

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

Debra A. Dunn

Court of Appeals No. OT-09-038

Appellant/Cross-Appellee

Trial Court No. 06DR113B

v.

William T. Dunn

DECISION AND JUDGMENT

Appellee/Cross-Appellant

Decided: December 30, 2010

* * * * *

Michael W. Sandwisch, for appellant/cross-appellee.

William C. Eickholt and Steven B. Winters, for appellee/
cross-appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal and cross-appeal from a judgment of the Ottawa County Court of Common Pleas that granted the parties a divorce and ordered a division of marital property. For the reasons that follow, the judgment of the trial court is affirmed.

{¶ 2} Appellant/cross-appellee ("wife") filed a complaint for divorce on June 7, 2006. At that time, the parties had been married for over 30 years and had two adult children. On June 19, 2006, appellee/cross-appellant ("husband") filed an answer and

counterclaim. Husband was retired from ODOT with an annual income of \$41,865 from the Ohio Public Employees Retirement System ("OPERS") and \$8,650 from deferred compensation. Wife was employed with an annual income of \$40,705. The matter came before a magistrate for hearing on April 30, 2007, at which time the parties entered into stipulations regarding the division of personal property, the value of certain marital assets and real estate, the values of their respective retirement assets, and their indebtedness. The issues before the trial court therefore were the division of personal property and marital assets, and husband's request for spousal support.

{¶ 3} On January 9, 2008, the magistrate filed a decision granting the parties a divorce. The magistrate's decision regarding the division of household goods is not in dispute herein. The division of the parties' retirement assets, in which the magistrate awarded wife 18 percent of husband's OPERS benefit, is raised on appeal and will be discussed in detail below. The magistrate denied husband's request for spousal support, finding that husband failed to show a substantial need for income to maintain his current standard of living.

{¶ 4} Both parties filed objections to the magistrate's decision. By judgment entries filed May 19 and June 9, 2008, the trial court granted some of wife's objections; all of husband's objections were denied as untimely pursuant to Civ.R. 53. The trial court denied wife's objection regarding the division of husband's OPERS account.

{¶ 5} On July 3, 2008, wife filed an appeal in this court from the May 19, June 9, and June 19, 2008 judgment entries.¹ (6th Dist. No. OT-08-039.) On May 1, 2009, this court sua sponte dismissed the appeal and remanded the matter to the trial court to prepare and enter a proper final divorce decree pursuant to Civ.R. 54(A). In doing so, this court found that the trial court's June 9, 2008 judgment adopted the magistrate's decision but did not enter the decision as the judgment of the court, and thus was not a final appealable order. The trial court's judgment did not grant the parties a divorce, divide the marital assets, address the issue of spousal support, allocate the marital debt or state that each party should pay his or her own attorney fees.

{¶ 6} On November 18, 2009, the trial court filed an amended judgment entry. On December 17, 2009, wife filed a Civ.R. 60(A) "Motion to Correct a Clerical Mistake." In her motion, wife stated that certain recommendations made by the magistrate which were not objected to by either party were not fully incorporated into the amended judgment entry of November 18, 2009. In light of the Civ.R. 60(A) motion, this court remanded this matter to the trial court on February 12, 2010, effectively staying the appeal.

{¶ 7} On February 24, 2010, while the matter was on remand, wife filed a motion asking that court to rule on the merits of husband's February 1, 2008 objections to the

¹By judgment entry filed June 19, 2008, the trial court denied wife's motion for a new trial. Denial of the motion for a new trial is not raised on appeal herein.

magistrate's decision before remanding back to this court. On April 16, 2010, the trial court filed a second amended judgment entry; the case was then reinstated in this court.

{¶ 8} In support of her appeal, wife sets forth the following assignments of error:

{¶ 9} "1) The ruling of the Trial Court denying Plaintiff one-half (1/2) of the Defendant's Ohio Public Employees System Benefits which is a marital asset and subject to equitable division pursuant to O.R.C. Section 3105.171, was plain error, abuse of discretion, and against the manifest weight of the evidence and the established law of Ohio.

{¶ 10} "2) The Trial Court failed to fully correct the clerical mistakes requested by Plaintiff's Motion, pursuant to Civil Rule 60(A), to the prejudice of both the Plaintiff and the Defendant."

{¶ 11} In her first assignment of error, wife asserts that the trial court erred by denying her a one-half share of husband's OPERS account and instead awarding her 18 percent of the pension. Wife argues that as a result of the trial court's decision, her share of the parties' various retirement accounts is approximately \$113,000 less than husband's share.

