

[Cite as *State v. Smith*, 2015-Ohio-2258.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

| | | |
|----------------------------|---|----------------------|
| ANGELA SMITH, | : | APPEAL NOS. C-140391 |
| | | C-140408 |
| Plaintiff-Appellee/Cross- | : | TRIAL NO. DR-1102461 |
| Appellant, | | |
| | : | |
| vs. | | <i>OPINION.</i> |
| | : | |
| RAYMOND SMITH, | | |
| | : | |
| Defendant-Appellant/Cross- | : | |
| Appellee. | : | |

Civil Appeal From: Hamilton County Court of Common Pleas, Domestic Relations
Division

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: June 12, 2015

The Farrish Law Firm and Kathleen C. King, for Plaintiff-Appellee/Cross-Appellant,

Leslie F. Thomas Co., L.P.A., and Leslie F. Thomas, for Defendant-Appellant/Cross-Appellee.

Please note: this case has been removed from the accelerated calendar.

FISCHER, Presiding Judge.

{¶1} Defendant-appellant Raymond Smith appeals from the judgment of the Hamilton County Court of Common Pleas, Domestic Relations Division, granting his ex-wife, plaintiff-appellee Angela Smith's Civ.R. 60(B) motion for relief from judgment, seeking to include Raymond's Federal Employee Retirement System ("FERS") pension, which had been inadvertently omitted as a marital asset from the decree of divorce. Raymond challenges the trial court's decision to divide equally his FERS pension as of the date of the parties' divorce decree without reconsidering the parties' property division, and the trial court's decision to designate Angela as an alternate payee with survivorship benefits in his FERS pension. Angela has cross-appealed, challenging the trial court's decision to grant Raymond's motion for modification of her spousal-support award to \$1 per year effective February 1, 2013. We affirm the trial court's judgment.

Factual and Procedural Posture

{¶2} Raymond and Angela were married in 1978. They were divorced by decree on November 8, 2012, after 34 years of marriage. The decree of divorce incorporated a separation agreement, which the parties had signed on October 10, 2012. The decree provided that Raymond would pay Angela \$1200 a month in spousal support, with the amount and term of the spousal support subject to the continuing jurisdiction of the court. Specifically, it provided: "The parties agree that upon a future showing of any substantial change in circumstances, the court will exercise its jurisdiction to determine if a modification is reasonable and appropriate."

{¶3} On January 4, 2013, Raymond filed a motion to modify and/or terminate spousal support based upon a substantial change in circumstances. Raymond had applied for early retirement from the United States Postal Service ("USPS") effective January 31, 2013, and had begun receiving his FERS benefits. In 2012, Raymond had

gross earnings of \$79,300. Following his retirement, he received \$1451 per month in retirement income.

{¶4} On February 27, 2013, Angela filed a motion for relief from judgment. On April 2, 2013, Angela filed an amended motion for relief from judgment. On May 3, 2013, Angela filed a second amended motion for relief from judgment. She alleged that Raymond had fraudulently failed to list as marital assets his FERS pension, his vacation-leave pay, and a lump-sum payment made as an early-retirement incentive. Angela alternatively argued that even if the court found that Raymond had not committed a fraud upon her and the court, she and Raymond had not reached an agreement on the issue of his pension, and the court, therefore, should include the pension as a marital asset and divide it equally between them.

{¶5} Hearings on both motions were held before a magistrate on September 13, and October 20, 2013, and January 14, 2014. On February 14, 2014, the magistrate issued a decision. The magistrate acknowledged that the parties' separation agreement had referred to and divided Raymond's thrift savings plan, which he had accumulated during the marriage from his employment with the USPS, but that it had not referenced his pension plan or his accrued vacation pay.

{¶6} After reviewing Raymond's property statement, which had listed his pension plan as a "marital asset," and correspondence between Angela's and Raymond's counsel before the divorce decree had been entered, the magistrate concluded that Raymond had not intentionally concealed his pension plan, but that its omission from the separation agreement had been inadvertent. The magistrate determined that the omission of the marital pension benefits was significant and that Raymond should pay Angela \$227 a month until his pension payments ceased.

{¶7} The magistrate stated that while it was not an equal division of the asset, it was equitable in that it equalized the parties' income. The magistrate awarded Angela half of Raymond's vacation-leave pay, but did not award her any of the lump-sum retirement incentive. The magistrate determined the lump-sum retirement incentive was nonmarital, because no evidence had been presented as to what portion, if any, of the amount was attributable to Raymond's employment during the marriage as opposed to a monetary incentive to encourage his retirement.

{¶8} The magistrate further found that Raymond had voluntarily undertaken the USPS retirement offer based upon his concerns for potential job elimination, the differences between himself and management, and his health problems. The magistrate cited the factors in R.C. 3105.18(C)(1), and stated that the most important factor was Raymond's substantial decrease in income. The magistrate granted Raymond's motion to modify spousal support and reduced his annual spousal-support obligation to \$0 effective January 4, 2013, the date of his motion to modify spousal support.

