

[Cite as *Gallitto v. Levinsky*, 2017-Ohio-5715.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ROBYN R. GALLITTO,)	CASE NO. 16 MA 0157
)	
PLAINTIFF-APPELLEE,)	
)	
VS.)	OPINION
)	
NICK C. LEVINSKY,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Domestic Relations Appeal from the Court of Common Pleas Division of Domestic Relations of Mahoning County, Ohio Case No. 2006 DR 736
---------------------------	---

JUDGMENT:	Affirmed.
-----------	-----------

APPEARANCES:

For Plaintiff-Appellee:	Atty. William Biviano Biviano Law Firm Huntington Bank Tower, Suite 700 108 Main Ave. S.W. Warren, Ohio 44481
For Defendant-Appellant:	Atty. Matthew C. Giannini 1040 S. Commons Place Suite 200 Youngstown, Ohio 44514

JUDGES:

Hon. Carol Ann Robb
Hon. Mary DeGenaro
Hon. Timothy P. Cannon of the Eleventh District Court of Appeals, sitting by
assignment.

Dated: June 27, 2017

ROBB, P.J.

{¶1} Defendant-Appellant Nick C. Levinsky (Husband) appeals the decision of Mahoning County Common Pleas Court, Domestic Relations Division, finding he began receiving disability retirement in lieu of age and service retirement on March 1, 2007, and the marital portion of the age and service component was 17.8%, which included a social security offset. Husband argues the trial court's decision was an abuse of discretion. For the reasons expressed below, the trial court's decision is affirmed.

Statement of the Case

{¶2} In 2006, Plaintiff-Appellee Robyn Gallito (Wife) filed a complaint for divorce from Appellant (Husband). *Gallito v. Levinsky*, 7th Dist. No. 13 MA 143, 2016-Ohio-889, ¶ 2. The final divorce decree was issued on November 19, 2007 without a Division of Property Order (DOPO). *Id.* In the divorce decree the trial court held a portion of Husband's OPERS retirement was marital and awarded it to Wife. *Id.*

{¶3} Almost five years after the divorce decree, Wife filed a motion to enforce asking the court to compel Husband to execute the DOPO drafted by Wife. *Id.* at ¶ 5. The DOPO submitted by Wife sought payments to her as the Alternate Payee from Husband's plan from two distinct benefits: the age and service retirement benefit, and the disability monthly benefit. *Id.* at ¶ 4. Husband refused to sign and moved to dismiss the proposed DOPO. *Id.* at ¶ 5. Husband contended his disability benefits were separate property, and Wife was only entitled to the marital portion of his age and service retirement, which he was not receiving yet. *Id.* at ¶ 4.

{¶4} The trial court held a hearing on the motions. Brian Hogan of QDRO Consultants testified at the hearing. *Id.* at ¶ 6-7. Hogan testified Husband accumulated 29.749 years of service and 6.612 years of that service was the marital portion. *Id.* at ¶ 8. The marital portion translated to 22.4702% of the total years of service and the present value of the marital portion of Husband's age and service pension was \$267,386.70. *Id.* at ¶ 8.

{¶5} Hogan also testified, based upon the date Husband began his employment with the police department, “he was covered by a disability plan which provided that if an individual left employment on a disability, they had the option to continue to receive a disability pension even after they reached the qualifying age to receive an age and service pension.” *Id.* at ¶ 9. Hogan testified Husband was 51 years old when he began receiving disability benefits, which he could continue to collect for the rest of his life; he did not have to convert to an age and service pension. *Id.* at ¶ 10.

{¶6} Hogan stated Husband would be eligible to convert to age and service pension when he was 52 because he had over 25 years of service. *Id.* at ¶ 10. Husband turned 52 in March 2008, approximately four months after the divorce decree was issued. *Id.* at ¶ 11.

{¶7} Hogan opined Husband was receiving a disability pension in lieu of an age and service pension. *Id.* at ¶ 12. Hogan did not offset any social security benefits for which Wife could be eligible when he calculated the present value of the marital portion of Husband's age and service pension. *Id.* at ¶ 12.

{¶8} After hearing the evidence, the trial court found that pursuant to the 2007 divorce decree Wife was awarded the marital portion of Husband's OPERS age and service retirement. *Id.* at ¶ 14-16; 8/16/13 J.E. However, the court declined to award any portion of Husband's disability benefits to her. *Id.* at ¶ 14-15.

