

2012 PA Super 83

CHRISTINE A. MACDOUGALL,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellant	:	
	:	
v.	:	
	:	
WILLIAM D. MACDOUGALL,	:	
	:	
Appellee	:	No. 1849 EDA 2011

Appeal from the Order Entered June 17, 2011  
in the Court of Common Pleas of Bucks County,  
Civil Division, at No(s): A06-01-62624-Q-20

BEFORE: SHOGAN, OTT, and STRASSBURGER\*, JJ.

OPINION BY STRASSBURGER, J.:

Filed: April 10, 2012

Christine A. MacDougall (Wife) appeals from the trial court’s order denying her petition for civil contempt. We reverse and remand for further proceedings consistent with this opinion.

The overarching legal issue in this case is whether post-separation cost of living adjustments (COLAs) are considered marital property subject to the terms of an equitable distribution order, where the ex-spouse was awarded a share of the marital portion of the former spouse’s defined benefit pension plan.

The relevant facts and procedural history of this case are as follows. On January 30, 1993, Wife and William MacDougall (Husband) were married.

\* Retired Senior Judge assigned to the Superior Court.

The parties separated, and on July 26, 2001, Wife filed a complaint in divorce. On September 5, 2003, the couple participated in an equitable distribution hearing, and at the conclusion thereof, agreed that Wife would receive a deferred distribution of 50 percent of the marital portion of Husband's military pension. N.T., 9/05/03, at 1-11.

On May 20, 2004, the trial court entered a divorce decree and confirmed that Wife would receive 50 percent of the marital portion of Husband's military pension. Decree, 5/20/04, at 1. Pursuant to the terms of Husband's retirement plan, a service member who obtains 20 years of creditable service receives 50 percent of his monthly salary, as a pension, without any monetary contribution on the part of the service member.<sup>1</sup>

After accumulating 20 years (240 months) of military service, Husband retired on December 31, 2005. As the parties were married in 1993 and separated in 2001, Husband served a total of 102 months in the military while married to Wife. According to a coverture fraction calculation, the marital portion of Husband's pension was 42.5 percent (102 months of service while married divided by 240 months of total service), and Wife's 50 percent share of this amount was 21.25 percent.

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<sup>1</sup> The Uniformed Services Former Spouses' Protection Act, 10 U.S.C.S. §§ 1408-1412, authorizes a state court to dispose of military retirement pay according to state law in a divorce proceeding, provided the court has jurisdiction over the military member. ***See generally Wagner v. Wagner***, 768 A.2d 1112 (Pa. 2001).

At the time of separation, Husband's monthly retirement benefit was calculated at \$1,207.35, which amounted to 50 percent of his three year average monthly salary of \$2,414.70. Consequently, Husband determined that Wife's 21.25 percent of the \$1,207.35 monthly retirement benefit was \$256.56. From the time of separation until his retirement, Husband received COLAs that increased his salary, and consequently, his retirement benefit.

On February 1, 2006, Husband entered retirement pay status and received his first monthly pension payment. Since then, Husband has each month mailed Wife a money order in the amount of \$256.56. Due to the COLAs, Husband's actual total monthly retirement pay was \$1,634.00 from February 2006 to December 2006; \$1,687.00 from January 2007 to December 2007; \$1,725.00 from January 2008 to December 2008; and \$1,825.00 from January 2009 to December 2009.

On November 13, 2009, Wife filed a petition for civil contempt. In this petition, Wife claimed that Husband violated the equitable distribution order by failing to distribute 21.25 percent of Husband's actual, total monthly benefit as augmented by the COLA increases. On December 14, 2009, Husband filed an answer to the petition for contempt.

Following the submission of a joint stipulation of facts, oral argument, and legal briefing, the trial court denied Wife's petition for civil contempt on June 17, 2011. The trial court concluded that under prevailing precedent,

Husband complied with the terms of the equitable distribution order. Particularly, the trial court concluded that under *Berrington v. Berrington*, 633 A.2d 589 (Pa. 1993), Husband properly used the date of separation to determine Wife's base monthly retirement benefit of \$256.56, and that Wife was not entitled to any COLA increases that occurred since the date of separation.

Thereafter, Wife filed a timely notice of appeal. Both the trial court and Wife have complied with Pa.R.A.P. 1925.

