

[Cite as *Ivanov v. Ivanov*, 2010-Ohio-1963.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

VALENTINA M. IVANOV

Appellant

v.

IVAYLO M. IVANOV

Appellee

C. A. No. 24998

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 1998-02-0484

DECISION AND JOURNAL ENTRY

Dated: May 5, 2010

CARR, Judge.

{¶1} Appellant, Valentina Ivanov (“Wife”), appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court reverses.

I.

{¶2} Wife and Ivaylo Ivanov (“Husband”) were divorced on November 21, 2001. The parties’ separation agreement, attached to and incorporated into the divorce decree, addresses the division of the marital portion of Wife’s interest in the State Teachers Retirement System. The separation agreement further enunciates numerous court orders to that end. No order, however, addresses any contingency wherein Wife would receive disability benefits. The agreement further provides that the domestic relations court would retain:

“Continued jurisdiction to establish, maintain, and enforce the qualified status of the original order and intent of the parties. If necessary, the court may enforce other orders including the recharacterization of the benefits if payable under another retirement system or as spousal support, if applicable.”

Both Husband and Wife waived any right to receive spousal support under the terms of the agreement.

{¶3} On October 22, 2007, Husband filed a motion for a division of property order (“DOPO”) in regard to Wife’s STRS retirement benefits. Husband requested that service of the motion be effected on Wife by personal service. On February 11, 2008, the magistrate issued an order on the motion, noting that counsel requested a continuance to give them an opportunity to confer with an expert “to determine what language is needed to satisfy the Division of Property Order in the Final Decree without Defendant receiving one-half of Plaintiff’s disability check.” The magistrate scheduled the matter for review hearing on March 12, 2008. On April 24, 2008, the trial court issued a judgment entry noting that counsel had notified the court that the parties had reached an agreement. The trial court dismissed all pending motions and ordered that an agreed journal entry be filed by June 16, 2008.

{¶4} The parties failed to file the agreed journal entry as ordered. On July 3, 2008, however, Husband filed a motion for a DOPO, identical to his October 22, 2007 motion, which the domestic relations court had dismissed. Husband certified service of the motion on Wife’s counsel. Wife’s counsel filed a response, moving (1) for dismissal of the motion pursuant to Civ.R. 12(B)(5) for insufficient service of process, and (2) for summary judgment because Wife had provided Husband on May 20, 2008, with a DOPO which was approved by the State Teachers Retirement System, fully complied with the terms of the divorce decree, and fully and completely satisfied Husband’s motion. Wife’s counsel asserted that Husband nevertheless refused to approve the DOPO.

{¶5} Husband moved for an extension of time to respond to Wife’s motion for summary judgment. He asserted that he needed Wife’s executed STRS authorization and time to

obtain information from STRS to verify Wife's earliest retirement date, her STRS contributions, and her monthly pension/disability payments. He further moved for an order requiring Wife to sign an authorization for Husband's expert to obtain information from STRS. The magistrate granted Husband's motion.

{¶6} On October 6, 2008, Wife's counsel filed a motion to vacate the order requiring her to execute a STRS authorization for release of information and a renewed motion to dismiss for insufficient service of process. Wife's counsel asserted that, after the domestic relations court issued its April 24, 2008 judgment dismissing Husband's motion and ordering the filing of an agreed journal entry, Wife left the country. Counsel asserted that she has no knowledge of Wife's whereabouts or the intended duration of her stay abroad. Husband subsequently requested service of his motion by certified mail on Wife at her last known local address. Husband responded in opposition to the motion to vacate and motion for summary judgment. Husband argued that Wife's proposed DOPO does not divide the STRS benefits because "it purports to pay those benefits, even after full retirement age as disability benefits rather than retirement benefits." On November 4, 2008, the trial court vacated its order requiring Wife to execute an authorization to release information from STRS. The court further denied Wife's motion to dismiss and scheduled Husband's motion for a DOPO for hearing on January 21, 2009, as long as Husband effected service of process of the motion on Wife.

