

Affirm in part, reverse in part, and remand; Opinion Filed June 26, 2018.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-17-00826-CV

**ROBERT EDWIN GILL, Appellant
V.
LYNDA RAE GILL, Appellee**

**On Appeal from the 97th District Court
Archer County, Texas
Trial Court Cause No. 2015-0164A-CV**

**MEMORANDUM OPINION
Before Justices Bridges, Evans, and Whitehill
Opinion by Justice Evans**

Appellant, Robert Edwin Gill, appeals from a final decree of divorce awarding appellee, Lynda Rae Gill spousal maintenance for a period of five years and 100% joint and survivor benefits in Robert's retirement pension plan. Robert¹ contends that the evidence is insufficient to support the court's award of spousal maintenance based on the trial court's finding that Lynda lacked the present ability to earn sufficient income to provide for her minimum reasonable needs. Robert also contends that the trial court erred in awarding 100% of his joint and survivor's annuity to Lynda because it amounts to an award of his future separate property. We affirm the court's award of spousal maintenance and reverse the award of 100% joint and survivor benefits in Robert's retirement pension plan and remand to the trial court for further proceedings.

¹ Due to having the same surname, we will use the parties' first names.

BACKGROUND

Robert and Lynda divorced in 2017 after having been married for over thirty-nine years. In the final divorce decree, the court ordered Robert to pay Lynda \$650 per month for five years or until the earliest of one of the following events occurs: Lynda receives her first payment of her share of Robert's retirement pension benefits; the death of either Lynda or Robert; Lynda's remarriage; or further orders from the court affecting the spousal maintenance obligation, including a finding of cohabitation. Lynda was also awarded a 100% interest in the joint and survivor's annuity of Robert's retirement pension plan.

ANALYSIS

I. Spousal maintenance.

In his first issue, Robert contends that the evidence is insufficient to support the court's award of spousal maintenance based on its finding that Lynda lacked the present ability to earn sufficient income to provide for her minimum reasonable needs.

The trial court may, in its discretion, award spousal maintenance when a divorce is sought in a marriage lasting ten years or more, and the spouse seeking spousal maintenance lacks sufficient property to meet her minimum reasonable needs and cannot support herself due to insufficient earning capability. TEX. FAM. CODE ANN. § 8.051 (West 2006); *Deltuva v. Deltuva*, 113 S.W.3d 882, 888 (Tex. App.—Dallas 2003, no pet.). We review the trial court's decision to award spousal maintenance under an abuse of discretion standard. *Id.* The legal and factual sufficiency of the evidence are relevant factors in assessing whether the trial court abused its discretion, but are not independent grounds for asserting error. *Diaz v. Diaz*, 350 S.W.3d 251, 254 (Tex. App.—San Antonio 2011, pet. denied). The trial court does not abuse its discretion if there is some evidence of a substantive and probative character to support the decision or if reasonable

minds could differ as to the result. *In re Marriage of McFarland*, 176 S.W.3d 650, 656 (Tex. App.—Texarkana 2005, no pet.).

Robert contends that Lynda’s yearly salary was more than adequate to meet her minimum reasonable needs and that it was her request to be awarded the marital home which put her in a worse financial situation. Determining the spouse’s minimum reasonable needs is a fact-specific determination done on a case-by-case basis. *Deltuva*, 113 S.W.3d at 888. Because Robert has limited his argument to Lynda’s income and housing costs, we likewise limit our review to consideration of the evidence regarding Lynda’s income and housing costs.