On appeal from the order denying her petition for civil contempt, Wife raises a number of issues, but they all distill into the question of whether the "marital property" component of Husband's pension includes the COLA increases. Appellant's Brief at 1-2.<sup>2</sup>

Our standard of review from an order denying a petition for civil contempt is as follows. This Court will reverse a trial court's order denying a civil contempt petition only upon a showing that the trial court misapplied the law or exercised its discretion in a manner lacking reason. *Harcar v. Harcar*, 982 A.2d 1230, 1234 (Pa. Super. 2009) (citations omitted). In proceedings for civil contempt of court, the general rule is that the burden of proof rests with the complaining party to demonstrate that the defendant is in noncompliance with a court order. *Lachat v. Hinchcliff*, 769 A.2d 481,

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<sup>2</sup> We note that an order denying a petition for civil contempt is immediately appealable. *Basham v. Basham*, 713 A.2d 673, 674 (Pa. Super. 1998).

489 (Pa. Super. 2001) (citations omitted). To sustain a finding of civil contempt, the complainant must prove, by a preponderance of the evidence, that: (1) the contemnor had notice of the specific order or decree which he is alleged to have disobeyed; (2) the act constituting the contemnor's violation was volitional; and (3) the contemnor acted with wrongful intent.

***Id.***

Preliminarily, we frame the legal dispute in this case, beginning with what the parties and the trial court agree on. First, the parties and the trial court all agree that the dispositive authority in this is case is ***Berrington*** and its progeny. **See** Trial Court Opinion (T.C.O.), 9/14/2011, at 7. Second, all those interested agree that Husband's arithmetic is correct, and the monthly base amount he owed to Wife, without considering the COLA increases, using a date of separation salary and a coverture fraction, is \$256.52. **See** T.C.O., 9/14/2011, at 7; Appellant's Brief at 19-22. Thus, the sole issue in this case is whether Wife is entitled to receive a share of Husband's post-divorce COLAs under the equitable distribution order. **See** Appellant's Brief at 8-11; Appellee's Brief at 6-9.

In ***Berrington***, our Supreme Court analyzed a defined benefit pension plan, akin to Husband's retirement plan in this case, and determined how to calculate the non-employee-spouse's share of the pension fund. The Supreme Court announced that the participant-spouse's salary at the time of separation would dictate the non-participant's share of retirement benefits.

The Supreme Court also decided what post-separation increases in the pension plan could be attributed to the employee-spouse's efforts (which are considered non-marital property), and those increases that could not be attributed to the employee-spouse's efforts or contributions (which are considered marital property). As the High Court pronounced:

[W]e hold that in a deferred distribution of a defined benefit pension, the spouse not participating may not be awarded any portion of the participant-spouse's retirement benefits which are based on post-separation salary increases, incentive awards or years of service. Any retirement benefits awarded to the non-participant spouse must be based only on the participant-spouse's salary at the date of separation. **However, should there be increases in retirement benefits payable to the employee spouse between the date of marital separation and the date the non-participant spouse begins receiving benefits which are not attributable to the efforts or contributions of the participant-spouse, any such increased benefits may be shared by the non-participant spouse based upon his or her proportionate share of the marital estate.**

*Id.* at 594 (emphasis added).<sup>3</sup>

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<sup>3</sup> In 2004, our legislature amended 23 Pa.C.S. § 3501, which superseded, at least in part, the majority opinion in *Berrington*. See *Smith v. Smith*, 938 A.2d 247, 252 and 258-261 (Pa. 2007) (concluding that 23 Pa.C.S. § 3501 abrogated *Berrington* "regarding the use of the salary at the time of separation," but suggesting that *Berrington* and its progeny remains good law insofar as it determines whether post-separation enhancements are attributable to the participant-spouse's efforts or contributions).

Here, the trial court concluded that the amended version of 23 Pa.C.S. § 3501 was inapplicable because the equitable distribution order pre-dated the amendment, T.C.O., 9/14/2011, at 10-11. The parties agree with the trial court's legal conclusion. Therefore, for purposes of this appeal, we assume that current § 3501 has no bearing on the disposition of this case, and that *Berrington* is controlling law.

In applying **Berrington**, the trial court concluded that Wife could not receive any enhanced value to Husband's retirement benefit as a result of the COLAs, reasoning as follows:

The Court must determine whether the COLAs argued in this immediate case were considered. The **Berrington** exception does not apply to the COLA that was accumulated from the time of separation to the date of reaching pay status. . . . There was no evidence of any "augmentation by growth in the pension fund based on factors other than the employer's or employee's contributions to the fund after the date of separation." **See Berrington**, at 590. In fact, COLAs are an employer's contribution in the form of an increase in the service members' salary. It is for this reason that we hold that Wife is precluded from receiving any portion of the Husband's COLAs.

T.C.O., 9/14/2011, at 9-10. Upon review, we disagree with the trial court.

