

[Cite as *Cunningham v. Cunningham*, 2010-Ohio-1397.]

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CARL L. CUNNINGHAM	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-25
MARGARET CUNNINGHAM	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Knox County Court of Common Pleas, Domestic Relations Division, Case No. 07DV10-0243

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: March 30, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee

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Gwin, P.J.

{¶1} Plaintiff-appellant Carl L. Cunningham appeals a judgment of the Court of Common Pleas, Domestic Relations Division, of Knox County, Ohio, which granted a divorce to appellant from defendant-appellee Margaret Cunningham, divided the marital property and debts, and established spousal support. Appellant assigns twelve errors to the trial court:

{¶2} “I. MAGISTRATE COHEN ERRED IN CALCULATING THE VALUE OF THE SICK TIME FOR APPELLANT IN HER PROPOSED DECISION FILED ON JANUARY 23, 2009.

{¶3} “II. APPELLANT OBJECTS TO THE COURTS FINDINGS CONCERNING VACATION TIME.

{¶4} “III. APPELLANT OBJECTS TO THE DECISION THAT APPELLEE IS AWARDED ENTIRE MARITAL INTEREST IN THE FOLLOWING ITEMS: 1980 TOYOTA LAND CRUISER, THE GO-CART, THE HONDA ELEMENT.

{¶5} “IV. APPELLANT OBJECTS TO THE DECISION OF THE COURT IN REGARDS TO THE U.S. BANK ACCOUNTS FOR THE APPELLEE AND THE NATIONAL CITY ACCOUNTS FOR THE APPELLANT.

{¶6} “V. APPELLEE STATED THAT HER CAR WAS A 2006 HONDA CIVIC LS COUPE. THE CAR IN FACT IS A LX, WHICH INCREASES THE VALUE OF THE VEHICLE TO \$12,675.00 FOR GOOD CONDITION.

{¶7} “VI. WAS STATED ON THE BALANCE SHEET THAT THE APPELLANT’S PRIMARY VEHICLE, MINI COOPER S WAS VALUED AT \$30,715.55 WHEN IN FACT THE FAIR MARKET VALUE IS \$19,070.00 FOR GOOD CONDITION.

{¶8} “VII. APPELLANT OBJECTS TO THE STATEMENT ON PAGE 6 OF THE JUDGMENT ENTRY WHICH STATES THAT THE HUSBAND HAS THE ‘ABILITY TO REDUCE HIS LIVING EXPENSES BECAUSE HE SHARES THEM WITH ANOTHER INDIVIDUAL.’

{¶9} “VIII. APPELLANT OBJECTS TO THE RULING FOR SPOUSAL SUPPORT HEREIN RAISES THE FOLLOWING ASSIGNMENT OF ERROR: THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN FAILING/REFUSING TO CONSIDER THE EARNING ABILITIES OF THE PARTIES.”

{¶10} “IX. APPELLANT OBJECTS TO THE DECISION OF THE COURT IN ASSIGNING MARITAL DEBT.

{¶11} “X. APPELLANT OBJECTS TO THE DECISION OF THE COURT AS TO THE REQUIREMENT OF THE PLAINTIFF TO SECURE WIFE’S INTEREST IN SAID RETIREMENT PLAN WITH LIFE INSURANCE ON HIS LIFE IN THE AMOUNT OF \$60,000.00 AS BEYOND THE SCOPE OF THE COURT’S AUTHORITY.

{¶12} “XI. APPELLANT RESPECTFULLY REQUEST THAT THE COURT COST AND ATTORNEY FEES ORDERED TO BE PAID BY THE APPELLANT TO THE APPELLEE BE WAIVED DUE TO THE FACT THAT HE HAS HAD A REDUCTION OF HIS INCOME AND HIS EMPLOYER NOT GRATING ANNUAL RAISES.

{¶13} “XII. APPELLEE STILL REFUSES TO FILE AMENDED TAX RETURN FOR 2007. “

{¶14} The record indicates the parties were married in 1986, and have two children, both emancipated. The matter was tried before a magistrate, who prepared a proposed decision. Both parties filed objections, and the trial court reviewed the objections, the proposed decision from the magistrate, and the transcript of proceedings before entering a judgment.

