

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

|                        |   |                             |
|------------------------|---|-----------------------------|
| SHIRLEY J. FAZENBAKER, | : | <b>OPINION</b>              |
| Plaintiff-Appellant,   | : | <b>CASE NO. 2009-T-0131</b> |
| - vs -                 | : |                             |
| THOMAS E. FAZENBAKER,  | : |                             |
| Defendant-Appellee.    | : |                             |

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, Case No. 43962.

Judgment: Affirmed.

*A. Robert Steiskal*, 4431 Mahoning Avenue, Youngstown, OH 44515 (For Plaintiff-Appellant).

*Robert M. Platt, Jr.*, Gessner & Platt Co., L.P.A., 212 West Main Street, Cortland, OH 44410 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Shirley J. Fazenbaker, appeals the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, dividing her former husband appellee Thomas E. Fazenbaker’s military and federal civil service pensions. At issue is whether the trial court abused its discretion in determining the appropriate method to value Shirley’s interest in these pensions. For the reasons that follow, we affirm.

{¶2} The parties were married in August 1976. In April 1987, Shirley filed a complaint for divorce, which was granted by the trial court on April 28, 1988. In the divorce decree, the trial court divided the parties' marital property by awarding the parties' marital residence, their household goods and furnishings, and their 1984 Oldsmobile to Shirley and by ordering Thomas to pay the parties' credit card and other debts. The divorce decree also divided Thomas' retirement benefits as follows: "[Shirley] is a co-pensioner with [Thomas] in his military retirement program, Federal Civil Service Program, and Social Security Pension, and [Thomas] shall cooperate with [Shirley] in any way necessary at such time that [Shirley] applies for any pension payments to which she may be entitled. \*\*\*"

{¶3} In 1965, Thomas entered the air force, and in 1971, he was also employed by the federal civil service as a civilian in the military. Thomas retired from the air force reserve and federal civil service on December 1, 2005.

{¶4} On July 27, 2007, Shirley moved the trial court to establish her portion of Thomas' pensions. The matter was referred to the magistrate. On September 4, 2007, the magistrate held an oral hearing on Shirley's motion. Following the hearing, the magistrate recommended that the court order the parties to submit proposed qualified domestic relations orders (QDRO) for Shirley's portion in Thomas' military and civil service pensions for the court's approval. On September 10, 2007, the magistrate's decision was filed and the trial court adopted it.

{¶5} On January 24, 2008, the magistrate held another oral hearing on Shirley's motion. In his decision, filed January 25, 2008, the magistrate noted that because the parties disagree concerning the method to be applied in calculating

Shirley's interest in the pension plans, another hearing would be required. The magistrate recommended that the parties be ordered to submit to QDRO Consultants, Inc., a firm specializing in the apportionment of pension plans, the QDRO reports that firm had already prepared along with Thomas' objections thereto. The magistrate also recommended that this firm be ordered to provide its "determination" of Shirley's portion in both plans. The court adopted this decision on January 25, 2008. QDRO Consultants, Inc. submitted its report to the court on February 5, 2008.

{¶6} On April 10, 2008, Shirley filed a motion to confirm the court's January 25, 2008 judgment and the QDROs prepared by QDRO Consultants, Inc. Thomas filed a brief in opposition. The matter was set for hearing in July 2008, but Shirley moved to continue the hearing and the court granted her motion.

{¶7} On March 17, 2009, Shirley took the trial deposition of Heather Stoll of QDRO Consultants, Inc., and filed it. Ms. Stoll testified that Thomas' military pension as a reservist is determined by the number of points earned during his reserve time in the military. In contrast, his civil service pension benefit is based on his years of service. She said there are two different formulas the military and the federal civil service accept in calculating the non-employed spouse's portion of the retiree's pension plan. These are the "coverture" method, advocated by Shirley, and the "hypothetical" or "fixed" method, urged by Thomas. Under the coverture method, the value of the pension is determined at retirement and takes into account the retiree's advances in rank and pay increases that occur between the divorce and retirement.