In **Smith**, our Supreme Court observed that the Court "has struggled to reach a consensus regarding how to provide economic justice in the equitable division of pension benefits." 938 A.2d at 253. The issue before the Court in that case, *inter alia*, was whether post-separation increases in a retirement benefit due to legislative reclassifications entailed any effort or contribution on the husband-pensioner's part. After noting the applicability of the amendment in 23 Pa.C.S. § 3501, and stating that the outcome of the case would have been the same if **Berrington** and its progeny had applied, the Court concluded that the wife was entitled to share in the post-separation increases because the husband did not expend any contribution or effort to receive the enhancements. In tracing and reviewing **Berrington** and its successors, our Supreme Court cited favorably the lead opinion in

***Gordon v. Gordon***, 681 A.2d 732 (Pa. 1996) (opinion announcing the judgment of the court).

In ***Gordon***, the lead opinion applied ***Berrington***, and reiterated “that some changes in the nature and value of the pension occurring after separation are of a different character in that they arise through no effort or expense on the part of the participating spouse.” ***Gordon***, 681 A.2d at 735. According to the lead opinion in ***Gordon***, “[t]hese changes in the pension not attributable to the participant’s labors or contributions . . . are not regarded as property acquired after separation, but as adjustments to the plan which should be available to both parties to the marriage.” ***Id.*** The lead opinion in ***Gordon*** further explained that the purpose of the above-highlighted holding in ***Berrington*** “was to allow the non-participating spouse to benefit from changes in the plan which no one knew about at the time of equitable distribution, and which arose through no effort or expenditure on the part of the participating spouse.” ***Id.***

In ***Gordon***, the husband was offered retirement incentives in the form of supplemental retirement income and a bonus, which was calculated based upon the total years of services and an accumulation of past bonuses. Our Supreme Court decided whether the enhancements to the pension benefits resulting from the employee-spouse’s election of early retirement constituted post-separation efforts or contributions, and thus non-marital property that was excluded from equitable distribution. With regard to the

husband's supplemental retirement income and bonus, the lead opinion in **Gordon** concluded that these increases in the husband's retirement benefit were marital property because, "for the most part, the increased benefits were not attributable to the efforts or contributions of [the husband]." **Id.** at 736. Rather, the lead opinion in **Gordon** concluded that the "[s]upplemental retirement income and the bonus were simply benefits based upon years of service, and so required no effort or contributions from [the husband.]" **Id.** at 736.

In **Meyer v. Meyer**, 749 A.2d 917 (Pa. 2000), another retirement incentive case, a majority of the Justices of our Supreme Court reaffirmed and applied the reasoning of the lead opinion in **Gordon**. The Court in **Meyer** was confronted with the issue of whether the husband's action in purchasing two years of additional service to obtain a special retirement option were attributable to the husband's efforts or contributions. The **Meyer** Court noted that "[a]ll that was required of husband to receive the benefits in this case was that he accumulate enough years of service," and that "[w]ithout the martial years of service, he could not have done this." **Id.** at 919-20 (citation omitted). From this premise, the **Meyer** Court concluded that "[w]here, as here, increased pension benefits are based on years of service, which include years of service in which the marriage was intact, the increased benefits must be included in the marital estate to the extent of the coverture fraction." **Id.** at 919. "The rationale behind the rule

is clear – to provide the nonparticipant spouse the benefits of favorable changes in retirement benefits that are not due to the participant spouse's post-separation efforts." *Id.*

Therefore, under the principles of law announced in *Berrington* and its progeny, this Court must determine whether the increase in Husband's retirement benefit due to the COLAs was attributable to the efforts or contributions of Husband. If they are the result of Husband's efforts or contributions, then the COLAs cannot be deemed marital property; on the other hand, if the COLAs were not the result of Husband's efforts or contributions, they will be considered marital property.

In resolving this issue, we conclude that the lead opinion in *Gordon*, as reaffirmed and endorsed in *Smith* and *Meyer*, is the most instructive. Akin to the husband in *Gordon*, whose increase in retirement benefits was based upon years of service, Husband's COLAs in this case were automatic and provided as a matter of right, based solely upon Husband's continued years of service. Contrary to the trial court's conclusion, the increases in Husband's salary and retirement benefit, due to the COLAs, were not merit-based or the result of a promotion that was dependent on Husband's work performance. Rather, the COLAs were a fixed formula calculated by the Department of Labor to account for adjustments in the consumer price index, and Husband received the COLAs without any additional effort or contribution on his part. As such, similar to the retirement incentives that

the husband obtained in **Gordon**, the COLAs that Husband received in this case were unrelated to Husband's unique personal efforts or individual monetary contributions. Therefore, the COLAs that Husband collected post-separation and after retirement are marital property subject to equitable distribution.

