[Cite as *Grae v. Grae*, 2010-Ohio-4083.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

JOHN G. GRAE,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-L-013**
- vs -	:	
BARBARA R. GRAE,	:	
Defendant-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Domestic Relations Division, 07 DI 000004.

Judgment: Affirmed.

Debra P. Simon, 425 Western Reserve Building, 1468 West Ninth Street, Cleveland, OH 44113 (For Plaintiff-Appellant).

Nicholas A. D'Angelo, Morganstern, MacAdams & DeVito Co., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} John G. Grae appeals from the December 31, 2009 judgment entry of the Lake County Court of Common Pleas, Domestic Relations Division, granting a divorce between him and Barbara R. Grae. We affirm.

{¶2} The Graes were married September 26, 1981. There is issue of the marriage: two daughters, Kristen and Lindsey. At the time this action commenced, both were emancipated and in college, though both remained dependent on their parents for support.

{¶3} Mr. Grae had a successful career in pharmaceutical sales, earning in excess of six figures. During the pendency of this action, Mr. Grae, alleging he suffered from depression and heart disease, went on disability. Initially, he received 100% of his salary as short-term disability – in excess of $2,000 per week – under a policy of insurance provided by his employer. Thereafter, it appears he received long-term disability under that policy, at a rate slightly in excess of $5,000 per month. Noting that his long term disability qualified him for Social Security benefits, his employer's private insurer reduced his private monthly benefit in or around November 2008 by the amount of his estimated monthly Social Security benefit – i.e., just over $2,100. This left his private monthly benefit at $2,944.99.

{¶4} Mrs. Grae was primarily a homemaker during the marriage. She did some outside work, apparently in retail sales. As of 2008, she was employed at Saks Fifth Avenue in Beachwood, Ohio, earning about $20,800 per year.

{¶5} This action commenced as a dissolution January 3, 2007, and was thereafter converted to a divorce. Trial was held on four separate days in the spring and summer of 2008 before the trial court's magistrate. January 30, 2009, she filed her decision. Relevant to this appeal are her conclusions regarding the parties Vanguard Individual Retirement Account, and spousal support.

{¶6} The Vanguard account had a stipulated value of $251,153 and was the parties' largest retirement asset. During the proceedings, Mr. Grae cashed it out, paying taxes and penalties, and allegedly used the proceeds – slightly in excess of $130,000 – for trips and gambling. For purposes of determining the parties' marital property interests in their retirement accounts, the magistrate used the stipulated value

of the Vanguard I.R.A., not the lower value of the monies obtained from it by Mr. Grae upon cashing it out.

{¶7} Regarding spousal support, the magistrate decided Mr. Grae owed Mrs. Grae $2,000 per month from May 1, 2007, through December 31, 2007, plus the processing charge. The magistrate further ordered him to pay $1,200 per month, plus processing charge, from January 1, 2008, through August 15, 2008 – the date of the marriage's termination. Finally, she ordered him to pay $1,200 per month, plus processing, commencing August 16, 2008, for a period of one hundred twenty months. The magistrate determined the court should retain jurisdiction over the amount of spousal support.

{¶8} Mr. Grae filed timely objections to the magistrate's decision. He challenged the amount of spousal support, based on the fact that his private monthly benefit had been reduced from over $5,000 per month to $2,944.99. He did not challenge the magistrate's conclusion that the value of the Vanguard I.R.A. should be deemed its full value, before his cashing out, and payment of taxes and penalties, upon it.

{¶9} October 27, 2009, the trial court overruled Mr. Grae's objections, and adopted the magistrate's decision. The trial court thereafter filed its final judgment entry of divorce. Mr. Grae timely noticed this appeal, assigning two errors. The first is:

{¶10} "The trial court erred to the prejudice of Plaintiff Appellant and abused its discretion when it assessed the face value of his Vanguard IRA account rather than its net value as his distributive share in its distribution of marital assets. ***"

{¶11} Civ.R. 53(D)(3)(b)(iv) provides:

{¶12} "Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶13} "'In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. (***)' *Goldfuss v. Davidson* (1997), 79 Ohio St.3d116, ***, at the syllabus. (Citations omitted.)" *The Huntington Natl. Bank v. Lomaz*, 11th Dist. Nos. 2008-P-0007 and 2008-P-0061, 2010-Ohio-705, at ¶42. (Parallel citations omitted.)