The evidence showed that when Robert and Lynda divorced, they had been married for more than thirty-nine years. Lynda was fifty-eight years old and had been employed with the Texas Department of Public Safety for thirty-one years. She was eligible to retire from her job but did not know when she would retire. Lynda’s gross salary was \$2,829 per month and, after taxes and deductions for retirement and her 401k, her net monthly pay was \$2,136.07. Lynda testified that her monthly expenses totaled \$2,764.54 based upon the assumption that the court would award her the debt and equity from the marital home. The record reflects that the marital home was awarded to Lynda in the final divorce decree. The mortgage payment and utilities associated with the home were \$1,191.85. Lynda testified that her shortfall each month would \$628.47. She also testified that she did not have sufficient assets to pay for her monthly minimum reasonable needs.²

With regard to housing, Lynda testified that during the pendency of the divorce, she was living with her son in the house her son rented from her mother and did not have any rent payments; however, she “was not going to live with her son forever.” She testified that if she was awarded the marital residence, she would move back into the house and live there. She testified that the

² Robert does not argue that Lynda had sufficient separate property to satisfy her minimum reasonable needs. His only reference to the division of assets was his statement that a portion of the Charles Schwab IRA that was awarded to Robert could have been awarded to Lynda to remedy any perceived shortfall in meeting her minimum needs.

marital house was actually cheaper than some of the other housing places she looked at. She testified that she had contacted an apartment complex and learned that the rent would be a little over \$1,000 a month.³ Robert does not challenge the trial court's award of the marital home to Lynda. Nor did he present evidence showing that housing was available to Lynda for an amount significantly less than the cost of living in the marital home.

Based on this record, we cannot say that the trial court abused its discretion in considering the costs associated with the marital home in determining Lynda's minimum reasonable needs for purposes of spousal maintenance and finding that Lynda lacked the present ability to earn sufficient income to provide for her minimum reasonable needs.

Robert also contends that Lynda did not show that she exercised diligence in earning sufficient income or developing the necessary skills to provide for her minimum reasonable needs because she did not present any evidence that showed she attempted to find employment that would offer a higher income or work more hours or that she tried to develop any skills that would further her chances to secure employment that would provide for her reasonable minimum needs. It is a rebuttable presumption that maintenance is not warranted unless the spouse seeking maintenance has exercised diligence in earning sufficient income or developing the necessary skills to provide for the spouse's minimum reasonable needs during a period of separation and during the time the suit for dissolution of the marriage is pending. TEX. FAM. CODE ANN. § 8.053 (West Supp 2017). The record established that Lynda had been employed full-time with the Texas Department of Public Safety for the past thirty-one years and was currently making almost \$34,000 a year, producing a net income of a little over \$25,500. Although she was eligible to retire from her job, she had no current plans to retire. Robert cites no authority supporting the proposition that

³ The \$1,191.85 monthly cost associated with the marital home included the mortgage payment and utilities. The testimony does not indicate whether the \$1,000 monthly rental fee for an apartment included utilities.

evidence indicating a thirty-one year record of steady full-time employment during the marriage is insufficient to show that she exercised diligence in earning sufficient income to overcome the statutory presumption against spousal maintenance nor do we find any supporting authority for the argument. The authorities cited by Robert are inapplicable as they concern spouses awarded spousal maintenance due to an incapacitating physical or mental disability⁴ or the inability to obtain full-time employment.⁵

From the testimony presented, the court was within its discretion to conclude that Lynda lacked the present ability to earn sufficient income to provide for her minimum reasonable needs. Accordingly, we cannot say that court abused its discretion in awarding spousal maintenance to Lynda. We rule against Robert on his first issue.

II. Retirement Benefits.

In his second issue, Robert contends that the trial court erred in awarding 100% of his survivor's annuity to Lynda because it amounts to an award of his future separate property. We agree.

Robert and Lynda married in 1977. The couple divorced on January 20, 2017. For most of the marriage, Robert had been employed by Oncor Electric Delivery (Oncor).⁶ Robert's continued employment with Oncor after the divorce is not in dispute.⁷ Robert participates in Oncor's retirement program which includes a thrift savings plan and a retirement pension plan. In

⁴ See *Smith v. Smith*, 115 S.W.3d 303, 306 (Tex. App.—Corpus Christi—Edinburg 2003, no pet.) (spouse suffered aneurism which left him physically disabled); *Ayala v. Ayala*, 387 S.W.3d 721, 729 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (spouse was diabetic and blind and unable to work); *Hackenjios v. Hackenjios*, 204 S.W.3d 906, 910 (Tex. App.—Dallas 2006, no pet.) (spouse permanently disabled); *Pickens v. Pickens*, 62 S.W.3d 212, 216 (Tex. App.—Dallas 2001, pet. denied) (same).