{¶9} Angela filed eight objections to the magistrate's decision. She argued that the magistrate had erred by failing to divide Raymond's FERS pension equally, and by failing to order that Raymond be required to name her as an alternate payee with survivor benefits in Raymond's pension plan. With respect to Raymond's motion to modify spousal support, Angela argued that even if the magistrate had not erred by basing his decision on the equity of the circumstances that existed at the time of the hearing on the Civ.R. 60(B) motion, the magistrate had erred by failing to consider the parties' bona fide and consistent expenses, the rental income that Raymond could be receiving from the unemployed woman with whom he was living, and the income he could be earning from employment. Angela further argued that the magistrate had erred in applying the spousal-support law as it exists today, as opposed to the date of the

parties' decree of divorce, in setting Raymond's spousal-support obligation at \$0 and retaining jurisdiction, and in making the order effective to January 4, 2013, in light of the fact that Raymond had received regular pay through the end of January 2013, and had received an additional month and a half of pay as a buyout incentive.

{¶10} On June 4, 2014, the trial court sustained some of Angela's objections and overruled some of her objections. The trial court journalized an entry ordering that Raymond's FERS pension be divided equally between Angela and Raymond, based upon the value of the account at the time their divorce decree had been entered and that, if permitted, Raymond name Angela as the alternate payee with survivor benefits. The trial court further ordered that Raymond's spousal-support obligation be reduced to \$1 per year effective February 1, 2013, with the court retaining jurisdiction to modify the amount and duration of the spousal-support award. Neither Raymond nor Angela requested that the trial court issue findings of fact or conclusions of law. Raymond filed a timely notice of appeal on July 3, 2014. Angela filed a timely notice of cross-appeal on July 14, 2013.

Raymond's Appeal

{¶11} In his first assignment of error, Raymond argues that the trial court abused its discretion when it overruled the magistrate's decision and ordered that the FERS pension benefits be reconverted from income to an asset and divided equally between the parties. In his second assignment of error, Raymond argues the trial court abused its discretion when it issued a judgment that Angela be named as an alternate payee with survivor benefits in his pension plan. Because these assignments of error are interrelated, we consider them together.

{¶12} Retirement benefits acquired during the marriage are marital assets that must be equitably divided between the spouses in a final judgment of divorce.

Thompson v. Thompson, 1st Dist. Hamilton No. C-050578, 2006-Ohio-2623, ¶ 14, citing R.C. 3105.171(A)(3)(a)(ii) and *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 178, 559 N.E.2d 1292 (1990). A vested pension plan accumulated during the marriage is a marital asset and must be considered in conjunction with other factors under R.C. 3105.18 to ensure that the result reached is equitable. *Holcomb v. Holcomb*, 44 Ohio St.3d 128, 541 N.E.2d 597 (1989), syllabus.

{¶13} A separation agreement that omits one of the parties' major assets is unconscionable on its face and subject to being vacated under Civ.R. 60(B). *Khoshbin v. Khoshbin*, 9th Dist. Summit No. 18237, 1997 Ohio App. LEIXS 4296, *8 (Sept. 24, 1997).

{¶14} Raymond does not challenge the trial court's decision to grant Angela's Civ.R. 60(B) motion and to include his FERS pension as a marital asset. Rather, he challenges only the trial court's treatment of the pension. Raymond argues that under the Ohio Supreme Court's opinion in *Hoyt*, the trial court erred in treating the pension plan as an asset as opposed to income.

{¶15} However, as we read *Hoyt*, nothing prohibits the trial court's determination in this case to treat Raymond's pension plan as an asset instead of income. In *Hoyt*, the Supreme Court stated that when the parties are close to retirement age, the court may choose to treat the pension as income, but the court emphasized that "the trial court must have flexibility to make an equitable decision based upon the circumstances of each case, the status of the parties, the nature, terms and conditions of the pension plan, and the reasonableness of the result." *Hoyt*, 53 Ohio St.3d at 181 and paragraph one of the syllabus, 559 N.E.2d 1292. The Supreme Court, moreover, held that the trial court should attempt to preserve the pension or retirement asset so that each party can procure the greatest benefit. *Id.* at paragraph two of the syllabus.

{¶16} Here, given our review of the record, we cannot conclude that the trial court's decision to treat the pension plan as an asset to be divided equally between the parties was an abuse of discretion. The parties had been married for 34 years and Raymond had worked for the USPS during their entire marriage. And, as Angela points out, the parameters of the pension plan, which was in current-pay status, were not clear, and thus, the trial court did not err in ordering that Raymond, if permitted, name Angela as the alternate payee with survivorship benefits. *See Hoyt* at 181 (noting that a trial court cannot violate the terms of a pension plan when fashioning a division of the asset). We, therefore, overrule Raymond's first and second assignments of error.

{¶17} In his third assignment of error, Raymond argues that the trial court abused its discretion when it overruled the magistrate's decision that his FERS pension benefits be equally divided between the parties without considering the equity of this allocation on all the marital assets. We disagree.

