

[Cite as *Dolan v. Dolan*, 2002-Ohio-2440.]

**COURT OF APPEALS
ELEVENTH DISTRICT
TRUMBULL COUNTY, OHIO**

J U D G E S

PATRICIA A. DOLAN,

Plaintiff-Appellee/
Cross-Appellant,

HON. JUDITH A. CHRISTLEY, P.J.,
HON. ROBERT A. NADER, J.,
HON. DIANE V. GRENDALL, J.

CASE NOS. 2000-T-0154
and 2001-T-0003

- vs -

JAMES L. DOLAN, JR.,

Defendant-Appellant/
Cross-Appellee.

OPINION

CHARACTER OF PROCEEDINGS:

Civil Appeals from the Court of Common
Pleas, Domestic Relations Division
Case No. 99 DR 422

JUDGMENT: Affirmed.

ATTY. MARY JANE STEPHENS
7330 Market Street
Youngstown, OH 44512

ATTY. GEORGE E. GESSNER
212 West Main Street
Cortland, OH 44410

(For Plaintiff-Appellee)

(For Defendant-Appellant)

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant/cross-appellee, James L. Dolan, Jr. (“appellant”), appeals from the judgment entry of the Trumbull County Court of Common Pleas granting appellant and plaintiff-appellee/cross-appellant, Patricia A. Dolan (“appellee”), a divorce. Specifically, appellant objects to the valuation and division of the parties’ pension benefits.

{¶2} The parties married on June 26, 1971. Appellee filed a complaint for divorce on August 23, 1999. There is no answer by appellant in the record before this court. A hearing was held before the trial court, commencing August 1, 2000. At the hearing, the attorneys for both parties agreed on the values of the pensions of appellant and appellee. Appellant testified he felt half of his pension should be awarded to appellee, while he should receive half of appellee’s pension upon her retirement. Appellant acknowledged he would not receive any portion of his wife’s pension until her retirement. This was the only testimony regarding his pension offered by appellant. No evidence was submitted by appellant reflecting a valuation of his pension or that of appellee’s pension.

{¶3} On November 28, 2000, the trial court issued its judgment entry of divorce. In its findings of fact, the trial court explained that appellant had a pension with Sharon Steel, which he is currently receiving. Appellee has a pension with Delphi Packard. Both pensions were accrued during the marriage. The trial court acknowledged that appellant

asked that it issue a Qualified Domestic Relations Order (“QDRO”) for both pensions. However, the court found it was better to disentangle the parties, since there were sufficient assets to distribute the property equally. The court stated it was provided with present day values of the pensions as calculated by an outside attorney, by agreement of the parties. That information was recalculated to use the same years for both parties. Counsel for both parties agreed that the dates on the valuations were the dates to be used for determination of pension values. The trial court valued appellant’s pension at \$86,978.32 and appellee’s pension at \$51,228.98. Each party was awarded their own pension in the property division. Appellant has appealed from the judgment of the trial court.

{¶4} Appellant assigns the following error for review:

{¶5} “The trial court decision as to the division and allocation of the parties respective pensions has resulted in an inequitable division of the assets, and accordingly is in error and an abuse of discretion.”

{¶6} Upon appeal, appellant disputes the valuation and division of the parties’ pensions. Appellant contends it was error to assume appellee would retire at age 65 and receive benefits from then until age 81, her life expectancy. Appellant then calculates what he and appellee would expect to receive in benefits over their respective lifetimes. Based upon this calculation, appellant argues the trial court did not obtain a result which would preserve the pension in a way that the parties would receive the most benefit. Appellant maintains appellee will receive more than he in pension benefits over her

lifetime, rendering the valuation of their pensions inaccurate and inequitable.

{¶7} A review of the record before this court shows that appellant never raised this argument below nor presented the calculation he now contends is correct to the trial court for its consideration. It is well established that a party cannot raise any new issues or legal theories for the first time on appeal. See *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. Because appellant did not present this argument, or any evidence in support of a different valuation below, appellant has waived any assertion of error upon appeal.

{¶8} Appellant also asserts the trial court should have granted his request to issue a QDRO for the pension benefits of himself and appellee. A trial court has broad discretion in formulating an equitable distribution of marital property. *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. The trial court's judgment will not be disturbed upon appeal unless that discretion is abused. *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144. The term abuse of discretion implies more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶9} A vested pension plan accumulated during marriage is a marital asset subject to distribution between the parties. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128. A trial court must determine the value of a pension but has considerable latitude regarding the method used in the valuation. *Spurlock v. Spurlock* (Dec. 15, 1995), 11th Dist. No. 94-A-0026, 1995 Ohio App. LEXIS 5568.

