

[Cite as *Drummond v. Estate of Drummond*, 2010-Ohio-6139.]

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ARLENE K. DRUMMOND

Plaintiff-Appellee

-vs-

JAMES DRUMMOND, AND THE
ESTATE OF JAMES DRUMMOND

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P.J.

Hon. William B. Hoffman, J.

Hon. John W. Wise, J.

Case No. 10-CA-20

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Fairfield County Common
Pleas Court, Domestic Relations Division,
Case No. 1996DR00237

JUDGMENT:

Affirmed in part, Reversed in part and
Remanded

DATE OF JUDGMENT ENTRY:

December 9, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

MARTY ANDERSON

Sowald, Sowald, Anderson & Hawley

400 S. Fifth Street, Suite 101

Columbus, Ohio 43215

MARK A. MCLEOD

471 East Broad Street, 19th Floor

Columbus, Ohio 4315-3872

Hoffman, J.

{¶1} Defendant-appellant the Estate of James Drummond (“the Estate”) appeals the April 1, 2010 Entry entered by the Fairfield County Court of Common Pleas, Domestic Relations Division, which overruled its objections to the Magistrate’s December 24, 2009 Decision, and approved and adopted said decision as order of the court. Plaintiff-appellee is Arlene K. Drummond.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee and James Drummond (“Decedent”) were married in Williamson, West Virginia, on December 20, 1969. Five children were born as issue of said union. Appellee and Decedent were divorced via Judgment Entry/Decree of Divorce filed November 26, 1997. The Decree incorporated this Separation Agreement reached by Appellee and Decedent. At the time of the divorce, Decedent was a retired educator, receiving retirement benefits as provided by the State Teacher Retirement System of Ohio (“STRS”).

{¶3} With respect to Decedent’s STRS benefits, the Decree of Divorce provides:

{¶4} “(a) Until such time a Qualified Domestic Relations Order (“QDRO”) assigning the portion of Defendant’s benefits to Plaintiff as alternate payee under the STRS pension plan is permitted by law, Defendant shall pay to Plaintiff the sum of \$1,374.00 per month (44.41% of Defendant’s gross monthly benefit), plus poundage and cost-of-living increases, for Plaintiff’s interest in the STRS Plan as spousal support, payable until the death of either Defendant or the Plaintiff.

{¶15} “(b) Said payments from the STRS shall be deemed periodic spousal support and shall be taxable income to the Plaintiff and tax deductible from the income of the Defendant * * *

{¶16} “To effectuate this provision, Defendant shall continue to maintain Plaintiff as the sole irrevocable beneficiary of \$1,374.00 per month or 44.41% of his gross monthly retirement benefit, plus cost-of-living increases, and shall take all necessary actions to assure and guarantee that Plaintiff will receive 44.41% of Defendant’s gross monthly retirement benefit for the remainder of the Plaintiff’s life in the event that Defendant predeces Plaintiff in death.

{¶17} “During Plaintiff’s lifetime, Defendant shall continue to designate Plaintiff as his sole irrevocable beneficiary of 44.41% of said retirement benefit and, the Defendant’s legal separation from the Plaintiff, their divorce, a dissolution of their marriage, the Defendant’s remarriage, the birth of a child of the Defendant or his adoption of a child, shall not constitute and automatic revocation of Plaintiff as the beneficiary of 44.41% of Defendant’s monthly payments from STRS.”

{¶18} Article 4, Section E, of the Separation Agreement provides:

{¶19} “11. If HUSBAND predeces WIFE in death, spousal support payments shall terminate and WIFE’S interest in the STRS Pension shall be replaced by the STRS survivor benefits as set forth herein.

{¶10} “To effectuate this provision, HUSBAND shall continue to maintain WIFE as the sole irrevocable beneficiary of \$1,374.00 per month or 44.41% of his gross monthly retirement benefit, plus costs-of-living increases, and shall take all necessary actions to assure and guarantee that WIFE will receive 44.41% of HUSBAND’S gross

monthly retirement benefit for the remainder of the WIFE'S life in the event that HUSBAND precedes WIFE in death."

{¶11} Section 6, subsection (n) of the Decree of Divorce also provides the trial court "shall continue to maintain subject matter jurisdiction over the issues of Defendant's designation of plaintiff as the beneficiary of his retirement benefits through the STRS."

{¶12} Decedent passed away on September 7, 2006. On February 20, 2009, the Estate filed a notice of suggestion of death; a notice for substitution of parties; and a motion for contempt. In the motion for contempt, the Estate argued Appellee had received and maintained 100% of the monthly survivor benefits from STRS, not the 44.41% for which the Decree had provided; therefore, the Estate argued Appellee was in contempt by retaining these funds.

{¶13} The Estate asked the trial court to impose a constructive trust and order Appellee to hold the funds for the benefit for the Estate. Appellee filed a memorandum in opposition thereto on April 16, 2009. Subsequently, Appellee filed a Motion to Dismiss, asserting the trial court was without jurisdiction to hear the Estate's motion. The Estate filed a memorandum contra Appellee's motion to dismiss. The magistrate issued a scheduling order on June 12, 2009. Pursuant thereto, the parties were ordered to reach an agreement as to the uncontested facts of the case. The parties filed Joint Stipulated Findings of Fact on August 21, 2009. On September 3, 2009, Appellee filed a second, additional memorandum in opposition to the Estate's motions and in support of her motion to dismiss. The Estate filed a supplemental memorandum contra Appellee's motion to dismiss on September 4, 2009. The magistrate conducted

a non-oral hearing on the pending motions, memorandum, and stipulations filed in the matter.