{¶14} We do not find plain error in the trial court's use of the Vanguard account's stipulated face value of $251,153 in making its distribution of the parties' marital assets. Indeed, Mr. Grae does not argue civil plain error. Rather, he asserts an exception to the waiver save for plain error doctrine mandated by Civ.R. 53(D)(3)(b)(iv). He cites to the decision in *Baker v. Baker* (1990), 68 Ohio App.3d 402, 405, where the Sixth District Court of Appeals held that untimely objections, if actually considered by the trial court, are preserved for appeal. Accord, *Gorombol v. Gorombol* (Aug. 9, 1996), 11th Dist. No. 95-L-036, 1996 Ohio App. LEXIS 3366, at 3. Mr. Grae asserts the trial court sua sponte raised the issue of the proper valuation of the Vanguard account in overruling his objections.

{¶15} We respectfully disagree. The trial court merely alluded to Mr. Grae's dissipation of the Vanguard account in its discussion of his objection to the amount of spousal support he was ordered to pay. The trial court in no fashion considered the proper measure of that account's value, which Mr. Grae now seeks to question on appeal.

{¶16} The first assignment of error lacks merit.

{¶17} Mr. Grae's second assignment of error is as follows:

{¶18} "The trial court erred and abused its discretion when it refused to hear additional evidence that Appellant's monthly income had decreased from $5062.09 to $2944.99. The evidence was proffered subsequent to Magistrate's Decision 9/10/08 and prior to the trial court's judgment entered into on 5/11/09. *** The trial court erred further when it found the evidence could have been obtained in time to present it to the Magistrate. ***"

{¶19} "A trial court's judgment regarding whether to adopt, reject, or modify a magistrate's decision is reviewed for abuse of discretion, *In re Gochneaur*, 11th Dist. No. 2007-A-0089, 2008 Ohio 3987, at ¶16; as are its judgments concerning support, whether child or spousal. *Haribhakti v. Haribhakti*, 11th Dist. No. 2006-P-0067, 2007 Ohio 207, at ¶7. *** Regarding this standard, we recall the term 'abuse of discretion' is one of art, essentially connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto* (1925), 112 Ohio St. 667, 676-678, ***." *Winkelman v. Winkelman*, 11th Dist. No. 2008-G-2834, 2008-Ohio-6557, at ¶8. (Parallel citations omitted.)

{¶20} Further, an abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, at ¶15.

{¶21} Regarding this assignment of error, we note two points. First, the magistrate's decision was filed January 30, 2009, not September 10, 2008. Attached to Mr. Grae's objections to the magistrate's decision is a letter from his insurer, Reliance Standard Life Insurance Company, dated October 6, 2008, informing him that his monthly benefit would be reduced by $2,117.10, the amount of his anticipated Social Security disability benefit, to which he became entitled in November 2008. Consequently, Mr. Grae had ample time to submit this evidence of the alleged reduction in his income to the magistrate, prior to her decision.

{¶22} Second, the reduction in his private disability benefit was premised on his Social Security disability benefit becoming available. Mr. Grae presented no evidence to the trial court that he had been prevented from applying for his Social Security disability, or that the Social Security Administration had rejected his application. Consequently, there was no evidence before the trial court that his monthly income had decreased in such a fashion as to make a monthly payment of $1,200 to Mrs. Grae in spousal support inequitable.

{¶23} The second assignment of error lacks merit.

{¶24} The judgment of the Lake County Court of Common Pleas, Domestic Relations Division, is affirmed.

{¶25} It is the further order of this court that appellant is assessed costs herein taxed.

{¶26} The court finds there were reasonable grounds for this appeal.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.