{¶7} Husband failed to serve Wife with his motion for a DOPO by January 21, 2009, and the hearing on the motion did not proceed on that date. On January 21, 2009, Wife's counsel moved to withdraw as counsel because Wife's whereabouts were unknown and counsel had no way of communicating with Wife. Wife's counsel rightfully asserted that no hearings were

presently scheduled before the court. The trial court granted Wife's counsel permission to withdraw on January 23, 2009.

{¶8} On January 21, 2009, Husband filed a motion to serve Wife by publication. The domestic relations court granted the motion. Wife's counsel was neither served with the motion nor copied on the order. Legal Notice to Wife of a March 26, 2009 hearing on Husband's motion for a DOPO was published in the Akron Legal News for six consecutive weeks, beginning on February 6, 2009.

{¶9} Husband's motion was heard on March 26, 2009. On April 6, 2009, the magistrate issued a decision approving Husband's proposed DOPO. The domestic relations court judge also signed the magistrate's decision. On April 30, 2009, Wife, through new counsel, filed a motion for an extension of time to file objections because (1) she did not receive either the decision or the Civ.R. 58 notice, and (2) the magistrate's decision failed to include the necessary language pursuant to Civ.R. 53(D)(3)(b). Wife then filed an appeal from the April 6, 2009 judgment. This Court dismissed the appeal by journal entry for lack of jurisdiction on June 5, 2009. *Ivanov v. Ivanov*, 9th Dist. No. 24744.

{¶10} On May 20, 2009, Wife filed a motion for relief from judgment pursuant to Civ.R. 60(B). Husband filed a response in opposition. On June 4, 2009, the trial court declined to consider the motion pending appeal. It further denied Wife's motion for extension of time to file objections.

{¶11} On June 9, 2009, Wife filed a motion to dismiss Husband's July 3, 2008 motion for a DOPO. On June 19, 2009, the trial court dismissed Wife's motion to dismiss, reissued the magistrate's decision on Husband's motion for a DOPO, and ordered that Wife may refile objections to the magistrate's decision.

{¶12} On June 26, 2009, Wife timely filed objections to the magistrate’s decision. She supplemented them on July 10, 2009. Husband responded in opposition, and Wife filed a reply. On August 29, 2009, the domestic relations court issued a judgment entry overruling Wife’s objections. On September 17, 2009, the domestic relations court issued a judgment entry nunc pro tunc in which it overruled Wife’s objections and ordered that the attached DOPO be incorporated therein as the order of the court. Wife filed a timely appeal, raising four assignments of error for review. This Court rearranges and consolidates some assignments of error for purposes of review.

II.

ASSIGNMENT OF ERROR IV

“THE COURT LACKED SUBJECT MATTER JURISDICTION TO MODIFY THE DIVORCE DECREE.”

{¶13} Wife argues that the domestic relations court did not have subject matter jurisdiction to approve Husband’s proposed DOPO. This Court disagrees.

{¶14} R.C. 3105.89(B) allows the trial court to modify an order dividing marital property that was in effect prior to January 1, 2002, “for the purpose of enforcing the order or carrying into effect the manifest intentions of the parties.” The parties’ divorce decree, which ordered a division of marital property, became effective on November 21, 2001. Moreover, the parties’ separation agreement, incorporated into the divorce decree, granted “continued jurisdiction [to the domestic relations court] to establish, maintain, and enforce the qualified status of the original order and intent of the parties.”