{¶14} Via Decision filed December 24, 2009, the magistrate granted Appellee's motion to dismiss, finding the trial court lacked jurisdiction. The magistrate further found, assuming the trial court had jurisdiction, there was no basis for a constructive trust and Appellee was not unjustly enriched. The trial court dismissed the contempt action and the Estate's claim for attorney fees. The Estate filed objections to the magistrate's decision. Via Entry filed April 1, 2010, the trial court approved and adopted the magistrate's decision as order of the court.

{¶15} It is from this entry the Estate appeals, raising the following assignments of error:

{¶16} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY ASSESS, WEIGH AND DETERMINE THE FACTS IN CONJUNCTION WITH THE LAW REGARDING JURISDICTION OVER A MARITAL ASSET.

{¶17} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY ASSESS, WEIGH AND DETERMINE THE FACTS IN CONJUNCTION WITH THE LAW REGARDING CONTEMPT.

{¶18} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION IN FAILING TO PROPERLY ASSESS, WEIGH AND DETERMINE THE FACTS IN CONJUNCTION WITH THE LAW REGARDING STRS BENEFITS AND THE IMPOSITION OF A CONSTRUCTIVE TRUST."

{¶19} Appellee cross-appeals the same, raising as error:

{¶20} “I. THE TRIAL COURT ERRED OR ABUSED ITS DISCRETION IN MAKING A SUMMARY DENIAL OF PLAINTIFF-APPELLEE/CROSS-APPELLANT’S REQUEST FOR AN AWARD OF FEES.”

Appeal

I

{¶21} In its first assignment of error, the Estate contends the trial court erred and abused its discretion in finding it lacked jurisdiction over the marital asset, to wit: decedent’s STRS retirement benefits.

{¶22} In its November 26, 1997 Judgment Entry/Decree of Divorce, the trial court stated:

{¶23} “This Court of Common Pleas of Fairfield County, Ohio shall continue to maintain subject matter jurisdiction over the issues of Defendant’s designation of Plaintiff as the beneficiary of his retirement benefits through the STRS.”

{¶24} Despite this language, the trial court does not have jurisdiction to modify or change a division of property pursuant to a divorce decree. See, e.g., *Bobo v. Jewell* (1988) 38 Ohio St.3d 330, 336; *In Re Kuntz*, 183 Ohio App.3d 154, 2009-Ohio-3316 par. 11. However, a trial court does have the power to clarify and construe its original property division in order to effectuate its judgment. *Gordon v. Gordon* (2001), 144 Ohio App.3d 21, 23.

{¶25} In the instant action, the Estate is not asking the trial court to modify or change how decedent’s pension was divided. Rather, the Estate is asking the trial court to enforce implementation of the division of the pension as it originally decreed. We find

the trial court has jurisdiction over the Estate's request. Accordingly, we find the trial court erred in finding it lacked jurisdiction.

{¶26} The Estate's first assignment of error is sustained.

Appeal

II

{¶27} In its second assignment of error, the Estate contends the trial court erred in dismissing the contempt action against Appellee.

{¶28} Having found the trial court does have jurisdiction to address the issue of decedent's pension, we reverse the trial court's dismissal of the contempt action. Upon remand, the trial court should address the contempt.

{¶29} The Estate's second assignment of error is sustained.

Appeal

III

{¶30} In its final assignment of error, the Estate argues the trial court erred and abused its discretion in failing to impose a constructive trust.

{¶31} A constructive trust is an equitable remedy that arises by operation of law against one who, through any form of unconscionable conduct, holds legal title to property where equity and good conscience demand that he should not. *LeCrone v. LeCrone*, 10th Dist. No. 04AP-312, 2004-Ohio-6526, at ¶ 11, citing *Hill v. Hill*, 10th Dist. No. 01AP-716, 2002-Ohio-685. A constructive trust is an appropriate remedy against unjust enrichment, and, although usually invoked when property has been acquired by fraud, a constructive trust may also be imposed where it is against the principles of equity that the property be retained by a person even though the property was acquired

without fraud. *Ferguson v. Owens* (1984), 9 Ohio St.3d 223, 226, citing 53 Ohio Jurisprudence 2d (1962) 578-579, Trusts, Section 88, and V Scott on Trusts (3d Ed. 1967), 3412, Section 462. Where a person holds title to property against equity and good conscience and will be unjustly enriched by retaining title, Ohio courts have not required, as a prerequisite for a constructive trust, that the holder obtained title by fraudulent or questionable means. See *Groza-Vance v. Vance*, 162 Ohio App.3d 510, 2005-Ohio-3815, 834 N.E.2d 15, ¶ 27.

{¶32} The provisions in the Separation Agreement, which are set forth, supra, indicate the clear intent of the parties that Appellee was to receive 44.41% of the monthly payouts and, after decedent's death, 44.41% of the monthly survivorship benefits.

{¶33} Accordingly, we find the trial court erred in failing to impose constructive trust. The Estate's final assignment of error is sustained.

Cross-Appeal

I

{¶34} In her sole assignment of error in her cross-appeal, Appellee maintains the trial court erred and abused its discretion in summarily denying her request for attorney fees. Specifically, Appellee submits the trial court is required to make findings to support its summary conclusion. We disagree. We find no case law to support Appellee's assertion the trial court was required to set forth reasons for denying her request.

{¶35} Appellee's sole assignment of error on cross-appeal is overruled.

{¶36} The judgment of the Fairfield County Court of Common Pleas, Domestic Relations Division, is affirmed in part, reversed in part and the matter remanded for further proceedings in accordance with our opinion and the law.

By: Hoffman, J.

Edwards, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

s/ John W. Wise
HON. JOHN W. WISE