{¶15} Our standard of reviewing decisions of a domestic relations court is generally the abuse of discretion standard, see *Booth v. Booth* (1989), 44 Ohio St. 3d 142. The Supreme Court made the abuse of discretion standard applicable to alimony orders in *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140 and to property divisions in *Martin v. Martin* (1985). The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary or unconscionable, *Blakemore*, supra, at 219. When applying the abuse of discretion standard, this court may not substitute our judgment for that of the trial court, *Pons v. Ohio State Medical Board*, (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d.748.

{¶16} Civ. R. 53 deals with matters referred to magistrates. Civ. R. 53 (D)(3)(b) provides:

{¶17} "(ii) Specificity of objection.

{¶18} "An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶19} ***

{¶20} "(iv) Waiver of right to assign adoption by court as error on appeal.

{¶21} "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not

specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b).”

{¶22} The Supreme Court has also held an appellant cannot ascribe error to the findings in a magistrate's decision if the appellant has failed to timely object as required by the Rule. *State ex rel Booher v. Honda of America Manufacturing, Inc*, 88 Ohio St.3d 52, 53, 2000-Ohio-269, 723 N.E.2d 571.

I

{¶23} In his first assignment of error, appellant argues the trial court erred in calculating the value of his accrued sick time. The magistrate found the value of the sick leave is \$25,863.00. On objection, appellant offered evidence he is not entitled to a pay out of the full amount of the sick leave, and the trial court adjusted the valuation to \$4,310.05. The trial court incorporated this value into its itemization of the parties' assets and liabilities. See Judgment Entry of April 9, 2009 at Page 7.

{¶24} The first assignment of error is overruled.

II

{¶25} In his second assignment of error, appellant argues the court erred in calculating the value of his vacation time. The magistrate valued the accumulated vacation leave at \$8,261.00, but appellant states this asset is not available for payout and should not be included in the balance sheet.

{¶26} The trial court found appellant had presented no evidence of the actual present value, and overruled appellant's objection to the valuation of his accumulated

vacation time. We find the trial court did not abuse its discretion or commit an error of law in doing so.

{¶27} Appellant also argues the trial court erred in not factoring in the value of any sick or vacation time the appellee had accrued. It does not appear this matter was raised in the objections to the magistrate's opinion, and accordingly, this court will not review it.

{¶28} The second assignment of error is overruled.

III, IV, & IX

{¶29} In his third assignment of error, appellant argues the trial court erred in giving appellant the entire marital interest in the 1980 Toyota Land Cruiser, the party's go-cart, and the Honda Element. The trial court ordered appellant to pay the outstanding debt on the Toyota and the go-cart, and appellant had already paid off the Honda during the divorce proceedings.

{¶30} In his fourth assignment of error, appellant argues the trial court erred in dividing the U.S. Bank and National City Bank accounts. He urges these accounts were created after the restraining orders were in place and therefore should be deemed separate, not marital.

{¶31} In his ninth assignment of error, appellant argues the trial court erred in not dividing the party's assets and debts equally.

{¶32} R.C. 3105.171 requires property divisions to be equal unless the court finds it would be inequitable to do so. The court may then fashion a division of the marital property equitably. In dividing marital property, the court shall consider all relevant factors, including those set forth in R.C. 3105. 171(F). The factors are:

{¶33} “(1) The duration of the marriage;

{¶34} “(2) The assets and liabilities of the spouses;

{¶35} “(3) The desirability of awarding the family home, or the right to reside in the family home for reasonable periods of time, to the spouse with custody of the children of the marriage;

{¶36} “(4) The liquidity of the property to be distributed;

{¶37} “(5) The economic desirability of retaining intact an asset or an interest in an asset;

{¶38} “(6) The tax consequences of the property division upon the respective awards to be made to each spouse;

{¶39} “(7) The costs of sale, if it is necessary that an asset be sold to effectuate an equitable distribution of property;

{¶40} “(8) Any division or disbursement of property made in a separation agreement that was voluntarily entered into by the spouses;

{¶41} “(9) Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension;

{¶42} “(10) Any other factor that the court expressly finds to be relevant and equitable.”