{¶15} Wife argues that, because Husband’s proposed DOPO modifies the underlying division of property instead of merely enforcing or carrying into effect the prior order, the domestic relations court did not have jurisdiction to entertain Husband’s July 3, 2008 motion for

a DOPO. The parties agree that Husband is entitled to 50% of the marital portion of Wife's interest in her STRS account as of June 12, 2001. A DOPO is necessary to effect that purpose. That the trial court may have erred in its adoption of Husband's proposed DOPO did not divest it of jurisdiction to consider his motion. Wife's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT ERRED IN APPROVING THE MAGISTRATE’S DECISION AND ISSUING A DIVISION OF PROPERTY ORDER THAT IS NOT AUTHORIZED BY THE DIVORCE DECREE AND IS CONTRARY TO THE LAW OF OHIO AND THIS APPELLATE JURISDICTION.”

ASSIGNMENT OF ERROR II

“THE TRIAL COURT ERRED IN APPROVING A DIVISION OF PROPERTY ORDER WHERE [HUSBAND] FAILED TO CARRY HIS BURDEN OF PROVING THAT [WIFE] IS RECEIVING HER DISABILITY RETIREMENT BENEFITS IN LIEU OF OLD-AGE RETIREMENT.”

{¶16} Wife argues that the domestic relations court erred by overruling her objections to the magistrate's decision and adopting Husband's proposed DOPO as the order of the court. This Court agrees.

{¶17} When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. “In so doing, we consider the trial court's action with reference to the nature of the underlying matter.” *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18. “Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision.” *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio

St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶18} This Court has held:

“Whenever a clause in a separation agreement is deemed to be ambiguous, it is the responsibility of the trial court to interpret it. The trial court has broad discretion in clarifying ambiguous language by considering not only the intent of the parties but the equities involved. An interpretive decision by the trial court cannot be disturbed upon appeal absent a showing of an abuse of discretion.” (Internal citations omitted.) *Bond v. Bond* (1990), 69 Ohio App.3d 225, 228.

{¶19} The parties’ separation agreement, incorporated as part of the divorce decree, is a contract between the parties. Therefore, the separation agreement is subject to the same rules of construction, which govern other contracts. *Hyder v. Pizer* (Apr. 17, 2002), 9th Dist. No. 20791, citing *Forstner v. Forstner* (1990), 68 Ohio App.3d 367, 372.

{¶20} While a trial court retains broad discretion to clarify ambiguity in a contract, the determination whether a contract is ambiguous is a matter of law. *Hyder*; see, also, *In re Dissolution of Marriage of Seders* (1987), 42 Ohio App.3d 155, 156. Where no ambiguity exists, the trial court may not construe, clarify or interpret the parties’ agreement to mean anything outside of that which it specifically states. *Dzeba v. Dzeba* (Dec. 1, 1993), 9th Dist. No. 16225. Specifically, “the trial court must defer to the express terms of the contract and interpret it according to its plain, ordinary, and common meaning.” *Hyder*, citing *Forstner*, 68 Ohio App.3d at 372. Moreover, the parties’ agreement is not ambiguous where its terms are clear and precise. *Ryan v. Ryan* (Oct. 27, 1999), 9th Dist. No. 19347, citing *Lawler v. Burt* (1857), 7 Ohio St. 340, 350.

{¶21} The parties' separation agreement provides, in relevant part:

“Wife is presently a member/participant in the State Teachers Retirement System of Ohio (STRS) and has retirement benefits therein. It is the intention of the parties that Husband shall receive 50% of the marital portion of Wife's interest in STRS as of June 12, 2001. Said benefits shall be made available to Husband at the earliest available opportunity that said benefits can be transferred to Husband pursuant to Ohio Law.”

{¶22} In this case, the trial court did not find that the retirement accounts provision in the parties' separation agreement was ambiguous. It acknowledged that the plain language of the agreement awarded Husband 50% of the marital portion of Wife's interest in STRS. Because the domestic relations court determined that Wife's unspecified “interest” might include various benefits such as old-age retirement and disability benefits, it concluded that Husband was entitled to 50% of any benefits Wife received at any time. In so concluding, the trial court improperly construed and interpreted the parties' agreement to mean something outside of what the agreement specifically states. See *Dzeba*, supra.