{¶ 12} The record reflects that the parties stipulated to the following regarding their retirement assets. Wife stipulated to \$57,301.78 in her Federal Employee Retirement System Account; \$77,775.19 in her Federal Thrift Saving Plan and \$111,041.11 in social security. Husband stipulated to a balance of \$627,274.12 in his OPERS account. These amounts total \$873,392.20 in marital retirement assets.

{¶ 13} The record also reflects that, for purposes of determining the amount of marital assets with which to work, the magistrate reduced the value of wife's social security to \$38,850. Having done that, the magistrate found that wife's total retirement assets were \$173,926.97. The magistrate then found that husband's retirement assets were \$453,347.15 greater than wife's; dividing that amount in half, in order to achieve an equal division of marital property, would result in a total of \$226,673.57 of husband's assets being assignable to wife; this sum represented 36.61 percent of husband's assets.

{¶ 14} However, the trial court then determined that an equal division of retirement assets would not be equitable and would have an unfair impact upon husband. This decision was based on the trial court's conclusion that an award of 36.61 percent of husband's OPERS benefits to wife would result in wife, who was still employed, having a gross annual income of \$58,326.89, in contrast to husband, who was fully retired, having a gross annual income of \$26,539.32 (plus his deferred compensation dividend). Accordingly, the trial court awarded wife 18 percent of husband's benefit.

{¶ 15} It is well-settled that "review of a trial court's division of marital property is governed by the abuse of discretion standard." *Raff v. Raff*, 5th Dist. No. 2004-CA-00251, 2005-Ohio-3348, ¶ 21, citing *Martin v. Martin* (1985), 18 Ohio St.3d 292. The Supreme Court of Ohio has determined that an abuse of discretion requires "more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore,

"[t]he trial court's characterization of property as separate or marital will not be reversed * * * absent an abuse of discretion." *Peck v. Peck* (1994), 96 Ohio App.3d 731, 734. In conjunction with this standard, the Supreme Court of Ohio has long recognized that domestic relations courts have "broad discretion to determine what property division is equitable in a divorce proceeding." *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, paragraph two of the syllabus. It is well-established that an equitable division of marital property need not be an equal one. R.C. 3105.171(C)(1) enumerates the factors to be considered in making a marital property division determination. Those factors include the duration of the marriage, assets and liabilities of the parties, property liquidity, economic desirability, tax consequences, cost of sale, and other factors relevant to each particular case. Accordingly, "[t]he mere fact that a property division is unequal, does not, standing alone, amount to an abuse of discretion." *Cherry, supra*.

{¶ 16} The trial court in this case explained the basis for its decision, noting that wife is still working and earning approximately \$43,000 annually, while husband is retired and dependent upon his pension and deferred compensation income. Further, it appears from the record that wife will have social security benefits and other assets as listed above. Based on all of the foregoing, we are unable to find that the trial court's allocation of husband's OPERS benefits was unreasonable, arbitrary or unconscionable and therefore constituted an abuse of discretion. Accordingly, appellant wife's first assignment of error is not well-taken.

{¶ 17} In her second assignment of error, wife asserts that the trial court failed to fully correct the clerical mistakes in the court's November 18, 2009 judgment entry as requested in her Civ.R. 60(A) motion filed December 17, 2009. Specifically, wife claims that the numerous "findings" of the trial court in paragraph five of its amended judgment entry were not brought forward in the April 16, 2010 judgment entry as orders of the court. However, a careful review of the judgment entry reflects that each of the items specified as "findings" in paragraph five were also made orders of the court at the conclusion of the entry. (See Amended Judgment Entry filed April 16, 2010, paragraphs 14 through 23.) Accordingly, appellant wife's second assignment of error is not well-taken.

{¶ 18} We now look to appellee husband's cross-assignments of error, set forth as follows:

{¶ 19} "1. The trial court abused its discretion in awarding One Hundred Percent (100%) of the survivorship interest in appellee's OPERS account to appellant.

{¶ 20} "2. The trial court erred as a matter of law when it overruled appellee's objections as being untimely filed.

{¶ 21} "3. The trial court abused its discretion when it reduced the value of appellant's Social Security benefit with no apparent basis for such reduction.

{¶ 22} "4. The trial court abused its discretion when it denied appellee's request for spousal support.

{¶ 23} "5. The trial court committed plain error when it revised its judgment entry to change the substance of the order while this case was on remand."

{¶ 24} In support of his first cross-assignment of error, husband challenges the trial court's decision to award wife 100 percent of the survivorship interest in his OPERS account. The trial court stated that "[a]warding full survivorship or widow's benefits to the former spouse is the only way to insure that the former spouse receives what she is entitled to under the terms of the deferred distribution." The trial court cited *Hoyt v. Hoyt* (1990), 53 Ohio St.4d 177.