⁵ See *Yarbrough v. Yarbrough*, 151 S.W.3d 687, 690–92 (Tex. App.—Waco 2004, no pet.).

⁶ At the final divorce hearing on May 31, 2016, Robert testified that he had worked for Oncor for thirty-seven years and eight months.

⁷ At the time of the divorce, Robert was eligible to retire.

the final divorce decree signed on April 12, 2017,⁸ the trial court awarded Lynda interest in Robert's retirement pension plan benefits as follows:

A portion of Robert Edwin Gill's retirement benefits in Oncor Electric Delivery, LLC, Retirement Pension Plan arising out of Robert Edwin Gill's employment with Oncor Electric Delivery, LLC, as of May 31, 2016, that portion being one-half (1/2) of the marital property portion, together with any interest, dividends, gains, or losses on that amount arising since that date along with 100% joint and survivor benefits and more particularly defined in a Qualified Domestic Relations Order signed by the Court subsequent to the entry of this Final Decree of Divorce. It is further ordered that Lynda Rae Gill shall be entitled to receive her portion of Robert Edwin Gill's retirement benefits when Robert Edwin Gill reaches the age of 62.

Texas law prohibits courts from divesting spouses of their separate property. *See Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 139–40 (Tex. 1977). In *Berry v. Berry*, the Texas Supreme Court approved the proposition “that pension benefits accruing for services rendered after a divorce are not part of the estate of the parties subject to division on divorce.” 647 S.W.2d 945, 947 (Tex. 1983) (citing in *In re Marriage of Rister*, 512 S.W.2d 72 (Tex. Civ. App.—Amarillo 1974, no writ). Thus, the court held that post-divorce increases in retirement benefits paid to Mr. Berry could not be awarded to Mrs. Berry because “to do so would invade Mr. Berry's separate property, which cannot be done.” *Id.*

Robert had not yet retired at the time of the divorce. To the extent that his benefits increase from his continued employment and future increased earnings, awarding Lynda 100% of the survivor annuity benefits has the effect of awarding benefits accruing to Robert after the divorce from Lynda. Under the court's holding in *Berry*, such benefits are to be apportioned to the spouses based on the value of the community's interest at the time of divorce. *Berry*, 647 S.W.2d at 947; *Grier v. Grier*, 731 S.W.2d 931, 932 (Tex. 1987); *see also Shanks v. Treadway*, 110 S.W.3d 444,

⁸ The initial divorce decree was signed on January 20, 2017. On February 15, 2017, the trial court granted Robert's motion for new trial challenging, among other things, the 100% survivorship language contained in the divorce decree. After a hearing on the motion for new trial, the trial determined that the survivorship language should remain the same. A Qualified Domestic Relations Order has not been signed by the court.

446 (Tex. 2003) (holding that the division of retirement benefits is currently governed by the *Berry* case). We therefore sustain Robert's second issue, reverse the trial court's order awarding Lynda 100% of the survivor annuity and remand the matter to the trial court for further hearing and the entry of amended orders consistent with this opinion.

CONCLUSION

We affirm the court's award of spousal maintenance and reverse the award of 100% joint and survivor benefits in Robert's retirement pension plan and remand to the trial court for further proceedings consistent with this opinion.

/David Evans/
DAVID EVANS
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

ROBERT EDWIN GILL, Appellant

No. 05-17-00826-CV V.

LYNDA RAE GILL, Appellee

On Appeal from the 97th District Court,
Archer County, Texas
Trial Court Cause No. 2015-0164A-CV.
Opinion delivered by Justice Evans,
Justices Bridges and Whitehill
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED** in part and **REVERSED** in part. We **REVERSE** that portion of the trial court's judgment that awards Lynda 100% joint and survivor benefits in Robert's retirement pension plan. In all other respects, the trial court's judgment is **AFFIRMED**. We **REMAND** this cause to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 26th day of June, 2018.