{¶18} First neither party was prevented from presenting evidence regarding the allocation of the assets and debts during the hearings on the Civ.R. 60(B) motion. Nor does the record reflect that the trial court disregarded the equity of the allocation of assets. Rather, the record shows that both parties had agreed at the time they entered into the separation agreement that all of the assets included in the agreement were divided fairly and equitably. Because the parties were in agreement with the prior settlement, and because this was one last "forgotten" asset to be divided, we cannot conclude that the trial court abused its discretion in limiting its review to the pension plan and not reconsidering the distribution of assets between Angela and Raymond.

{¶19} In *Millhon v. Millhon*, 10th Dist. Franklin No. 90AP-1111, 1991 Ohio App. LEXIS 1375 (Mar. 26, 1991), the Tenth Appellate District reached a similar result when considering the division of two parcels of real property that had been omitted from

a separation agreement. The Tenth District held that “[w]hen relief is warranted on equitable grounds, the remedy should be narrowly tailored to reform only those portions of the property settlement tainted by the property’s omission. Equity grants only the remedy necessary to rectify the injustice complained of.” *Id.* at *10. The Tenth District held that “on remand, the trial court should allocate the property between the parties as provided in R.C. 3105.18, as effective, on the date the divorce was originally granted.” *Id.* at *12. Given our review of the record and *Millhon*, we cannot conclude that the trial court abused its discretion in dividing only the FERS pension and not reconsidering the distribution of assets between Angela and Raymond. We, therefore, overrule Raymond’s third assignment of error.

Angela’s Cross-Appeal

{¶20} In her cross-appeal, Angela has raised a single assignment of error, challenging the trial court’s determination that Raymond’s spousal-support obligation should be modified.

{¶21} “A trial court has broad discretion in determining a spousal support award, including whether or not to modify an existing award. Courts must look at the totality of the circumstances and determine whether the trial court acted unreasonably, arbitrarily, or unconscionably in modifying a spousal support obligation.” *Brandner v. Brandner*, 2012-Ohio-3043, 973 N.E.2d 330, ¶ 12 (12th Dist.).

{¶22} Angela first argues that the version of R.C. 3105.18 in effect at the time of the divorce should apply rather than the law in effect at the time of Raymond’s motion for modification. But, as Raymond points out, there was no difference between the version of R.C. 3105.18 at the time of his motion for modification and the date of the divorce decree. Thus, we find Angela’s argument meritless.

{¶23} Angela next argues that the trial court erred by reducing Raymond's spousal-support obligation without considering the factors set forth in R.C. 3105.18. But the magistrate's decision set forth the factors in R.C. 3105.18, and provided an analysis as to those factors. The trial court, in its entry on Angela's objections, stated, "The Magistrate appropriately found, based on husband's significant decrease in income, his motion to terminate spousal support to be well taken." The court then dropped a footnote, noting that "as stated by the magistrate, in 2012, husband had gross earnings of \$79,300. He now receives \$1451 per month in retirement income. Husband testified that his concern for potential job elimination and differences with management necessitated his early retirement. Husband also testified regarding his health problems, which was another factor in his decision to retire." Thus, Angela's argument is meritless.

{¶24} Angela next argues that Raymond should have worked for another 12 years, as retirement age is 67 for social-security purposes. However, as Raymond points out, the age and eligibility standards for social security are not express factors to be considered for spousal-support purposes. Nor has Angela cited any case law that would support using the social-security age of 67 as a mandatory-retirement age. Thus, Angela's argument is not well taken.

{¶25} Angela also argues that Raymond is capable of finding other employment. Raymond testified that his decision to retire was due to chronic chest and back problems, from which he had suffered during the course of the marriage. Angela, however, put forth no evidence to refute his claims that he was medically incapable of working.

{¶26} Angela next argues the trial court should have imputed rental income to Raymond, who testified that his girlfriend was living with him. Angela put forth

no evidence as to the value of any rental income for Raymond's home. Without any valuation, there was no basis for the court to determine what the rental income would be. Therefore, the trial court did not abuse its discretion by failing to incorporate the amount of the rental income into the spousal-support calculation.

{¶27} Finally, Angela argues the trial court abused its discretion when it reduced Raymond's spousal-support obligation effective February 1, 2013, as opposed to April 15, 2013. Angela argues that because Raymond received his last regular pay through the end of January 2013, and also received a buyout incentive of \$9,936.61 in gross pay, he had extra money that should have provided him with the financial means to pay Angela another six weeks of spousal support.

{¶28} The trial court sustained Angela's objection in part, noting that Raymond's retirement was not effective until January 31, 2013. However, the trial court considered the buyout to be nonmarital, as there was no evidence presented on the portion of the funds that was paid for husband's service during the marriage versus a bonus paid to him as a result of his decision to retire. Thus, we cannot conclude the trial court erred by reducing Raymond's spousal-support obligation to \$1 effective February 1, 2013. We, therefore, overrule Angela's cross-assignment of error.

Conclusion

{¶29} Having overruled Raymond's three assignments of error and Angela's cross-assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

DEWINE and MOCK, JJ., concur.

Please note:

The court has recorded its own entry this date.