{¶ 25} Husband's retirement benefits, including the survivorship interest, constitute a marital asset earned during the parties' marriage of nearly 35 years. See *Hoyt*, supra. The trial court determined that granting wife the survivorship interest is equitable in light of the fact that the benefits were accumulated during the marriage, and considering the duration of the marriage. Based on the foregoing, we find that the trial court's decision to award wife full survivorship interest in husband's OPERS pension was not unreasonable, arbitrary or unconscionable and therefore not an abuse of discretion. Accordingly, husband's first cross-assignment of error is not well-taken.

{¶ 26} In support of his second cross-assignment of error, husband asserts that the trial court erred by overruling his objections to the magistrate's January 9, 2008 decision as being untimely. Husband argues that his objections were timely filed pursuant to Civ.R. 53. The record reflects that in its May 19 and June 9, 2008 judgment entries the trial court did in fact find that husband's objections were untimely filed. Based on our

review of the record as well as Civ.R. 53, we find that determination to have been in error. However, the record further reflects that in its April 19, 2010 amended judgment entry, the trial court again overruled husband's objections, omitting any language finding that the objections were not timely filed. Further, husband has not argued on appeal the merits of his original objections, only raising the issue of the trial court's finding—later corrected—that the objections were not timely filed. This cross-assignment of error is not well-taken.

{¶ 27} In support of his third cross-assignment of error, husband asserts that the trial court erred by reducing the value of wife's social security benefit to \$38,850 for purposes of computing their retirement assets, despite the parties having stipulated to an amount of \$111,041.

{¶ 28} A domestic relations court is vested with broad discretion to determine what constitutes an equitable division of property in a divorce proceeding, and its exercise of discretion will not be disturbed on appeal in the absence of some demonstration that the court abused its discretion. *Martin v. Martin* (1985), 18 Ohio St.3d 292. In determining whether the trial court abused its discretion, a reviewing court cannot examine the valuation and division of a particular marital asset or liability in isolation; rather, the reviewing court must view the property division in its entirety, consider the totality of the circumstances, and determine whether the property division reflects an unreasonable, arbitrary or unconscionable attitude on the part of the domestic

relations court. *Jelen v. Jelen* (1993), 86 Ohio App.3d 199, citing *Briganti v. Briganti* (1984), 9 Ohio St.3d 220; *Blakemore*, supra.

{¶ 29} Therefore, this court will refrain from examining the valuation of wife's social security benefits "in isolation." The parties stated that the stipulations as to their retirement assets were submitted to the court for the court's use in determining an equitable division of the same. Viewing the property division in its entirety, we find that the trial court's decision was not unreasonable, arbitrary or unconscionable. The trial court reduced wife's potential equal share of husband's retirement benefits from 36.61 percent, which the court determined would have an unfair impact on husband's income, to 18 percent, which the court found to be equitable under the circumstances. In so doing, the trial court considered wife's income from current employment with husband's retirement income. Husband has not shown how he was prejudiced by the trial court's valuation of the parties' retirement assets and, accordingly, we find that husband's third cross-assignment of error is not well-taken.

{¶ 30} In support of his fourth cross-assignment of error, husband asserts that the trial court abused its discretion when it denied his request for spousal support. Husband claims that the trial court's decision was based in part upon the magistrate's division of husband's OPERS account and asserts that, should this court determine that the trial court erred when it divided the OPERS account, the matter should be remanded for reconsideration of the issue of spousal support. Husband admits that his request for spousal support was based in part on his calculation of the effect of an equal division of

his OPERS account. However, as set forth above, the trial court did not order an equal division of the OPERS account, awarding wife only 18 percent of the account.

Accordingly, husband's argument is without merit and his fourth cross-assignment of error is not well-taken.

{¶ 31} In support of his fifth cross-assignment of error, husband asserts that the trial court committed plain error when it revised its judgment entry on remand. Husband argues that the trial court changed the substance of its original order after this court remanded the matter on February 12, 2010, for the trial court to make clerical corrections. Husband notes that on remand the trial court removed language denying his objections to the magistrate's decision as being untimely filed. Wife does not dispute that the trial court deleted the language referring to husband's objections as being untimely. The record reflects that after the matter was remanded, wife filed a motion with the trial court asking it to rule on husband's objections because they had in fact been timely filed. In its April 16, 2010 amended judgment entry, the trial court denied husband's objections. Since the matter was in the trial court on remand, the trial court was not prohibited from addressing wife's motion for a ruling on husband's objections. Accordingly, husband's fifth cross-assignment of error is not well-taken.

{¶ 32} On consideration whereof, the judgment of the Ottawa County Court of Common Pleas is affirmed. Pursuant to App.R. 24, costs of this appeal are assessed to each party equally.

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

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

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:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.