[Cite as *Meeker v. Skeels*, 2010-Ohio-3525.]

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

Virginia P. (Skeels) Meeker	Court of Appeals No. L-09-1190
Appellee	Trial Court No. DR1991-1583
v.	
Stephen Skeels	**DECISION AND JUDGMENT**
Appellant	Decided: July 30, 2010

* * * * *

Beverly J. Cox, for appellee.

Jay E. Feldstein and Edward J. Stechschulte, for appellant.

* * * * *

COSME, J.

{¶ 1} This appeal arises out of a division of property order awarding appellee a stated fraction of any retirement benefits that appellant, her former husband, will receive through his Deferred Retirement Option Plan ("DROP"). We find that a fractional approach to apportioning future DROP benefits is inherently unfair under the circumstances of this case, because it necessarily divides appellant's separate property in

the form of post-divorce salary contributions to his DROP account. For this reason, we reverse the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, and remand the cause for further proceedings consistent with this decision.

I. BACKGROUND

{¶ 2} Defendant-appellant, Stephen Skeels, and plaintiff-appellee, Virginia Meeker, were married on January 7, 1971, and divorced on December 22, 1993. During their 22-year marriage, appellant was employed as a police officer by the city of Toledo and had been so employed since April 1, 1968. Through his employment, appellant had accumulated benefits in the Ohio Police and Fire Pension Fund ("OP&F"). In its judgment entry of divorce, the trial court awarded appellee "one-half of the marital portion [of appellant's OP&F] accumulated during the marriage" to be divided by the court "upon the happening of the first event that the Defendant chooses to receive benefits." The court also found that the "portion [of the pension] accumulated prior to the marriage is [appellant's] separate property."

{¶ 3} On February 1, 2003, appellant elected to participate in the newly created DROP program established under R.C. 742.43. Appellant had completed almost 35 years of service and was 56 years old when he opted to enroll in DROP. The DROP program, which began on January 2, 2003, provides an incentive for certain long-term OP&F members to remain in their positions for another three to eight years after they become eligible to retire. Any OP&F member who has reached 48 years of age and completed 25 years of active service is eligible to participate in DROP. During his or her participation

in DROP, the employee's individual DROP account accumulates the following amounts: (1) the monthly OP&F benefits that the employee would be eligible to receive if he or she had actually retired on the date of election, plus an annual three percent cost of living adjustment ("COLA"); (2) a percentage of the employee's regular salary contributions to OP&F for the first three years of participation and the entire amount of the employee's salary contributions during years four through eight; and (3) interest on the foregoing amounts, currently at the rate of 5 percent compounded annually.[1]

{¶ 4} In April 2009, appellee submitted a proposed division of property order ("DOPO") in which she selected the "type of payment" as "Age and service retirement benefit, INCLUDING Partial Lump Sum Payments received under Sections 145.46(B)(3), 3307.60(B), 3309.46(B)(3), or 5505.162(A)(3), Revised Code, and Deferred Retirement Option Plan under Section 742.43, Revised Code." As to "method of payment," the DOPO specified that the Public Retirement Program shall pay appellee 50 percent of the following fraction:

{¶ 5} "i. The numerator of the fraction shall be twenty one and eight hundred nineteen thousands (21.819) which is the number of years during which the Plan Participant [appellant] was both a member of the Public Retirement Program and married to the Alternate Payee [appellee]. The date of the marriage is January 7, 1971.

[1]The percentage of the employee's salary contributions that are not deposited into DROP during the first three years of participation are used to fund the program; they do not accrue to the member's benefit in either DROP or OP&F.

{¶ 6} "ii. The denominator, which shall be determined by the Public Retirement Program at the time that the Plan Recipient elects to take a benefit or a payment, shall be the Participant's total years of service credit with the Public Retirement Program or, in the case of a Participant in a retirement program under Chapter 3305, Revised Code, the years of participation in the plan."

{¶ 7} On April 24, 2009, appellant's counsel filed a letter with the trial court stating, "Please accept this letter as my objection to the proposed Division of Property Order." Specifically, counsel argued that the fractional approach to apportioning retirement benefits is inappropriate in this case because it "allows the Plaintiff to reap the benefits of my client's participation in the 'DROP' program which will have the net effect of enhancing Plaintiff's share of the retirement benefits * * *." Counsel also requested that the matter either be set for pretrial conference or an evidentiary hearing to allow for "additional testimony from representatives of the 'DROP' program as to the impact the proposed Division of Property Order will have in connection with the same."