{¶23} By its plain language, the above provision allows distribution to Husband of a portion of Wife's STRS benefits only as such distribution comports with Ohio law. Accordingly, any proposed distribution which is contrary to law is expressly not authorized by the parties' decree.

{¶24} R.C. 3105.171(C) and (D) require the domestic relations court to equitably divide marital property between the spouses, while in most cases disbursing separate property to the spouse to whom it belongs. “Marital property” includes retirement benefits of the spouses. R.C. 3105.171(A)(3)(a)(i). It does not, however, include any “separate property,” which includes “[c]ompensation to a spouse for the spouse's personal injury.” R.C. 3105.171(A)(3)(b) and (6)(a)(vi). Disability benefits constitute compensation received for personal injury. *Bakle v. Bakle*, 2d Dist. No. 2009 CA 9, 2009-Ohio-6003, at ¶13, citing *Ockunzzi v. Ockunzzi*, 8th Dist.

No. 86785, 2006-Ohio-5741, at ¶64; see, also, *Arkley v. Arkley*, 7th Dist. No. 03 JE 10, 2003-Ohio-7021, at ¶14, citing *Bauser v. Bauser* (1997), 118 Ohio App.3d 831, 835.

{¶25} The Ohio Supreme Court recognized the “general rule [] that pension or retirement benefits earned during the course of a marriage are marital assets[,]” although disability retirement pay constitutes an exclusion from the general rule. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 178. The Second District Court of Appeals reviewed an article cited by the *Hoyt* court which noted the exclusion of disability benefits from marital property unless “they are accepted by the retiree in lieu of retirement pay, [in which case] they are marital property to the extent that retirement pay value is included therein.” *Elsass v. Elsass* (Dec. 29, 1993), 2d Dist. Nos. 93-CA-0005, 93-CA-0016, citing Principles and Guidelines for the Division of Property in Actions for Divorce in Ohio (Mar. 1981), 54 Ohio Bar 491. The *Elsass* court reasoned that “disability benefits *** are a form of wage continuation designed to compensate the recipient for wages that he would otherwise receive but for the disability.” *Id.* It held, therefore, that disability retirement benefits are not marital property subject to division unless the recipient spouse has accepted them in lieu of old-age retirement pay, and then only to the extent that such retirement pay value is included in the disability pension benefit. *Id.*

{¶26} This Court has recognized the holding in *Elsass* and applied it as the law in this district. See, e.g., *Potter v. Potter* (Nov. 14, 2001), 9th Dist. No. 01CA0033; *Hyder v. Hyder*, 9th Dist. No. 06CA0014, 2006-Ohio-5285, at ¶37. It originally appeared too, by virtue of the magistrate’s February 11, 2008 order, that Husband recognized that he had no right to a portion of Wife’s disability benefits when the parties requested an opportunity to confer with an expert “to determine what language is needed to satisfy the Division of Property Order in the Final Decree without Defendant receiving one-half of Plaintiff’s disability check.” One-half of Wife’s

disability check is precisely what Husband later sought and received by virtue of the trial court's adoption of his DOPO as the order of the court.

{¶27} The parties' separation agreement expressly provides that Husband is entitled to a share of the marital portion of Wife's benefits. By the express language of the agreement then, Husband is not entitled to any of Wife's STRS benefits which constitute her separate property.

{¶28} STRS members qualify for retirement benefits in one of three ways: (1) at age 60 with a minimum of five years of service credit; (2) at age 55 with a minimum of 25 years of service credit; or (3) at any age with a minimum of 30 years of service credit. R.C. 3307.58. Wife was 46 years old at the time of the hearing on Husband's motion for a DOPO. There is no dispute that she had earned 12.23 years of service credit by the date of the parties' divorce in 2001. Husband concedes that Wife is currently receiving disability benefits because she is unable to work due to a serious medical condition. Nevertheless, he argues that he is entitled to 50% of those benefits because they are available to Wife. Husband, however, disregards the language of the agreement which allows disbursement to him "at the earliest available opportunity" only as such disbursement comports with Ohio law. Pursuant to the well-established law of this district, Husband is not entitled to a portion of Wife's disability benefits unless Wife is receiving them in lieu of old-age retirement. Based on her age and service credit, Wife does not yet qualify for old-age retirement pursuant to R.C. 3307.58 and cannot, therefore, be receiving disability benefits in lieu of old-age retirement.