{¶9} Wife appealed the decision to this court. *Id.* at ¶ 17. We found merit with her appeal. *Id.* at ¶ 23.

{¶10} In our decision, we explained the general rule is pension or retirement benefits are marital assets, while disability benefits are separate property. *Id.* at ¶ 19, citing *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 178–179, 559 N.E.2d 1292 (1990) (pension marital asset) and R.C. 3105.171(A)(3)(b) and (6)(a)(vi) (separate property statute) and *Bakle v. Bakle*, 2d Dist. No.2009 CA 9, 2009–Ohio–6003, ¶ 13 (disability is compensation for personal injury). The exception to this general rule is when disability benefits are accepted in lieu of age and service benefits; in that situation, “they are marital property to the extent that the retirement pay value is included in the

disability pension benefit.” *Id.*, quoting *Arkley v. Arkley*, 7th Dist. No. 03 JE 10, 2003–Ohio–7021, ¶ 14.

{¶11} We further explained:

Judge Giulitto did not err in refusing to award Wife Husband's disability benefits based on the language of the 2007 divorce decree. However, the trial court did err by failing to determine what portion of Husband's monthly retirement benefit was the age and service component, of which Wife was originally awarded the entire marital portion, calculated to be 6.6 years.

The uncontroverted testimony of Hogan was that Husband's pension had an age and service component to it, even though he took a disability retirement before the age he was eligible to take an age and service retirement. It is also uncontroverted that Husband, who has since met the eligibility requirements to begin receiving an age and service pension, nonetheless does not have to make that election and may remain on a disability pension.

Most importantly, it was Hogan's uncontroverted testimony that Husband was receiving a disability retirement in lieu of an age and service retirement. Pursuant to our holding in *Arkley*, the trial court must assess how much of Husband's monthly benefit constitutes the age and service component, as that is a marital asset, which here was awarded to Wife. Only the disability component is his separate property. Because the trial court did not make this determination, we must refrain from doing so, as the trial court must resolve this issue in the first instance.

Id. at ¶ 20-22.

{¶12} We reversed the trial court and remanded the case for further proceedings, instructing the court to determine three issues. *Id.* at ¶ 24. First, the

trial court was asked to determine when Husband began receiving “a disability retirement in lieu of an age and service retirement.” *Id.* Secondly, “what portion of his disability pension represents the age and service component?” *Id.* Lastly, “what is the value of the marital portion of the age and service component?” Upon determining these three issues, we ordered the trial court to issue a DOPO and ordered Husband to sign it. *Id.*

{¶13} Prior to a hearing on the above remanded issues, Husband filed a Motion to Offset State Benefits with the trial court. 6/24/16 Motion. In response, Wife filed a motion to dismiss. 7/1/16 Motion.

{¶14} A hearing was held on August 15, 2016. At the outset of the hearing, the trial court overruled the motion to dismiss and granted the motion to offset Wife’s social security benefits.

{¶15} Hogan once again testified at this hearing. His testimony and opinion focused on the three questions we asked the trial court to determine on remand. As to the first question, Hogan opined the disability benefits in lieu of age and service benefits began on the date Husband commenced the disability benefits. 8/15/16 Tr. 17. Hogan explained Husband was eligible to retire at age 48 with 25 years of service. 8/15/16 Tr. 16. He admitted this testimony was different from his earlier testimony where he stated Husband was eligible to retire at age 52 with 25 years of service. 8/15/16 Tr. 16; *Gallito I*, 2016-Ohio-889 at ¶ 10. Age 52 is used for safety officers, while age 48 is used for law enforcement officers. 8/15/16 Tr. 16. Hogan assumed Husband fell under the law enforcement officer provisions, not the public safety officer provisions. 8/15/16 Tr. 16. Therefore, since Husband began receiving disability benefits in March 2007 when he was 50 years old and eligible to retire, Hogan concluded the disability benefits in lieu of age and service benefits began on the date he commenced the disability benefits.

{¶16} On cross-examination Hogan admitted it is a presumption that Husband would take his age and service benefits when he was eligible to receive them. 8/15/16 Tr. 41. Hogan admitted there is nothing in the record indicating Husband said he was going to assert his benefit when he was eligible to receive it. 8/15/16 Tr. 41.

