

[Cite as *Robbins v. Robbins*, 2009-Ohio-2549.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY**

MARCELLA R. ROBBINS

Plaintiff-Appellee

v.

GARY L. ROBBINS

Defendant-Appellant

Appellate Case No. 2008-CA-39

Trial Court Case No. 06-DR-0471

(Civil Appeal from Common Pleas
Court, Domestic Relations)

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OPINION

Rendered on the 29th day of May, 2009.

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MARCELLA ROBBINS, 5136 South Charleston Clifton Road, South Charleston, Ohio 45368
Plaintiff-Appellee, *pro se*

JACK P. REYNARD, JR., Atty. Reg. #0014686, P.O. Box 1664, Springfield, Ohio 45501
Attorney for Defendant-Appellant

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BROGAN, J.

{¶ 1} This is the second appeal of the judgment of divorce granted Marcella and Gary Robbins. The Robbins were married in 1970. Their children are now adults. The trial court granted a divorce to both parties on grounds of incompatibility and divided their

marital property. The court awarded Marcella her entire pension benefit and the marital residence. Gary was ordered to pay Marcella spousal support of \$100 per month for twelve years. Gary appealed the trial court's judgment and we reversed the trial court's judgment. See *Robbins v. Robbins* (February 8, 2008), Clark App. No. 06CA0136, 2008-Ohio-495. We found that the trial court erred when, absent a finding of financial misconduct on Gary's part, the court denied him an equal share of Marcella's PERS benefit, in order to satisfy Marcella's need for maintenance and support, which the court is instead authorized to satisfy through a spousal support order.

{¶ 2} In the prior opinion, we set out the salient facts presented to the trial court. They are as follows:

{¶ 3} "Marcella retired from public employment in 2005, after thirty years of service, which coincided with the years of her marriage to Gary. Marcella draws a pension from the Ohio Public Employees' Retirement System ('PERS') in the amount of \$1,583 per month. Evidence was offered showing that, when she retired, Marcella made a lump sum withdrawal of \$52,000 from her PERS account, without Gary's knowledge. Marcella spent those funds to pay for her adult daughter's bariatric surgery and for a diamond and a car for herself.

{¶ 4} "Gary is not retired, and continues to work as a self-employed contractor. He maintains no retirement account of his own. And, because Gary has not filed a federal income tax return for twenty-one years preceding the divorce, it is unlikely that he will be entitled to a Social Security retirement benefit of any significant amount.

{¶ 5} " * * *

{¶ 6} " 'Ms. Robbins . . . retired from public service after 30 years of employment on

June 30, 2005 which was approximately one month prior to the time that she found out about Mr. Robbins' extramarital affair with (M.D.). The credible evidence in this case suggests that Mr.(sic) Robbins would not have retired had she known about Mr. Robbins' extramarital affair, in that she assumed that the parties would be continuing to live together and share income. Unfortunately for Ms. Robbins, she is in a position where she is now finding it necessary to obtain another job even after she has retired in order to supplement her income and to pay her bills.' (Decree, p. 12)."

{¶ 7} Upon remand, the trial court found that Gary was guilty of financial misconduct by failing to file income tax returns for more than twenty-one years. The trial court again awarded Marcella her entire interest in her public pension and Gary was required to pay the previously awarded spousal support.

{¶ 8} In two related assignments of error, Gary argues the trial court erred and abused its discretion in not complying with this Court's remand by awarding Marcella her entire pension despite her financial misconduct and by awarding her spousal support when she engaged in financial misconduct and did not need spousal support.

{¶ 9} Gary argues that the evidence demonstrated that Marcella received a lump sum distribution from PERS and used it to pay her daughters' bariatric surgeon (\$48,000), to buy a diamond ring (\$3,000) and a car for \$3,000. Gary says he was not aware of the lump sum distribution until after Marcella testified at the divorce hearing. He also notes that the evidence demonstrated that Marcella receives a monthly pension of \$1,856 and his income was never as high as Marcella's. He notes that she presently is working part-time to supplement her income. He argues that Marcella did not demonstrate the need for spousal support pursuant to the provisions of R.C. 3105.18(C)(1).

{¶ 10} In her brief, Marcella disputes Gary's contention that she used the lump sum distribution of her pension to pay for her daughter's bariatric surgery. She states she used the money to repay her daughter for loans she made to her to repay two prior "cash in's" of prior public service and to repay her for a loan she gave her to pay real estate taxes on the marital home. She also notes Gary was not truthful when he stated he did not have knowledge of her receipt of the lump sum distribution because she presented evidence in the trial court that Gary signed the request form for the distribution. (see Plt. Ex. 1)

{¶ 11} In the previous appeal we found that the trial court did not abuse its discretion in awarding Marcella \$100 per month in spousal support based "on unanticipated expenses that the court found Marcella's income was insufficient to cover." In the prior opinion we found the trial court erred in considering Gary's adulterous conduct as a basis for denying him a share of Marcella's pension. Upon remand, the trial court properly considered and indeed found that Gary engaged in financial misconduct and as a result granted Marcella a greater award of marital property as authorized by R.C. 3105.171(D)(3). Gary finds it inequitable that he will receive a modest Social Security pension while Marcella will receive the entire amount of her public pension. Gary's situation, however, was created by his own financial misconduct. Having been married to Gary for more than ten years, Marcella would be entitled to participate in Gary's Social Security benefits should she outlive him, but those benefits undoubtedly have been substantially reduced because of Gary's failure to file tax returns for many years.

{¶ 12} In allocating pension benefits, a court may take into account that one spouse lost pension benefits by being fired for misconduct. *Leadingham v. Leadingham* (1997), 120 Ohio App.3d 496. The trial court was also free to believe that Marcella would not have

retired as early as she did had she known Gary intended to end their marriage by having an affair. The trial court could also find from the evidence presented that Marcella received the lump sum payment with Gary's knowledge and that it was taken to pay off a loan to their daughter. The evidence does not demonstrate that Marcella herself engaged in financial misconduct.

{¶ 13} We also find no reason to disturb our previous ruling that the trial court had a basis to award spousal support to Marcella. Appellant's assignments of error are Overruled. The judgment of the trial court is Affirmed.

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DONOVAN, P.J., and WOLFF, J., concur.

(Hon. William H. Wolff, Jr., retired from the Second District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Marcella Robbins
Jack P. Reynard, Jr.
Hon. Thomas J. Capper