{¶29} Husband argues that Wife, because of her disability, has been "retired" and is, therefore, receiving retirement benefits to which he is entitled to a portion. He relies on R.C. 3307.63 which states in pertinent part: "A member participating in the plan *** who has elected disability coverage under this section, has not attained age sixty, and is determined by the state

teachers retirement board *** to qualify for a disability benefit shall be retired on disability under this section.” The statute concludes, however, that “[a] disability retiree under this section whose disability retirement has been terminated, when eligible, may apply for service retirement provided by section 3307.58 of the Revised Code.” R.C. 3307.63. Accordingly, the statute recognizes a distinction between disability retirement and old-age retirement. Husband has not explained how the mere designation of Wife as “retired” entitles him to her disability benefits.

{¶30} Moreover, the burden of proving that the retiree’s disability benefits fall within the exception for marital earnings lies with the spouse seeking disbursement of the retiree’s benefits. *Bauser*, 118 Ohio App.3d at 835. Therefore, unless Husband presented evidence to establish that Wife is receiving STRS disability benefits in lieu of old-age retirement benefits, and what portion of those disability benefits constitutes retirement pay value, the trial court erred in adopting his DOPO which awards him a present disbursement of Wife’s benefits. Husband argues that there is nothing in the record to support Wife’s assertion that her disability benefits constitute income replacement benefits. Husband, however, misplaces the burden of proof. A review of the record indicates that Husband failed to present any evidence to show that, in consideration of her age and service credit, Wife’s disability benefits constitute anything other than income replacement benefits.

{¶31} Because Husband failed to prove that Wife is receiving STRS disability benefits in lieu of retirement benefits, he has failed to prove the existence of any marital portion of those benefits which must currently be divided between the parties. Husband’s reliance on this Court’s recent decision in *Murphy-Kesling v. Kesling*, 9th Dist. No. 24176, 2009-Ohio-2560, is misplaced. *Kesling* does not stand for the proposition that STRS disability benefits are marital

property subject to equitable division. Rather, it reiterates that the doctrines of res judicata and forfeiture, as well as the strictures of Civ.R. 60(B), may apply to preclude a successful appeal within the context of a challenge to the disbursement of disability benefits pursuant to the terms of a DOPO. *Kesling* at ¶17-18.

{¶32} Because Husband’s proposed DOPO directs disbursement of Wife’s separate property in contravention of law, the domestic relations court erred by approving Husband’s DOPO as the order of the court. Wife’s first and second assignments of error are sustained.

ASSIGNMENT OF ERROR III

“THE TRIAL COURT ERRONEOUSLY RELIED ON ‘EXPERT TESTIMONY’ REGARDING THE EFFECT OHIO LAW WOULD HAVE ON THE PROPOSED DIVISION OF PROPERTY ORDERS.”

{¶33} Wife argues that the domestic relations court erred by relying on the purported expert testimony of Brian Hogan of Pension Evaluators when deciding to adopt Husband’s proposed DOPO because the witness’ testimony was conclusory and legally inaccurate. Because this Court’s resolution of Wife’s first and second assignments of error is dispositive, we decline to address her third assignment of error as it has been rendered moot for purposes of this appeal. See App.R. 12(A)(1)(c).

III.

{¶34} Wife’s fourth assignment of error is overruled. The first and second assignments of error are sustained. We decline to address the third assignment of error. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
MOORE, J.
CONCUR

APPEARANCES:

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