{¶43} “A Court of Common Pleas has broad discretion to determine what property division is equitable in a divorce proceeding. The mere fact that a property division is unequal, does not, standing alone, amount to an abuse of discretion.” *Cherry v. Cherry* (1981) 66 Ohio St.2d 348, 20 O.O. 3d 318, 421 N.E.2d 1293, syllabus by the

court, paragraph two. “The equitable division of marital property *is* within the sound discretion of the court and will not be reversed absent an abuse of that discretion. *Holcomb v. Holcomb* (1989) 44 Ohio St.3d 128, 131, 541 N.E.2d 597.

{¶44} The trial court reviewed the overall division of assets and liabilities and found although it was not equal, it was equitable. We find the trial court did not err in dividing the assets and debts between the parties.

{¶45} The third, fourth, and ninth assignments of error are overruled.

V & VI

{¶46} In his fifth assignment of error, appellant argues appellee incorrectly stated her car was a 2006 Honda Civic LS Coupe, when in fact it is an LX model which increases the value of the vehicle.

{¶47} In his sixth assignment of error, appellant challenges the valuation of his Mini Cooper S. The court found the value was the amount owed on the loan of the vehicle, while appellant urges the fair market value is some \$11,000.00 less.

{¶48} It does not appear these matters were raised in the objections to the magistrate’s report, and accordingly, we cannot address them.

{¶49} The fifth and sixth assignments of error are each overruled.

VII

{¶50} In his seventh assignment of error, appellant argues the trial court erred in finding appellant has the ability to reduce his living expenses because he shared them with another individual.

{¶51} The magistrate found appellant shares living expenses with his girlfriend and appellant testified to his share of their budget. The magistrate found their home was

purchased solely by the girlfriend and appellant pays rent but is not responsible for the mortgage. He also pays a share of the homeowner's insurance, taxes, and utilities. The magistrate concluded appellant had financial assistance which appellee does not. The magistrate further noted appellee lives in a home owned by her father and therefore her "rent" (quote marks by the magistrate) would remain the same.

{¶52} The trial court found appellant has the benefit of sharing his expenses. Appellant himself included shared expenses in the budget he submitted to the court.

{¶53} The trial court stated it considered and reviewed the factors set forth in R.C. 3105.18. The court reviewed the parties' tax returns and pay stubs, and adjusted the numbers to include appellant's mandatory contributions to the Ohio Police and Fire Pension as well as appellee's payment of certain educational expenses for the party's son. The court found both parties' budgets had changed after the hearing before the magistrate. Both parties submitted new budgets to the court, and the trial court found appellant had deducted certain expenses twice. The court accepted neither party's budget in determining spousal support, but instead restructured the property division and determined the amount and term of spousal support was appropriate. The court found although appellant earned more than appellee, it had allocated more marital debt to him. Neither the magistrate nor the trial court made a specific finding about the contribution the girlfriend made to appellant's finances or how the court factored it into his final budget. The trial court did state it was restructuring the property division in considering its award of spousal support.

{¶54} We find appellant has not demonstrated the trial court improperly computed his budget. The trial court retained jurisdiction over the amount and duration

of spousal support. On the record before us we cannot find the trial court abused its discretion in its award of spousal support.

{¶155} The seventh assignment of error is overruled.

VIII

{¶156} In his eighth assignment of error, appellant argues the trial court erred in failing to consider the earning ability of the parties. Appellant argues during the pendency of the matter, he worked a full-time job and also a part-time job with the City of Westerville earning approximately \$28,000.00 per year. At some point before the court ruled on the parties' objections to the magistrate's proposed decision, appellant quit his part-time job.

{¶157} The trial court stated it based the award of spousal support on appellant working only one job, instead of two jobs, taking into consideration appellant's health.

{¶158} We agree, and find no abuse of discretion in the trial court's calculations.

{¶159} The eighth assignment of error is overruled.

X.

{¶160} In his tenth assignment of error, appellant argues the trial court had no jurisdiction to order appellant to purchase life insurance to secure appellee's interest in his retirement plan. Appellant's assertion is incorrect.

