

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Graham H. Alexander,	:	
	:	
Plaintiff-Appellant/ Cross-Appellee,	:	
	:	
v.	:	No. 10AP-211 (C.P.C. No. 05DR-10-3809)
	:	
Carol M. Alexander,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee/ Cross-Appellant.	:	

D E C I S I O N

Rendered on November 16, 2010

Christopher J. Minnillo, for plaintiff-appellant/cross-appellee.

Wolinetz Law Offices, LLC, Barry H. Wolinetz and Kelly M. Gwin, for defendant-appellee/cross-appellant.

APPEALS from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

McGRATH, J.

{¶1} Plaintiff-appellant/cross-appellee, Graham H. Alexander ("Graham"), and defendant-appellee/cross-appellant, Carol M. Alexander ("Carol"), appeal from the Amended Judgment Entry/Decree of Divorce ("amended divorce decree"), entered by the Franklin County Court of Common Pleas, Division of Domestic Relations, on February 8, 2010.

{¶2} The trial court terminated the parties' marriage in a Judgment Entry/Decree of Divorce ("original divorce decree"), entered February 13, 2009. Both Graham and Carol appealed that judgment, and this court affirmed in part, reversed in part, and remanded two issues for the trial court to address. *Alexander v. Alexander*, 10th Dist. No. 09AP-262, 2009-Ohio-5856 ("*Alexander I*"). One issue pertained to Graham's child support obligation in light of Social Security benefits being received by the children. The second issue, and the one with which we are presently concerned, pertained to Graham's Employee Pension Plan from Battelle Memorial Institute ("BMI") (hereinafter referred to as "the pension plan").

{¶3} Graham retired prior to the parties seeking a divorce and elected a guaranteed 20-year payout and a 100 percent survivorship to Carol. As stated in *Alexander I*, this election provided that should Graham die within 20 years of his retirement date, Carol or their children would receive his pension payments until the conclusion of the 20-year period. The 100 percent survivorship interest ensured that upon Graham's death, Carol would be entitled to receive Graham's pension for the rest of her life. However, if Carol survives Graham, regardless of whether he dies within 20 years of his retirement, Carol will begin receiving 100 percent of Graham's monthly pension payments and will receive those payments for the remainder of her life. The trial court determined, based on stipulation of the parties, that the present value of Carol's survivorship interest was \$151,905.15. Neither party challenged this value on appeal. Rather, the parties disputed whether this asset should have been included on the marital balance sheet.

{¶4} In the trial court, Carol argued the survivorship benefit was too speculative to be included on the marital balance sheet because it is only received if Graham predeceases her. The trial court agreed and did not include the survivorship interest on the marital balance sheet. This court disagreed and stated:

First, this case does not involve speculation as to whether Carol might remarry because the only prerequisite to her receipt of survivorship benefits is that she survive Graham. Further, whereas the parties in *Dunham* differed in age by only seven years, Carol, who is in good health, is 25 years younger than Graham, who has battled prostate cancer. Moreover, the trial court's valuations incorporate life expectancies based on actuarial tables used by the experts, and those tables suggest that Carol will outlive Graham. It is arbitrary for the trial court to assume, for purposes of valuation, that Carol will outlive Graham, but to conclude that the same assumption is too speculative in compiling the marital balance sheet and dividing the marital assets.

Id. at ¶20.

{¶5} Therefore, this court concluded that the trial court abused its discretion by excluding Carol's survivorship interest in Graham's pension from the marital balance sheet and remanded this matter to the trial court for further proceedings.

{¶6} On remand, the trial court, "to further equalize the property division in light of the valuation of the survivorship interest," ordered Carol to pay Graham "\$500 per month until one-half of the tax-affected value of the survivorship interest is paid in full, beginning on March 1, 2010." (Amended divorce decree at 17.) As stated in the amended divorce decree, the total tax-affected value of the survivorship interest is \$118,486.02; thus, Carol was ordered to pay \$500 per month until \$59,243.01 is paid in full. Both parties have appealed.

{¶7} Graham asserts the following two assignments of error for our review:

FIRST ASSIGNMENT OF ERROR:

IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO EQUALIZE THE PROPERTY DIVISION OF THE PARTIES AND NOT DISTRIBUTE THE PROPERTY EQUALLY WHEN THERE WERE ADEQUATE ASSETS AVAILABLE TO MAKE A PRESENT EQUAL DISTRIBUTION AND WITHOUT A FINDING FROM THE EVIDENCE THAT A PRESENT DISTRIBUTION WOULD BE INAPPROPRIATE UNDER THE FACTORS SET FORTH IN R.C. §3105.171(F).