{¶8} Under this approach, with respect to Thomas' military pension, the marital portion of the benefit is determined by dividing the retirement points earned during the

marriage by the total retirement points earned during Thomas' career in the military. His retirement benefit is then multiplied by this fraction. In determining Shirley's benefit, the result is divided by 50 per cent. Similarly, with respect to Thomas' federal civil service pension, the number of years he was employed during the marriage is divided by the total number of years of employment until his retirement. His accrued pension is then multiplied by this fraction, resulting in the marital portion. Shirley would receive one-half of that amount.

{¶9} In contrast, Ms. Stoll testified that Thomas wanted the trial court to apply the hypothetical method to calculate Shirley's portion of his pensions. Under this formula, it is presumed that Thomas separated from the air force reserve and the federal civil service as of the date of the parties' divorce in 1988. This method requires using Thomas' pay rate at the time of the divorce without any increase due to any promotions or pay raises that occurred subsequent to the divorce. Ms. Stoll testified that, under this approach, the retiree's benefit at the time of the divorce is multiplied by a similar fraction, but the denominator is the number of points (as to the military pension) or years of service (as to the civil service pension) as of the time of the divorce.

{¶10} Ms. Stoll testified that, in her opinion, the method of calculation advanced by Shirley is the more appropriate formula. She testified the proposed QDROs and the QDRO reports she prepared followed the coverture method of calculation. However, she admitted this is not the inevitable method of calculation, and that both the military and federal civil service also allow for the method advocated by Thomas.

{¶11} On April 24, 2009, the magistrate held a status conference and, as a result of the dispute concerning the proper formula to be used, recommended that an evidentiary hearing be held on the issue. On April 28, 2009, the court approved the magistrate's decision.

{¶12} On July 9, 2009, the magistrate held another status conference. In his decision, dated July 14, 2009, he found that additional testimony was not necessary to adjudicate the issue, and ordered the parties to submit trial briefs within 45 days. Shirley did not object to this decision, which the trial court subsequently adopted.

{¶13} The magistrate's September 9, 2009 decision indicates he held another oral hearing on Shirley's motion on August 6, 2009. At this hearing, the parties agreed that Shirley is entitled to 50 per cent of the marital portion of Thomas' military pension and his federal service pension. They disagreed, however, on the method to be used to calculate the amount of each plan to be awarded to Shirley. As before, she advocated the coverture method, while Thomas urged the court to follow the hypothetical method.

{¶14} In his September 9, 2009 decision, the magistrate found that the approach advocated by Thomas should be used in calculating Shirley's interest in the marital portion of Thomas' pensions. On that same date, the trial court approved the magistrate's decision. On September 17, 2009, Shirley moved for separate findings of fact and conclusions of law. On September 18, 2009, the trial court ordered the parties to file proposed findings of fact and conclusions of law within thirty days. After the parties filed their proposed findings, on November 19, 2009, the magistrate filed his decision, adopting the proposed findings of fact and conclusions of law submitted by Thomas. The trial court adopted this decision. On December 2, 2009, Shirley filed

objections, which the trial court overruled in its December 7, 2009 judgment. Shirley appeals that judgment, asserting two assignments of error. For her first assigned error, she alleges:

{¶15} “The trial court abused its discretion by failing to conduct hearings on the issues presented by the various motions of Plaintiff-Appellant.”

{¶16} Shirley argues that the magistrate must not have reviewed the file at any time because in his September 10, 2007 decision, he ordered the parties to submit QDROs to the court, although, she claims, she had already filed proposed QDROs one month earlier. The argument is not well taken. First, we note that Shirley failed to object to this decision. Any error arising from it is therefore waived. “[A] party shall not assign as error on appeal the court’s adoption of any factual finding or legal conclusion \*\*\* unless the party has objected to that finding or conclusion. \*\*\*” Civ.R. 53(D)(3)(b)(iv). Further, “[i]t is a well-settled rule of law that issues which were not previously raised at the trial court level cannot be raised for the first time on appeal.” *Tryon v. Tryon*, 11th Dist. No. 2007-T-0030, 2007-Ohio-6928, at ¶29, quoting *JP Morgan Chase Bank v. Ritchey*, 11th Dist. No. 2006-L-247, 2007-Ohio-4225, at ¶27, citing *State v. Awan* (1986), 22 Ohio St.3d 120, at paragraph one of the syllabus. Because Shirley did not object to the magistrate’s September 10, 2007 decision, her argument is waived. Moreover, Shirley failed to appeal the court’s judgment approving that decision. Her argument is therefore also barred by res judicata. *State ex rel. G & M Tanglewood, Inc. v. Desiderio*, 11th Dist. No. 2003-G-2497, 2004-Ohio-5309, at ¶25.