{¶10} At trial, appellant offered no evidence, beyond his own, brief, speculative testimony, regarding the benefits of the trial court issuing a QDRO for the two pensions. Because he offered no evidence on this issue, appellant has waived the right to assert the argument on appeal. See *Ferrero v. Ferrero* (June 8, 1999), 5th Dist. No. 98-CA-00095, 1999 Ohio App. LEXIS 2848. Further, the parties agreed that a particular attorney would value their respective pensions. They also agreed that the dates on the valuations provided by the attorney were the dates to be used in determining the value of the pensions. The court's finding that it was better to disentangle the parties because there were sufficient assets to distribute property equally was not, based upon the evidence submitted below, an abuse of discretion.

{¶11} Further, appellant's cursory statement in his brief regarding the failure of the trial court to grant his request that a QDRO be issued for the pension benefits contains no citations to the record or authority in support as required by App.R. 16.

As such, this court may disregard his argument.

{¶12} Appellant's sole assignment of error is overruled. The judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

JUDITH A. CHRISTLEY, P.J., concurs,

ROBERT A. NADER, J., dissents.

ROBERT A. NADER, Judge, dissenting.

{¶13} I respectfully dissent from the majority opinion. I believe that the trial court's distribution of marital property was unreasonable. It allowed appellee to receive an additional \$35,749.32 in marital assets and payments to offset the difference in the values of the pensions, and deprived appellant of the opportunity to benefit from any future growth of his marital interest in appellee's pension plan.

{¶14} “[W]hen considering a fair and equitable distribution of pension or retirement benefits in a divorce, the trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan, and the reasonableness of the result; the trial court should attempt to preserve the pension or retirement asset in order that each party can procure the most benefit, and should attempt to disentangle the parties' economic partnership so as to create a conclusion and finality to their marriage.” *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 179.

{¶15} In the instant case, appellant requested that the pensions be divided equally by a QDRO so that appellee would receive one half of appellant's current monthly pension and appellant would receive his marital interest in appellee's pension, upon her retirement. Appellant was aware of the risk that his wife might chose to retire sooner rather than later; however, he was willing to assume that risk in order to have the opportunity to benefit from any growth in her pension plan. In the court's November 28, 2000 judgment entry it denied appellant's request for a QDRO, finding that it was “better to disentangle the parties since there [were] sufficient assets to distribute property

equally.”

{¶16} The Supreme Court of Ohio has recognized that, due to the nature of divorce, “some effort should be made to disentangle the parties’ economic affairs.” *Id.* at 183. “However, where circumstances permit, the trial court should attempt to ascertain the optimum value the pension or retirement benefit has to the parties as a couple, based upon the nature and terms of the plan. The trial court should structure a division which will best preserve the fund and procure the most benefit to each party.” *Id.* Thus, disentangling the parties’ economic affairs should not be the court’s sole focus when dividing the marital property. Although the utilization of a QDRO to divide retirement funds may result in a greater entanglement of the economic partnership of the parties than if a more immediate distribution were ordered; “[i]t is, however, a good compromise when a more immediate distribution is not viable, because, once the [QDRO] is in place, the nonparticipant spouse can look directly to the pension fund for benefits rather than having to look to the participant spouse.” *Sprankle v. Sprankle* (1993), 87 Ohio App. 3d 129, 134.

{¶17} In this case, the parties would have procured the most benefit from their pension plans by a QDRO dividing the pension plans. Appellant’s request should have been granted regardless of the value of the pensions, since appellant was simply seeking one half of both plans at the time of division. Instead of issuing a QDRO, the court awarded appellant his pension plan, valued at \$86,978.32, and awarded appellee her pension plan, value at \$51, 228.98. To offset the \$35,749.32 discrepancy in the values of

the parties' pension plans, appellee was awarded additional marital assets and appellant was ordered to pay her \$3,450. The trial court should have considered the benefits of each spouse's retirement plan in addition to their cash values when making its determination.

{¶18} A retirement plan is an investment made by both spouses during marriage to provide for their later years with the expectation that the investment will increase in value over time. *Layne v. Layne* (1992), 83 Ohio App.3d 559, 567 . "At divorce, each spouse is entitled to the value of his or her investment." "When the investment has not yet matured, each is entitled to a right to its value at maturity in proportion to the years of marriage." *Id.* While the non-participant former spouse is not entitled to share in the direct contributions made by the participant former spouse after the divorce, he or she is entitled to the benefit of any increase in the value of his or her "unmatured proportionate share after divorce attributable to the continued participation of the other spouse in the retirement plan." *Id.* "So long as each former spouse is limited to his or her proportionate right to share, there is neither unjust enrichment of the nonparticipant nor an inequitable deprivation of his or her rights." *Id.* Accordingly, the trial court should have issued a QDRO dividing the parties' pensions thereby allowing appellant to benefit from any increase in the value of his unmaturred proportionate share after divorce attributable to appellee's continued participation in the retirement plan.

{¶19} Based on the aforementioned reasons, I respectfully dissent from the majority opinion and would reverse and remand the judgment of the trial court to order a QDRO as requested by appellant.