{¶ 8} The trial court accepted the letter from appellant's counsel as a formal objection and appellee thereafter filed a "reply to objection." On June 8, 2009, the trial court filed its judgment entry overruling appellant's objections and, on June 9, 2009, approved and filed the DOPO as submitted by appellee. It is from this judgment entry and DOPO that appellant appeals.

II. DOPOS, DROPS, AND THE COVERTURE FRACTION

{¶ 9} In his first assignment of error, appellant asserts:

{¶ 10} "The trial court abused its discretion and committed reversible error in approving and filing the division of property order on June 9, 2009. The division of property order awarded a portion of the appellant's DROP account to the appellee. However, the DROP account is the appellant's separate property and not subject to division."

{¶ 11} Appellant's first assignment of error is stated more broadly than he intended. Actually, appellant concedes that appellee is entitled to a percentage or proportionate share of the funds in his DROP account that consist of his OP&F benefits, since a portion of those benefits was earned during the course of their marriage and, therefore, constitutes a marital asset. He argues, however, that by giving appellee a fractional interest in the entire accumulated funds in his DROP account, the trial court's DOPO apportions not only the deferred monthly OP&F benefits that were earned during marriage, but also appellant's separate property in the form of post-divorce salary contributions. Appellant maintains, therefore, that the usual method for determining the non-employed spouse's share of an unmatured pension, the so-called "coverture formula," should not be applied in this case.

{¶ 12} We agree with appellant and hold that the appropriate procedure for determining and enforcing appellee's share of appellant's DROP is to exclude appellant's post-divorce salary contributions, apply the coverture formula only to the monthly deposits of OP&F benefits (including COLA), add the interest attributable to those

amounts, and enter the result as a "dollar amount" under "method of payment" on the DOPO form.[2]

{¶ 13} It is well-established that pension or retirement benefits earned during the course of a marriage are marital assets subject to division. See *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 132; R.C. 3105.171(A)(3)(a). It is equally well-established that pension or retirement benefits earned before marriage or after divorce are not marital assets and are not subject to division. See *Makar v. Makar*, 7th Dist. No. 02-CA-37, 2003-Ohio-1071, ¶ 18; *Layne v. Layne* (1992), 83 Ohio App.3d 559, 567.

{¶ 14} In light of these principles, the Supreme Court of Ohio articulated a formula to be used in calculating the marital portion of retirement plan benefits that had vested but not matured at the time of divorce. The percentage is based on a fraction that is determined "by computing the ratio of the number of years of employment of the employed spouse during the marriage to the total years of his or her employment." *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 182, As explained by the Seventh District Court of Appeals, when "the marital asset is divided at the typical 50 percent equal starting point, the coverture formula which establishes the alternate payee's share of the entire pension is

[2]We disagree with appellee's contention that appellant waived his argument as to the apportionment of post-divorce salary contributions to DROP by failing to raise it below. The argument that appellant's current salary contributions to DROP constitute his separate property is fairly encompassed by his argument in the trial court that the DOPO would improperly award appellee a greater share of the retirement benefits than the parties or court originally contemplated. Moreover, to whatever extent appellant can be said to have shifted the focus of his objection to the DOPO on appeal, his current arguments are neither inconsistent with nor contrary to the theory upon which he proceeded in the trial court. See *Vanhoose v. Cartmill* (2001), 146 Ohio App.3d 161, 163.

'one half of the total years of marriage divided by the total number of years of pension service.'" *Makar*, supra, 2003-Ohio-1071, ¶ 20, quoting *McKinney v. McKinney* (2001), 142 Ohio App.3d 604, 607.

{¶ 15} In *Hoyt*, the Ohio Supreme Court recognized, "However, general rules cannot provide for every contingency and no specific rule can apply in every case." Id., 53 Ohio St.3d at 179. The coverture formula was established for use in apportioning standard pensions. The salient differences between standard pensions and DROP accounts compel the application of a different approach in this case. Unlike a standard pension that matures after divorce, the post-divorce DROP is continuously funded by both marital and non-marital contributions. Although appellant's DROP account was opened approximately nine years after his divorce from appellee, it is still funded in part by marital property in the form of OP&F benefits that he already earned during the course of his marriage to appellee. The character of those OP&F benefits as marital property does not change simply because they are deposited into a DROP account rather than paid directly to appellant. If the OP&F benefits were the only source of accumulations in appellant's DROP, the application of the coverture formula would be entirely workable and appropriate in this case. However, appellant's DROP account is simultaneously funded by contributions from appellant's current salary. Those post-divorce contributions are appellant's separate property not subject to division. Applying the coverture formula to appellant's DROP account will, therefore, result in the aggregate

division and distribution of both marital and non-marital assets, which is exactly what the formula was designed to avoid.