{¶17} However, even if the issue was not barred, it would lack merit. If Shirley had already filed her proposed QDROs and the magistrate had inadvertently entered his

decision, this does not mean he never reviewed the file. It only means he might not yet have seen the orders or did not remember seeing them.

{¶18} Next, Shirley argues that, in its January 24, 2008 judgment, the court ordered Thomas to obtain and file a report from QDRO Consultants, Inc. explaining its determination. She argues that such report was filed on February 5, 2008, but the court, in her view, obviously never read it because, she claims, each of the entries signed by the magistrate suggests that the magistrate was unaware of it. She argues “[t]he failure to have even the most basic understanding of what was in the file was clearly an abuse of discretion when the court is making a decision without a foundation therefore (sic).” Shirley’s argument is not well taken for several reasons.

{¶19} First, we note that Shirley failed to identify any evidence in the record that the magistrate or the court was unaware of QDRO Consultants, Inc.’s February 5, 2008 report. An appellate court in determining the existence of error is limited to a review of the record. *State v. Sheldon* (Dec. 31, 1986), 11th Dist. No. 3695, 1986 Ohio App. LEXIS 9608, \*2; *Schick v. Cincinnati* (1927), 116 Ohio St. 16, at paragraph three of the syllabus. Without any evidence in support of Shirley’s assignment of error, there is nothing for us to consider. On appeal it is the appellant’s responsibility to support his or her argument by evidence in the record that supports his or her assigned errors. *Columbus v. Hodge* (1987), 37 Ohio App.3d 68. Because Shirley failed to reference any evidence in support, her argument is not well taken.

{¶20} Shirley’s argument that each of the magistrate’s entries “suggests” he was unaware of this report is unavailing since she fails to argue how any of these entries

supports her contention. App.R. 16(A)(7). In any event, our review of these entries reveals they do not support her argument.

{¶21} Next, Shirley argues the trial court failed to conduct hearings on various motions filed with the court. She fails, however, to specify which motions were allegedly not resolved by hearing, in violation of App.R. 16(A)(7). She also fails to specify what she would have presented if given an opportunity to do so. She never made a proffer of evidence or filed any affidavits concerning evidence she would have presented at a hearing. Her failure to provide any specifics or to proffer any evidence is fatal to her argument.

{¶22} Shirley's first assignment of error is overruled.

{¶23} For her second assignment of error, Shirley alleges:

{¶24} "The court abused its discretion by refusing to adopt the QDROs the parties had agreed upon."

{¶25} It is well-settled that pension or retirement benefits accumulated during a marriage are marital assets subject to property division in a divorce action. *Erb v. Erb* (1996), 75 Ohio St.3d 18, 20. A reviewing court will not disturb a trial court's division of property in a divorce action absent an abuse of discretion. *Middendorf v. Middendorf*, 83 Ohio St.3d 397, 401, 1998-Ohio-403. This court has recently stated that the term "abuse of discretion" is one of art, connoting judgment exercised by a court, which does not comport with reason or the record. *Gaul v. Gaul*, 11th Dist. No. 2009-A-0011, 2010-Ohio-2156, at ¶24, citing *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678. The Second Appellate District recently adopted this definition of the abuse of discretion standard in *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, at ¶65, citing



Black's Law Dictionary (4 Ed.Rev.1968) 25 ("A discretion exercised to an end or purpose not justified by and clearly against reason and evidence").

