. *Kunkle v. Kunkle* (1990), 51 Ohio St.3d 64, 67.

{¶ 26} Appellant first argues that the trial court abused its discretion when it failed to take into account that the rental property, which the trial court determined generated an annual income of \$14,040, also involved annual expenses. To the contrary, the trial court expressly considered: (1) its own finding that expenses for the property in 2006 totaled \$6,320; and (2) appellant's claim that expenses related to the rental real estate amounted to \$250 per month.

{¶ 27} Appellant additionally argues that the trial court erred when it calculated appellee's yearly wages to be \$58,594 (based on her hourly wage of \$28.17 per hour), "despite the fact that appellee has not made less than [\$60,000] since 1993." Although appellee's trial testimony did confirm that, due to overtime payments, appellee had

already earned \$58,000 by the trial date, appellee also testified that due to economic conditions, her workplace was in a slowdown with no overtime available.

{¶ 28} Contrary to appellant's contention, support obligations must be based on overtime that is expected to be received, rather than on past years' overtime. See *Thomas v. Thomas*, 6th Dist. No. L-03-1267, 2004-Ohio-1034, ¶ 20. In addition, the evidence unequivocally demonstrated that during the years 2003 through 2006, appellee's wages had decreased annually, from a high of \$87,444 in 2003, to a low of \$66,358 in 2006. The trial court additionally noted that during this earlier time period, appellee was also working overtime. For all of the foregoing reasons, we find that the trial court did not abuse its discretion when it calculated appellee's wages to be \$58,594 per year.

{¶ 29} Appellant next argues that the trial court's award of spousal support caused appellant to incur a substantial debt, in light of his new cost of living due to the divorce. We disagree.

{¶ 30} Appellant specifically complains that because of the divorce, he will no longer be covered under appellee's General Motors health plans, and will be forced to spend \$830 per month for his various insurance and drug policies, which amount would "barely" be covered by his spousal support award of \$1,000.

{¶ 31} The trial court, in its decision, specifically noted that appellant, in anticipation of the divorce, had obtained Medicare coverage, including Medicare supplemental medical and prescription insurance. The trial court additionally observed: (1) that some of appellant's listed expenses, including those for food, gasoline, and drugs,

appeared to be inflated and/or duplicated; (2) that appellant (unlike appellee) had no mortgage payment, car payment, or credit card debt; and (3) that appellant had other income, apart from the spousal support award, in the amount of \$30,500 per year. In light of the foregoing, we simply do not find any abuse of discretion on the part of the trial court.

{¶ 32} Finally, appellant argues that the trial court erred when, in calculating appellant's spousal support award, it considered appellant's social security benefits (which are currently being paid), but failed to consider appellee's social security benefits, "which are capable of being withdrawn in four (4) years." In determining a party's income for spousal support purposes, a trial court must consider both parties' income derived from retirement benefits. *Duvall v. Duvall*, 7th Dist. No. 04 BE 41, 2005-Ohio-4685, ¶ 56; R.C. 3105.18(C)(1); R.C. 3105.171(A)(3)(a).

{¶ 33} Here, the trial court, in determining the spousal support award, properly considered appellant's social security income. That appellee's social security benefits were not also considered is not error, because appellee, unlike appellant, does not yet receive any social security income. See *Duvall*, supra, at ¶ 58.¹

{¶ 34} For all of the foregoing reasons, appellant's second assignment of error is found not well-taken.

¹In reaching this conclusion, we remain mindful that the trial court retains jurisdiction over the amount of spousal support and that the amount of appellant's spousal support may be subject to change once appellee does begin collecting social security benefits.

{¶ 35} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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