{¶ 16} Other appellate courts confronting similar facts have also recognized the inconsistency of apportioning future DROP benefits on a percentage basis. In *Killingsworth v. Killingsworth* (Ala.App.2005), 925 So.2d 977, the husband became a vested participant in the Employees' Retirement System of Alabama during the course of the parties' marriage. He elected to participate in that state's DROP program approximately five months after filing for divorce. The trial court entered a judgment of divorce that awarded the wife 30 percent of any retirement benefits the husband will receive through the DROP program. The Alabama Court of Appeals ruled as follows:

{¶ 17} "The monthly retirement benefits to be accumulated in the husband's DROP account are the benefits that had already accrued during his employment with the state before the filing of the divorce action, and they are not different in character from retirement benefits paid directly to a retired employee. An employee merely continues to earn his or her regular salary while his or her retirement benefits accumulate in a DROP account. Accordingly, at the conclusion of the required term of service, the husband will receive, on a deferred basis, the retirement benefits that he earned during the course of his marriage, and that he could have begun receiving * * * but for his election to participate in DROP. The trial court therefore did not err in awarding to the wife a portion of those retirement benefits.

{¶ 18} "The trial court did err, however, by awarding to the wife a portion of that part of the husband's DROP benefits representing the return to the husband of monthly contributions to the state retirement plan (5% of his salary) during the period of his DROP service, plus interest on that amount. Those contributions will be derived from the husband's salary, which will be earned after the filing of the divorce action and, therefore, do not constitute vested benefits subject to division under § 30-2-51[Ala.Code 1975]." Id. at 982.

{¶ 19} Similarly, in *Stravinoha v. Stravinoha* (Tex.App.2004), 126 S.W.3d 604, 612, the Texas Court of Appeals held that a DROP participant's wife was entitled to a percentage of his future DROP benefits to the extent they derived from retirement benefits that were already earned during the marriage, but that "increases in the DROP account from [the husband's] contributions from his salary post-divorce remain his separate property."

{¶ 20} Although no Ohio appellate court has addressed the issue, the matter was considered by the Cuyahoga Court of Common Pleas in *Kehoe v. Kehoe* (Nov. 14, 2005), Cuyahoga C.P. No. DR94 232973 (Magistrate's Decision). In that case, the parties were divorced on February 3, 1995, and the defendant-wife was awarded one-half of the plaintiff-husband's OP&F benefits in accordance with the parties' separation agreement. Eight years later, on January 20, 2003, plaintiff elected to participate in the DROP program. The magistrate found that defendant "is entitled to that portion of the DROP program money arising from her share of the [OP&F], plus applicable cost of living

adjustments and interest," but is not entitled to a percentage of "those contributions from [plaintiff's] current employment which are being paid into DROP, but are not subject to division."

{¶ 21} Based on the foregoing, we find that the trial court erred when it awarded appellee a fractional share of appellant's entire DROP account, which included post-divorce salary contributions that are not subject to division. Appellee is entitled only to her awarded share of the marital asset, i.e., that portion of the DROP account that is attributable to the OP&F benefits earned during the course of marriage. To calculate that amount, the trial court must apply the coverture formula[3] to all of the monthly OP&F benefits (including COLA) that have been and will be deposited into appellant's DROP account, and add the interest attributable to those amounts.

{¶ 22} The only remaining issue is how to achieve this distribution through the DOPO form. In *Hoyt*, the Supreme Court explained, "It is the trial court's responsibility, not the plan administrator's, to determine the value of this marital asset based on the evidence before it." Id., 53 Ohio St.3d at 183. We believe the trial court's responsibility in this regard includes providing for a method of payment that comports with both the substantive domestic relations law of Ohio and the dictates of the DOPO form.