Additionally, we find strong support for our conclusion from treatises and the case law from foreign jurisdictions that have applied a legal standard similar to that enunciated in **Berrington**, and have concluded that post-separation COLAs are marital property. As one legal scholar explained:

The most commonly recognized exception to the accrued benefit theory is cost-of-living increases. When the accrued benefit increases after the divorce because of a cost-of-living increase, the growth is clearly not the result of postdivorce efforts. Rather, it is the result of passive appreciation in overall benefit. As noted above, passive appreciation is always treated as marital property. Most states therefore agree that the marital estate is entitled to share in postdivorce cost-of-living increases.

Bret T. Turner, *Divorce Litigation – Postdivorce Increases in Retirement Benefits*, Divorce Code Amendments 2005, at 72 (Pennsylvania Bar Institute 2005).

In **Koziol v. Koziol**, 636 N.W.2d 890, 901 (Neb. Ct. App. 2001), the court found that COLAs are includable as a marital asset, stating: "Provisions for an increase in a pension due to cost of living adjustments have been held to be passive adjustments, and when they are tied to market or other forces, then both spouses should benefit so far as the marital portion is concerned." **Id.** (citation omitted).

Further, in *McGee v. McGee*, 585 S.E.2d 36 (W.Va. 2003), the Supreme Court of West Virginia surveyed nationwide jurisprudence on the issue and commented:

While this Court has not directly addressed the question presented, other jurisdictions analyzing this issue have concluded that the non-pensioner spouse in a divorce proceeding is entitled to share in COLA adjustments in retirement benefits applicable to the percentage of retirement benefits awarded to that spouse in the divorce order. *See Neese v. Neese*, 669 S.W.2d 388 (Tex. App. 11 Dist. 1984); *In re Marriage of Bocanegra*, 58 Wn. App. 271, 792 P.2d 1263 (Wash. App. 1990); *Thorpe v. Thorpe*, 123 Wis. 2d 424, 367 N.W.2d 233 (Wis. App. 1985). Such typical conclusion is premised upon the reasoning that such benefits constitute what is essentially passive appreciation of marital property, not attributable to contributions made by the pensioner spouse subsequent to the divorce.

*Id.* at 41.

Finally, in *Boyd v. Boyd*, 67 S.W.3d 398, 408 (Tex. Ct. App. 2d Dist. 2002), an intermediate appeals court from Texas elucidated: "Post-divorce increases in the value of an individual's defined-benefit retirement plans that are attributable to the person's continued employment, such as raises, promotions, services rendered, and post-divorce contributions, are the individual's separate property and are not subject to division. But post-divorce cost-of-living increases and other increases in value that are not attributable to the employee's continued employment after divorce are community property subject to division." *Id.* (citations omitted). *See also Brown v. Brown*, 828 S.W.2d 601, 602 (Ark. Ct. App. 1992); *Pagliari v. Pagliaro*, 31 A.D.3d 728, 729 (N.Y. Ct. App. 2d Div. 2006).

In light of the above authority, we conclude that the trial court erred in finding that the COLAs were not marital property. Because the COLAs accrued without any effort or contribution by Husband, and were instead the result of passive appreciation, they are marital property subject to proportionate distribution.

In her remaining arguments, Wife proposes different ways for this Court to calculate the manner, method and amount of her fair share of the COLAs. Appellant's Brief at 16-22. Rather than engage in such an assignment, which by its very nature is extremely fact intensive, this Court will remand to the trial court to conduct the calculation and enter an appropriate order.

For the above-stated reasons, we reverse the trial court's order and remand for the trial court to conduct an evidentiary hearing, if necessary, to calculate the amount of COLAs owed to Wife. Once the trial court makes this calculation, it shall enter an appropriate order compelling Husband to tender the required amount to Wife. ***See Romeo v. Romeo***, 611 A.2d 1325 (Pa. Super. 1992) (concluding that the trial court has the statutory and rule-based authority to grant appropriate relief where a party has failed to comply with an equitable distribution order). Moreover, on remand, the trial court shall also make findings of fact addressing the outstanding issues raised by Wife's petition for contempt – *i.e.*, whether Husband's non-compliance with the equitable distribution order was volitional and whether

J. S02044/12

Husband acted with wrongful intent – to determine if Husband was in civil contempt.

Order reversed. Case remanded for further proceedings outlined in this opinion. Jurisdiction relinquished.