

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Estate of Christina S. Rodela
[Nikki Mettling, Executor]

Court of Appeals No. L-14-1092

Appellee

Trial Court No. DR1994-0539

v.

Walter D. Rodela

DECISION AND JUDGMENT

Appellant

Decided: March 6, 2015

* * * * *

Steven C. Hales, for appellee.

Douglas A. Wilkins, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Walter Rodela, appeals the April 1, 2014 judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which awarded appellee,

Nikki Mettling¹, Executor of the Estate of Christine S. Rodela, a lump sum judgment of \$23,450.87 following the filing of a motion to show cause. Because we agree that the trial court abused its discretion in calculating the judgment amount, we reverse.

{¶ 2} The salient facts are as follows. The parties divorced on May 1, 1995. The final divorce decree provided, in relevant part:

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the parties acknowledge that the Defendant has been participating in the Ohio Public Employees Deferred Compensation and has made contributions to said plan during the marriage. As a result of the division of the property, the parties acknowledge that Plaintiff is entitled to a \$12,500 interest plus growth in this amount until date of distribution from Defendant's Ohio Public Employees Deferred Compensation Plan. It is the parties intent that Plaintiff's \$12,500 be segregated and set in a separate account so that it can continue to grow until Plaintiff is allowed to take the money out pursuant to the laws, rules, or plan governing the deferred compensation plan or at the time that the Defendant, in whose name the participant account is maintained, commences receipt of the money and income accredited to the account in accordance with the laws, rules, and

¹ We note that Ms. Mettling's first name had various spellings during the course of the proceedings. We have opted to use the version found on the notice of appeal and the April 1, 2104 judgment entry.

plan, whichever event occurs first in point of time. Defendant is enjoined from taking any action that will effect Plaintiff's \$12,500 interest plus growth that belongs to the Plaintiff.

{¶ 3} The decree further provided that the court would have continuing jurisdiction to ensure that appellee received her equitable share of the deferred compensation funds and that a review hearing was to be held 60 days following the divorce decree to confirm that the compensation program was complying with the terms. The hearing was never held.

{¶ 4} On August 31, 2010, appellee filed a motion to show cause arguing that appellant should be held in contempt of court for failure to fully comply with the above-quoted provision. Specifically, appellant tendered to appellee, in a check dated May 18, 2010, the sum of \$11,656.25, which represented her share of his deferred compensation, after taxes and minus the growth as specified in the divorce decree.

{¶ 5} On November 10, 2010, following the death of Christine Rodela, appellee filed a motion to substitute the executor of the estate, Nikki Mettling. The motion was granted.

{¶ 6} On June 13, 2011, appellant filed a motion to dismiss appellee's motion to show cause. Appellant argued that due to the death of Christine Rodela, the probate court had subject matter jurisdiction over the enforcement of the property division. Appellant further argued that the estate was not the real party in interest. Appellee opposed the motion. The magistrate found that the court had jurisdiction over the issue. On

November 19, 2012, the trial court overruled objections to the magistrate's decision finding that the court retains jurisdiction over its orders and that the estate requested enforcement of an existing order, not a modification.

{¶ 7} The show cause motion came on for a hearing on March 28 and June 13, 2013. Appellee presented the testimony of William Kimmelman, an expert in the division of pension assets in divorce cases. Kimmelman was asked to provide an estimated value of appellee's portion of the deferred compensation proceeds, factoring in the growth in the fund from 1995 through February 1, 2013. Over multiple objections, Kimmelman acknowledged that "in a perfect world" in valuing the funds every prior statements would have been reviewed. Kimmelman testified that because he did not have the statements he utilized the Standard & Poor's ("S & P") 500 Index to approximate an amount. Kimmelman then testified that value of the funds as of February 1, 2013, was \$40,388.25. Kimmelman stated that, based on his experience, a return rate between four to six percent was appropriate. He admitted during cross-examination that he had not seen an investment portfolio for any of the years between 1995 and 2010. Kimmelman also acknowledged that in 1995, the Ohio Public Employees Deferred Compensation Program was unable, contrary to the divorce decree, to segregate funds.

{¶ 8} Attorney Charles Conn testified that in 1995, he represented appellant in the divorce action. Conn testified that appellee's attorney drafted the final divorce judgment entry and that there was to be a 60-day review hearing. Conn testified regarding a letter dated March 30, 1995, and admitted into evidence, which he sent to appellee's attorney

indicated that Ohio's deferred compensation plan could not segregate the funds as provided in the entry. Conn stated that there was no further response and the review hearing was never held.