{¶17} As to the second question, Hogan opined the entire disability benefit is in lieu of age and service benefit. 8/15/16 Tr. 17. The basis for his opinion is the minimal difference between the amount Husband collects under disability and the amount he would collect under age and service. 8/15/16 Tr. 17. Hogan stated Husband had 29.749 years of service and given the OPERS formula for age and service benefit, Husband's age and service benefit would be approximately 72.5 percent of his final average salary. 8/15/16 Tr. 12. He indicated on disability, Husband is receiving 73 percent of his final average salary. 8/15/16 Tr. 12.

{¶18} As to the third question, Hogan testified 6.612 years of service were during the marriage. 8/15/16 Tr. 18. Therefore, since Husband had 29.749 years of service "22.2 percent is the marital portion of the age and service benefit or of the disability benefit being paid in lieu of age and service benefit." 8/15/16 Tr. 18. Hogan acknowledged his computation did not include a social security offset. 8/15/16 Tr. 21. The court ordered Hogan to determine the social security offset.

{¶19} Hogan also testified as to the amount of arrearage owed to Wife, which is \$112,974. 8/15/16 Tr. 19.

{¶20} Husband called one witness to testify - William D. Leicht, CPA, a fiscal officer for Boardman Township. 8/15/16 Tr. 58-59. The majority of his testimony was objected to and the objections were sustained. 8/15/16 Tr. 63-68. However, the testimony that was allowed indicated Husband did not officially retire, but rather resigned under disability. 8/15/16 Tr. 61

{¶21} At the end of the hearing, the trial court ordered Husband to sign the DOPO, which he did. 8/15/16 Tr. 74.

{¶22} The trial court issued its decision about a month after the hearing. It held Husband began receiving disability retirement in lieu of an age and service retirement on March 1, 2007. 9/14/16 J.E. The entire amount of disability retirement represented the age and service component of the benefit being received. 9/14/16 J.E. The value of the marital portion of the age and service retirement was 22.2%, but the social security offset reduced that percentage to 17.8%. 9/14/16 J.E. The

arrearage was determined to be \$94,270.90 through September 30, 2016 (after social security offset). 9/14/16 J.E.

{¶23} Husband timely appeals from the decision.

Assignment of Error

“The trial court abused its discretion in determining that all of Husband’s disability benefits constitute his age related retirement pension and the arrearage calculated thereon.”

{¶24} In reviewing a trial court’s decision in domestic relations matters, an appellate court must uphold the decision absent an abuse of discretion. *Booth v. Booth*, 44 Ohio St.3d 142, 144, 541 N.E.2d 1028 (1989). An abuse of discretion implies that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶25} Husband asserts the trial court abused its discretion in determining all of his disability retirement benefits constituted age and service retirement benefits. He argues the Disability Allowance statute, R.C. 145.361, as amended effective January 7, 2013 provides for termination of disability and “switch over” to service retirement benefits. He claims Hogan’s application of the statutory age of eligibility to age and service retirement was arbitrary because he is going to be required to “switch over” to age and service pension. Furthermore, he contends section (B) of that statute does not permit the disability benefit to be taken out of the employees’ savings fund, i.e., age and service retirement, and Hogan “failed to take into account the financial impact of the statutorily mandates reservation of the employee portion of contributions to husband’s employee savings fund in lieu of its transfer with the employer contributions to the pension serve fund.” Appellant’s brief 8.

{¶26} These arguments are meritless. R.C. 145.361 is the Disability Allowance statute. Division (B) indicates no part of the disability allowance can be charged against the member’s contributions and Division (C) is an indication of when disability benefits end:

(B) Sufficient reserves for payment of the disability allowance shall be transferred to the annuity and pension reserve fund from the employers’

contribution fund. The accumulated contributions of the member shall remain in the employees' savings fund. No part of the allowance paid under this section shall be charged against the member's accumulated contributions.

(C) A disability allowance paid under this section shall terminate at the earliest of the following:

(1) The effective date of age and service retirement under sections 145.32, 145.33, and 145.332, or section 145.37 or former section 145.34 of the Revised Code;

(2) The date the allowance is terminated under section 145.362 of the Revised Code;

(3) The later of the last day of the month in which the recipient attains the applicable age, or the last day of the month in which the benefit period ends as follows:

Attained Age at Effective Date of Disability Allowance

60 or 61

62 or 63

64 or 65

66, 67, or 68

69 or older

Benefit Period

60 months

48 months

36 months

24 months

12 months

The applicable age is sixty-five if the member is described in division (A) of section 145.32 or division (A) of section 145.332 of the Revised Code. It is sixty-six if the member is described in division (B) of section 145.32 or division (B) of section 145.332 of the Revised Code. It is sixty-seven if the member is described in division (C) of section 145.32 or division (C) of section 145.332 of the Revised Code.