{¶26} Further, an appellate court is not required to conduct an item-by-item review of a property division. *Winkler v. Thomas* (Jan. 23, 2001), 5th Dist. No. 2000AP03 0031, 2001 Ohio App. LEXIS 284, \*4. The trial court's property division should be viewed as a whole in determining whether it has achieved an equitable and fair division. *Id.*

{¶27} "[W]hen considering whether a trial court has abused its discretion in dividing marital property, a reviewing court 'should not review discrete aspects of the property division out of context of the entire award.' *Baker v. Baker* (1992), 83 Ohio App.3d 700, citing *Briganti v. Briganti* (1984), 9 Ohio St.3d 220, 222. Instead, a reviewing court 'should consider whether the trial court's disposition of marital property as a whole resulted in a property division which was an abuse of discretion.' *Baker* at [702]." (Emphasis added.) *Rice v. Rice*, 11th Dist. Nos. 2006-G-2716 and 2006-G-2717, 2007-Ohio-2056, at ¶33.

{¶28} In *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, the Supreme Court of Ohio established guidelines for trial courts to follow in exercising their discretion to award pension or retirement benefits. In doing so, the Court held:

{¶29} "\*\*\*\* [G]eneral rules cannot provide for every contingency and no specific rule can apply in every case. The purpose of the guidelines is to provide a fair and equitable division of property \*\*\*. Accordingly, this court holds that when 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.

{¶30} \*\*\*\*

{¶31} \*\*\*\* Thus, any given pension or retirement fund is not necessarily subject to direct division but is subject to evaluation and consideration in making an equitable distribution of both parties' marital assets.

{¶32} \*\*\*\*

{¶33} \*\*\*\* [T]he trial court must make an equitable determination based upon the parties' overall financial situation, whether a direct division, or some other alternative, would be most appropriate to preserve the pension or retirement asset so that each party may derive the most benefit. There are several alternatives to a direct \*\*\* division, such as an immediate offset or a current assignment of proportionate shares, with either a current distribution or a deferred distribution. \*\*\*

{¶34} "In the instance of vested matured retirement benefits, the amount is currently due and payable and the value is fixed and easily ascertainable. For example, where an employed spouse is receiving a pension at the time of the divorce, the trial court may consider the pension as earnings in determining the amount of alimony or support. \*\*\* *Likewise, in another given situation it may be more advantageous to determine the present cash value* \*\*\*. \*\*\* *This alternative may be viable only when the parties have other substantial marital assets to offset the nonemployed spouse's share.*

*The advantage of determining a present cash value is that it disentangles the affairs of the parties and concludes their economic partnership. Once the trial court has determined a value, a sum certain, the fund may be liquidated or the employed spouse could be required to make periodic payments to the nonemployed spouse in an amount equivalent to that person's share. Another alternative would be to offset the nonemployed spouse's proportionate share with some other marital asset.*" (Footnotes omitted and emphasis added.) *Hoyt*, supra, at 178-182.

{¶35} The Court in *Hoyt* held that in light of the facts of that case, where the pension was vested but not matured; the parties were far from retirement age; and the court awarded the marital residence to both parties, division by proportionality was appropriate. *Id.* at 184. However, while the Court followed the coverture method in *Hoyt*, it did not hold that in determining a spouse's interest in the marital portion of the other spouse's pension, a trial court must always follow this approach.

{¶36} In *Cole v. Cole*, 4th Dist. No. 00CA003, 2000-Ohio-2026, 2000 Ohio App. LEXIS 6324, the trial court had followed the coverture method of valuation, similar to that urged by Shirley, in retaining jurisdiction over the pension asset until the husband's retirement. The Fourth District held that the trial court abused its discretion in ordering that the wife would receive additional spousal support in the form of one-half of the husband's monthly PERS benefit once the husband retired. The court held:

{¶37} "The mandate in *Hoyt* is to 'disentangle' the parties' economic interest, and the trial court's reservation of jurisdiction defeats the goal of finality. It is an abuse of discretion not to break the economic entanglement when the parties are so far removed from a retirement date. The PERS pension rights of appellant have a present

value, and appellee's share also has a present value. The proper course for the trial court would have been to take evidence on the present value of the PERS pension, to determine present value, to determine appellee's share, to make an award of that amount." *Cole*, supra, at \*16.