{¶161} An unvested pension may be a marital asset. *Lemon v. Lemon* (1988), 42 Ohio App.3d 142, 144, 537 N.E.2d 246. In determining whether an unvested pension plan is a marital asset, and in determining its value as an asset, the court should take into consideration the time left before the pension becomes vested, the length of the marriage, and the contributions of both parties to the pension plan. *Id.*

{¶62} A trial court has the authority to order a party to secure a spouse's interest in a property settlement, including retirement benefits, by means of a life insurance policy naming the spouse as the beneficiary. *McCoy v. McCoy* (1993), 91 Ohio App. 3d 570., 582, 632 N.E.2d 1358, citing *Nori v. Nori* (1989), 58 Ohio App.3d 69, 568 N.E.2d 730; *Gore v. Gore* (1985), 27 Ohio App.3d 141, 27 OBR 173, 499 N.E.2d 1281.

{¶63} We find the trial court had jurisdiction to enter this order. The tenth assignment of error is overruled.

XI

{¶64} In his eleventh assignment of error appellant argues the attorney fees he was ordered to pay to appellee in the divorce decree should be waived because his finances have changed and he does not have the resources to pay them. He notes that the court ordered each party to pay his or her own fees attributable to the objections to the magistrate's opinion.

{¶65} This court does not have jurisdiction to vacate a court order because of a change in circumstances that occurred after the order was journalized. Our review of the within is limited to the evidence before the trial court at the time it made its decision.

{¶66} The eleventh assignment of error is overruled.

XII

{¶67} In his twelve assignment of error, appellant argues appellee has still not signed the amended tax returns as ordered by the trial court.

{¶68} This court reviews assignments of error to the trial court's decision, and appellant does not argue the trial court committed any error here. This matter is more properly addressed to the trial court.

{¶69} The twelfth assignment of error is overruled.

{¶70} Appellee assigns a single error on cross appeal:

{¶71} CROSS-ASSIGNMENT OF ERROR

{¶72} "I. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO FIND AN AWARD OF AT LEAST \$1,600.00 PER MONTH TO BE PAID BY THE PLAINTIFF TO THE DEFENDANT WAS AN APPROPRIATE AWARD OF SPOUSAL SUPPORT."

{¶73} Appellee argues the trial court erred and abused its discretion in not awarding her spousal support in an amount higher than \$1400 per month and for a term longer than seven years.

{¶74} The parties' marriage was of 22 years, during which time appellee worked only part-time in order to raise the children. At the time of trial, appellant was working two jobs. Appellee argues the trial court should not have excused his terminating his second, part-time job, but should have imputed the lost income to him. The court cited appellant's health as a reason for appellant to quit his second job.

{¶75} We have reviewed the record, and we find the trial court did not abuse its considerable discretion in computing the spousal support award.

{¶76} The cross-assignment of error is overruled.

{¶77} For the foregoing reasons, the judgment of the Court of Common Pleas, Domestic Relations Division, of Knox County, Ohio, is affirmed.

By Gwin, P.J., and

Delaney, J., concur

Hoffman, J., concurs in part,

dissents in part

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY

WSG:clw 0301

Hoffman, J., concurring in part and dissenting in part

{¶78} I concur in the majority's analysis and disposition of all of Appellant's assignments of error except for Assignment of Error VII. I also concur in the majority's analysis and disposition of Appellee's cross-assignment of error.

{¶79} As to Appellant's Assignment of Error VII, I respectfully dissent from the majority's decision to overrule this assignment. While I agree the fact Appellant shares living expenses with his girlfriend is a relevant factor in determining the amount of spousal support to be ordered under R.C. 3105.18, I do not believe it is a proper consideration when dividing marital assets.

HON. WILLIAM B. HOFFMAN

[Cite as *Cunningham v. Cunningham*, 2010-Ohio-1397.]

IN THE COURT OF APPEALS FOR KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CARL L. CUNNINGHAM	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARGARET CUNNINGHAM	:	
	:	
	:	
Defendant-Appellee	:	CASE NO. 09-CA-25

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Domestic Relations Division, of Knox County, Ohio, is affirmed. Costs to be split between the parties.

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

HON. PATRICIA A. DELANEY