{¶ 9} On January 16, 2014, the magistrate, sua sponte, called the matter for a hearing to elicit additional testimony as to the valuation of the growth between April 24, 1995, and May 18, 2010. Kimmelman testified that the value of the funds from April 24, 1995, through May 18, 2010, less the \$11,656.25, plus growth, and on the \$843.75 from May 19, 2010, through November 13, 2013. Kimmelman stated that the first sum was \$15,660, and the second sum was \$1,354.98. Kimmelman was again questioned about the accuracy of using the S & P 500 Index; he acknowledged no actual knowledge of whether the Ohio Deferred Compensation program actually invested in any of the S & P 500 companies.

{¶ 10} On February 11, 2014, the magistrate filed his decision which found that appellant was in contempt by failing to pay appellee's \$12,500 marital share of the fund plus the growth during the period of 1995 through May 18, 2010. Objections to the magistrate's decision were filed.

{¶ 11} On April 1, 2014, the trial court modified the magistrate's decision finding that appellant was not in contempt of court. The court rejected the objections relating to the valuation of the fund growth. This appeal followed.

{¶ 12} Appellant now raises one assignment of error for our review:

The lump sum award is not supported by competent, credible evidence.

{¶ 13} In his sole assignment of error, appellant contends that the court erred when it utilized the S & P 500 Index in valuing the growth of appellee's share of the deferred compensation funds. We note that retirement benefits accumulated during a marriage are marital assets subject to property division in divorce. *DiFrangia v. DiFrangia*, 11th Dist. Trumbull No. 2003-T-0004, 2003-Ohio-6090, at ¶ 8. “[T]he trial court should attempt to ascertain the optimum value the pension or retirement benefits has to the parties as a couple.” *Id.* at ¶ 22, quoting *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 183, 559 N.E.2d 1292 (1990).

{¶ 14} In addition, “a trial court has continuing jurisdiction to ‘clarify and construe its original property division so as to effectuate its judgment.’” *Brooks v. Brooks*, 6th Dist. Fulton No. F-11-020, 2013-Ohio-405, ¶ 13, quoting *Gordon v. Gordon*, 144 Ohio App.3d 21, 24, 759 N.E.2d 431 (8th Dist.2001). The court has broad discretion in clarifying any ambiguous language and may consider “not only the intent of the parties but the equities involved.” *Weller v. Weller*, 115 Ohio App.3d 173, 179, 684 N.E.2d 1284 (6th Dist.1996), quoting *In re Avers v. O’Boyle*, 6th Dist. Ottawa No. 93OT061, 1994 WL 518134 (Sept. 23, 1994).

{¶ 15} Reviewing the facts of the present case, we must find that the trial court abused its discretion in relying on William Kimmelman's valuation of the growth of the deferred compensation funds. Kimmelman admitted that he had no knowledge of the

particular funds invested in by the state of Ohio; he admitted no knowledge that even one stock on the S & P 500 list was actually purchased by the deferred compensation program. Kimmelman acknowledged that the most accurate way of valuing appellant's marital portion was to review the statements from the relevant time period; the statements were neither requested nor received. *See Newcomer v. Newcomer*, 6th Dist. Lucas No. L-11-1183, 2013-Ohio-5627, ¶ 69 (“The value of a pension fund is relatively fixed and may be determined with reasonable diligence”).

{¶ 16} Further the court, in its April 1, 2014 judgment entry on appellant's objections, stated that it had found no Ohio cases which utilized the S & P 500 index when calculating growth of the funds. The court cited two federal cases which had allowed for an approximation in calculating damages. In *Martin v. Feilen*, 965 F.2d 660 (8th Cir.1992), a breach of fiduciary ERISA case, the court remanded the case permitting evidence of the market in order to determine the “approximate” damages caused by the malfeasance. *Id.* at 673. Similarly, in *In re Burghoff*, 374 B.R. 672 (N.D.Iowa 2007), the court agreed that the S & P 500 Index provided a reasonable guide as to what the plaintiffs might have earned with their investment during the relevant time period. *Id.* at 679.

{¶ 17} The case before us is distinguishable from the cases relied upon by the court. Unlike *Martin* and *Burghoff*, there has been no testimony or evidence presented to show that the statements from the relevant time period were not available. In the above cases, the S & P Index was utilized because it was not possible to quantify an amount of

damages for investments which were never made. Based on the foregoing, we find that the trial court abused its discretion in calculating damages and appellant's assignment of error is well-taken.

{¶ 18} On consideration whereof, we find that substantial justice was not done the party complaining and the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is reversed and the matter is remanded for further proceedings consistent with this decision. Pursuant to App.R. 24, appellee is ordered to pay the costs of this appeal.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See also 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.