R.C. 145.361.

{¶27} Division B has not been altered since the statute's inception in 1992. *Compare* R.C. 145.361(B) (1992 version); R.C. 145.361(B) (2000 version). Division C has undergone alterations in 2000 and 2013. The 2013 amendment added the last paragraph of division (C)(3); the only significant change made to division C since its inception in 1992.

{¶28} Husband asserts he is going to have to “switch over” to age and service retirement based on the final paragraph of division (C)(3) of R.C. 145.361. Under division C disability benefits end upon the earliest of one of three events. Subsection 1 states the effective date of age and service retirement under specified retirement statutes. The applicable one for Husband is R.C. 145.332(A)(1) – age 48 with 25 years of service. The language of subsection 1 is “the effective date of age and service retirement.” However, since Husband has not elected age and service retirement, there is no effective date yet. Subsection 2 states the date the allowance is terminated under R.C. 145.362. That statute is titled Disability Benefit Recipient

Considered on Leave of Absence; Medical Examination; Statement; Restoration to Position and Salary. It is applicable when disability is terminated because the employee is no longer disabled and the employee can be restored to his/her prior position. It is undisputed Husband is still disabled. Subsection 3 lists end dates for disability periods of certain ages. For Husband who was 48 years of age with 25 or more years of service, the end of disability benefits is age 65.

{¶29} Under the 2013 version of the statute, Husband's disability may end at age 65. Despite the 2013 amendments, and given the record, it is unclear whether he will be required to switch over to age and service retirement. At the time of the first hearing on January 29, 2013, which resulted in our decision in the first appeal, the January 7, 2013 amendments were in effect. Testimony at the January 29, 2013 hearing included an opinion on whether or not Husband would have to switch retirement benefits. In *Gallito I*, we summarized Hogan's testimony about whether Husband would be required to convert his disability retirement benefit to age and service retirement benefit upon reaching a certain age; we explained Hogan testified Husband could stay on disability for life:

Hogan consistently testified that based upon the date Husband began his employment with the police department he was covered by a disability plan which provided that if an individual left employment on a disability, they had the option to continue to receive a disability pension even after they reached the qualifying age to receive an age and service pension. Subsequent to Husband's hire date, employees who originally took a disability pension would have to switch over to an age and service pension once they reached the qualifying age. * * *

Applying these principles to Husband, Hogan further testified that Husband was 51 years old when he began receiving disability benefits, which he could continue to collect for the rest of his life; he did not have to convert to an age and service pension. * * *

Id. at 9-10.

{¶30} During the second hearing in 2016, Hogan was not asked about the 2013 amendments and the effect it would have on his ability to stay on disability retirement and not elect age and service retirement. Moreover, it is noted those questions could have been asked at the 2013 hearing.

{¶31} At the second hearing, Hogan testified Husband was eligible for age and service retirement at age 48 because he had 25 years of experience. Tr. 16. Hogan explained Husband had 29.749 years of service and given the OPERS formula for age and service benefit, Husband's age and service benefit would be approximately 72.5 percent of his final average salary. Tr. 12. He indicated on disability retirement, Husband is receiving 73 percent of his final average salary. Tr. 12. Husband did not dispute any of that testimony. Therefore, since Husband began receiving disability retirement benefits in March 2007 when he was 50 years old and eligible to retire, and there was only a slight difference between the amount of disability retirement benefits and age and service retirement, Hogan concluded the disability benefits in lieu of age and service benefits began on the date he commenced the disability benefits and all of the disability benefit represented the age and service component of the benefit being received.

{¶32} It is difficult to find the trial court abused its discretion in agreeing with Hogan's conclusions. Given the above evidence, it was not unreasonable for the trial court to conclude the entire amount of disability was taken in lieu of age and service retirement. The fact that the disability retirement benefit and age and service retirement benefit are nearly identical in amount and given that Husband was of age to retire, the trial court's conclusions were reasonable.

{¶33} This assignment of error is meritless. The trial court did not abuse its discretion in finding Husband began receiving disability retirement in lieu of an age and service retirement on March 1, 2007 and the entire amount of Husband's disability retirement was taken in lieu of age and service retirement. The trial court's decision is affirmed.

DeGenaro, J. concurs.

Cannon, J., concurs.
The Eleventh District Court of Appeals,
Sitting by assignment.