{¶38} Before addressing the merits of the instant case, we note that Shirley did not file a transcript of any of the hearings conducted by the magistrate on July 27, 2007; January 24, 2008; or August 6, 2009. The magistrate's July 14, 2009 decision suggests that the parties had presented testimony at the previous hearings in support of their respective positions concerning the proper method of valuation. "In *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, the Court held that the duty of providing a transcript for appellate review falls exclusively on the appellant because an appellant bears the burden of showing error by reference to matters in the record. *Id.* at 199. An appellate court has nothing to pass on if the appellant fails to provide a transcript and such court has no choice but to presume the validity of the lower court's proceedings. *Id.*" *Samber v. Mullinax Ford East*, 173 Ohio App.3d 585, 596, 2007-Ohio-5778. Because Shirley failed to file transcripts of the proceedings below, it is impossible for us to review the evidence presented or to discern the reasons why the magistrate chose to apply the fixed method of calculation as opposed to the coverture method. We must therefore presume the regularity of the proceedings below.

{¶39} In any event, even if the issue was properly before us, the divorce decree provides a sound basis for the court's choice of the fixed method. In the decree the trial court divided the parties' other marital property and debt on terms that were highly favorable to Shirley. As noted above, the divorce decree awarded the marital residence

and the parties' other marital assets to Shirley and ordered Thomas to pay the marital debt. The court's adoption of the fixed method of valuation can reasonably be seen as the court's attempt to equalize its division of property.

{¶40} In *DiFrangia v. DiFrangia* (Oct. 22, 1999), 11th Dist. No. 98-T-0142, 1999 Ohio App. LEXIS 4974, this court recognized the domestic court's right to offset a spouse's interest in the marital portion of the retired spouse's pension with other marital property. In that case the court awarded the marital residence to the wife. While this court awarded the wife a portion of the husband's monthly pension benefit, this court reduced the portion of the husband's benefit that it awarded the wife from 50 per cent to 36 per cent in order to compensate the husband for giving the wife the marital residence. This court held: "There is no requirement that each individual asset be divided equally [as long as] all assets together are divided equally. \*\*\* [The husband's] loss of equity in the house was balanced by [the wife's] loss in equity in [the husband's] retirement fund." *Id.* at \*6.

{¶41} In view of the foregoing analysis and in the circumstances of this case, we cannot say the trial court abused its discretion in adopting the fixed method of calculation in determining Shirley's interest in the marital portion of Thomas' pension plans.

{¶42} Shirley's second assignment of error is overruled.

{¶43} For the reasons stated in the opinion of this court, the assignments of error are not well taken. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas, Domestic Relations Division, is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

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COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶44} I would reverse on the second assignment of error.

{¶45} In *DiFrangia v. DiFrangia*, 11th Dist. No. 2003-T-0004, 2003-Ohio-6090, at ¶23, this court quoted with approval the following language from the decision of the Second District Court of Appeals in *Layne v. Layne* (1992), 83 Ohio App.3d 559, 567:

{¶46} “(A) retirement plan is an investment made by both spouses during marriage to provide for their later years. They anticipate that the value of the investment will increase with time. 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. The nonemployed former spouse is not entitled to share in the direct contributions made by the participant former spouse after divorce. *However, the nonemployed former spouse 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*. That increase was contemplated when the investment was made. It would be inequitable to deprive the owner of its value. 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.” (Emphasis added.)

{¶47} In choosing the hypothetical approach in calculating Ms. Fazenbacker’s portions of the pensions, rather than the coverture fraction as proposed by Ms. Fazenbacker, the trial court deprived her of her entitlement to the “increase in the value of \*\*\* her unmatured proportionate share after divorce attributable to the continued participation of the other spouse in the retirement plan.” *DiFrangia* at ¶23. The evidence in the record on this issue consists of the QDRO Consultants, Inc. reports, and the testimony of Ms. Stoll, indicating the coverture fraction is far preferable in determining the division of retirement benefits, as compared with the hypothetical approach. Consequently, the decision of the trial court does not comply with the record, and is an abuse of discretion. Cf. *Ferranto*, supra, at 676-678. Further, an abuse of discretion may be found when the trial court “applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact.” *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15. Based on this court’s prior adoption of *Layne*, the trial court applied the wrong legal standard in reaching its judgment, and thus abused its discretion in this fashion.

{¶48} I respectfully dissent.