SECOND ASSIGNMENT OF ERROR:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY MAKING A DISTRIBUTIVE AWARD THAT INVOLVED PERIODIC FUTURE PAYMENTS, WITHOUT INTEREST, OF AN ASSET THAT HAD A STIPULATED PRESENT VALUE AND WITHOUT A DETERMINATION THAT A DIVISION OF THE MARITAL PROPERTY IN-KIND OR IN MONEY WOULD BE IMPRACTICABLE OR BURDENSOME IN ACCORDANCE WITH R.C. §3105.171(E).

{¶8} Carol asserts the following single assignment of error on cross-appeal for our review:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT ORDERED CAROL TO PAY GRAHAM \$500 PER MONTH FOR HIS INTEREST IN THE MARITAL PORTION OF THE NON-MATURED SURVIVORSHIP BENEFIT.

{¶9} Generally, pension benefits earned during the course of a marriage are marital assets and a factor to be considered in the division of marital property. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 178. In considering the equitable distribution of pension benefits in a divorce:

[T]he 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.

Id.

{¶10} In her single cross-assignment of error, Carol asserts that, even though the survivorship benefit should have been included on the marital balance sheet, the trial court abused its discretion in ordering her to pay Graham now for a benefit she will not receive if she predeceases Graham. Also, because, according to Carol, Graham has no present need for the asset, Carol asserts the trial court should have either ordered that the asset be divided at the time Carol becomes entitled to it, i.e., at Graham's death should he predecease her, or retained jurisdiction over this issue so that if Carol predeceases Graham, her estate would be credited with whatever amounts she paid for the survivorship benefit not actually received.

{¶11} In effect, Carol is reiterating her argument from the appeal of the original divorce decree that the survivorship benefit is too speculative to be included on the marital balance sheet and be divided accordingly – a position we flatly rejected in *Alexander I*. In that appeal, we relied on *Salmon v. Salmon*, 9th Dist. No. 22745, 2006-Ohio-1557, which held survivorship benefits are not too speculative to be considered in the division of a marital estate. The *Salmon* court affirmed the offset of a wife's survivorship interest in the husband's pension where there was no evidence that the expert valuator did not consider the possibility of the wife predeceasing the husband, and stated "the mere fact that Wife's interest may never be realized does not undermine the fact that Wife's interest *currently* has some value." (Emphasis sic.) Id. at ¶17. See also

Blackledge v. Blackledge, 5th Dist. No. 03-CA-44, 2004-Ohio-2086; *Levine v. Levine* (Sept. 3, 1999), 4th Dist. No. 98 CA 34; *Wylie v. Wylie* (June 4, 1996), 4th Dist. No. 95CA18 (remanding for a valuation of the parties' survivorship interests).

{¶12} Because we held in *Alexander I* that the survivorship benefit had a current value and was not too speculative to include on the marital balance, we find no abuse of discretion in the trial court's determination to equitably divide the asset. Further, we find no abuse of discretion in the trial court's valuation of the asset since it used the value of the survivorship benefit on the de facto marriage termination date as stipulated to by the parties. Accordingly, we overrule Carol's single cross-assignment of error.

{¶13} In his first assignment of error, Graham contends the trial court abused its discretion when instead of making a present distribution the trial court set up an installment payment method that will take close to ten years to complete. We are inclined to agree that the ordered installment method appears unreasonable under the circumstances presented herein; however, we note the record is void of any reasoning for the use of the installment method with respect to this asset when such method was not used for any other asset. This renders difficult our ability to determine whether there is an abuse of discretion.

{¶14} Considerations that appear to weigh against using the presently ordered installment method for this asset are as follows. First, offsetting the present value of Carol's survivorship benefit with installment payments does not disentangle the parties' economic partnership so as to create a conclusion to the marriage. *Hoyt*, supra. Additionally, there is no finding by the trial court that it would be impractical for Carol to offset the present value of her share with other marital assets. Also, though Graham was

awarded the marital share of the pension, this was offset by 50 percent of its present value with property of like-kind awarded to Carol. Moreover, under the current installment payment method, Graham would be 81 years old before the installment payments were complete. To the extent the parties continue to argue that the trial court was troubled by the speculative nature of this survivorship benefit, we note that we already decided in *Alexander I* that the said benefit was not too speculative for division because it has a current value.

{¶15} In light of these considerations, the method of division of Carol's survivorship benefit in Graham's pension, i.e., the ten-year installment payment method, appears unreasonable; however, we are hesitant to so hold without any reasoning from the trial court as to why it divided the asset as it did. Therefore, we find that the better approach is to remand the matter so that the trial court can either divide this asset in a different manner or set forth its reasoning for establishing a nearly ten-year installment payment method so we can adequately conduct our analysis. Therefore, we sustain, to a limited extent, Graham's first assignment of error.

{¶16} In conclusion, Carol's single cross-assignment of error is overruled, Graham's first assignment of error is sustained to a limited extent as discussed above, Graham's second assignment of error is moot, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, is hereby reversed and remanded to that court in accordance with law and this decision.

Judgment reversed; cause remanded with instructions.

KLATT and SADLER, JJ., concur.