{¶ 23} The problem is that the DOPO form is an inflexible instrument. A DOPO must be in the form created pursuant to R.C. 3105.90 and prescribed by the Appendix to

[3]In applying the coverture formula, it should be noted that pursuant to R.C. 742.441 and 742.442, appellant's service credit was fixed at the time he elected to participate in DROP. Thus, the denominator of the coverture fraction should be appellant's total years of service credit as of that time.

Ohio Adm. Code 742-21-01, which provides that "any variance from this form will result in non-acceptance of the order by the Public Retirement Programs." As relevant here, the DOPO form does not permit the court to split plans or methods of payment. The court must chose to either include or exclude the DROP account in the DOPO. If the DROP is excluded, the alternate payee would lose up to eight years of his or her marital portion of DROP and interest on those payments. Including the DROP, however, subjects it to the same method of payment that governs the OP&F. Thus, the DOPO form does not permit the court to order a distribution of OP&F benefits on a percentage basis in accordance with the coverture formula and, at the same time, provide for payment of DROP benefits in a dollar amount. Nor, obviously, does the form allow for a combination of both methods in distributing the benefits of any particular plan.

{¶ 24} This problem was addressed and, we believe, appropriately resolved by the magistrate in *Kehoe*:

{¶ 25} "The DOPO is intended to divide both the monthly benefit arising from the [OP&F] upon retirement, and the moneys being held in the DROP program. A DOPO can order the payment either by a dollar amount or on a percentage basis. Although the percentage basis may be preferred for the pension plan, it is not appropriate for the DROP moneys due to the current contributions which are being made [from the participant's salary] but which are [non-marital property] not subject to division. Based on the information provided, both funds must be divided by the same DOPO.

{¶ 26} "Therefore, the use of a dollar amount to divide the funds is the only method available. The proposed DOPO provides for a lump sum payment * * * from DROP, and periodic payments * * * from the [OP&F] upon retirement. Alternative dollar amount calculations are provided in the DOPO in the event [the plan participant] elects a plan of payment which consists of only a lump sum payment or only periodic payments."[4]

{¶ 27} Thus, even though the coverture formula must be used to calculate appellee's share of appellant's OP&F benefits and the marital portion of his DROP account, the trial court can still effectuate an appropriate distribution of both plans at retirement by entering those shares as a dollar amount on the DOPO form.

{¶ 28} Accordingly, appellant's first assignment of error is well-taken.

III. EVIDENTIARY HEARING AS NECESSARY TO AN INFORMED DECISION

{¶ 29} In his second assignment of error, appellant asserts:

{¶ 30} "Under the facts and circumstances of the case, the trial court abused its discretion and committed reversible error in failing to conduct an evidentiary hearing. Such a hearing would have rightfully considered evidence on the impact of the division

[4]It should be noted that the inserted dollar amounts on the *Kehoe* DOPO form do not actually refer to OP&F and DROP, but respectively to the participant's periodic benefit and lump sum payment. It should also be noted that none of the boxes under "type of payment" were checked in the *Kehoe* DOPO. See, also, *Schuster v. Schuster*, 3d Dist. No. 16-08-22, 2009-Ohio-1736, ¶ 2, 3 (reciting facts that State Teachers Retirement System rejected the trial court's DOPO using dollar amounts when a selection as to type of payment was made, but accepted the DOPO when it was changed to eliminate any designation as to the type of payment).

of property order on the appellant's interest in the DROP program prior to the court's decision favoring the appellee."

{¶ 31} Appellant argues that although no statute or rule specifically requires an evidentiary hearing in regard to the division of pension or retirement plans, such a hearing was necessary in this case in order for the trial court to make an informed decision.

{¶ 32} We agree.

{¶ 33} In *Hoyt*, the Ohio Supreme Court pointed out that trial courts "must understand the intricacies and terms of any given plan and, if necessary, require both of the parties to submit evidence on the matter in order to make an informed decision." Id., 53 Ohio St.3d at 181. Given the peculiar interplay among the OP&F plan, the DROP account, and the DOPO form, and in light of the complex calculations involved, we find that an evidentiary hearing is a necessary prerequisite to an informed decision in this case.

{¶ 34} Accordingly, appellant's second assignment of error is well-taken.

IV. CONCLUSION

{¶ 35} The judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is reversed and the cause is remanded for further proceedings consistent with this decision. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

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

Peter M. Handwork, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE