

[Cite as *Fisher v. Fisher*, 2015-Ohio-786.]

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

JASON R. FISHER

Plaintiff-Appellee

v.

CHRISTY L. FISHER

Defendant-Appellant

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C.A. CASE NO. 2014-CA-6

T.C. NO. 13DIV156

(Civil Appeal from Common Pleas
Court, Division of Domestic Relations)

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OPINION

Rendered on the 6th day of March, 2015.

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ERIC H. BRAND, Atty. Reg. No. 0004986, P. O. Box 158, Greenville, Ohio 45331
Attorney for Plaintiff-Appellee

DOUGLAS B. GREGG, Atty. Reg. No. 0014660, 7929 Washington Woods Drive, Dayton,
Ohio 45459
Attorney for Defendant-Appellant

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FROELICH, P.J.

{¶ 1} Christy L. Fisher appeals from a final judgment and decree of divorce entered by the Common Pleas Court of Darke County, which dissolved her marriage to Jason R. Fisher and divided some of their marital property. (Other property had been divided by agreement of the parties.) On appeal, Ms. Fisher asserts that the manner in which the trial court divided the parties' assets was not equitable. For the following

reasons, the judgment of the trial court will be affirmed.

{¶ 2} The Fishers were married in February 1978, and their divorce was finalized in May 2014. They have no minor children. Ms. Fisher was drawing on her pension with the State Teachers Retirement System (STRS) at the time of the divorce, and Mr. Fisher was receiving Social Security benefits. Ms. Fisher's pension provided for a substantially larger monthly payment than Mr. Fisher's Social Security benefits.

{¶ 3} Mr. Fisher filed a complaint for divorce in March 2013. The parties reached an agreement as to the distribution of some of their assets; the remaining assets, which included a large marital portion of Ms. Fisher's pension and other assets, were to be divided by the court.¹ The parties' agreement encompassed the following: 1) Ms. Fisher received the parties' 16-acre parcel of real estate in Darke County and all stock in the Jason Fisher Construction Company, in exchange for which she was to pay Mr. Fisher \$210,000; 2) Ms. Fisher kept a Ford Focus, and Mr. Fisher kept a Ford F-150 pickup truck, both of which were debt-free; 3) Ms. Fisher received the parties' 2012 tax refund, which was approximately \$6,000; 4) no spousal support would be paid by either party, and 5) the parties agreed to the distribution of various personal property. The parties also agreed that Ms. Fisher would retain, as her separate property, an inheritance from her father exceeding \$556,000, which was contained in specified investment and financial accounts.

{¶ 4} A magistrate conducted a hearing on the disputed issues in January 2014;

¹ Social Security benefits cannot be directly divided as a marital asset, but they can be considered in reaching an equitable distribution of the parties' pension and retirement plans. See *Harshbarger v. Harshbarger*, 158 Ohio App.3d 121, 2004-Ohio-3919, 814 N.E.2d 105, ¶ 15 (2d Dist.), citing *Neel v. Neel*, 113 Ohio App.3d 24, 29-30, 680 N.E.2d 207 (8th Dist.1996).

she filed a decision on February 4, 2014. Ms. Fisher filed objections to the magistrate's decision. On May 7, 2014, the trial court overruled the objections and issued its Final Judgment and Decree of Divorce. The trial court's judgment divided the remaining assets, as described below.

{¶ 5} Ms. Fisher raises one assignment of error on appeal. She argues that the trial court's division of assets was not equitable because, although most of the parties' assets were "liquid," the trial court "awarded a much greater share of the liquid assets" to Mr. Fisher; she does not assert that there was an inequitable disparity in the value of the assets distributed to each party, although she claims that varying tax consequences were not taken into account. She contends that the trial court awarded Mr. Fisher almost twice as many liquid assets (\$721,071.97 vs. \$387,161.53²). She also asserts that the trial court "ignored" the fact that both parties "were in pay status for the pension accounts" and misapplied or overemphasized the goal of severing the parties' economic relationship.

{¶ 6} R.C. 3105.171(B) requires that marital property be divided equitably, and an equal division is presumed to be equitable. "If an equal division of marital property would be inequitable, the court shall not divide the marital property equally but instead shall divide it between the spouses in the manner the court determines equitable." R.C. 3105.171(C)(1). "Equality" is the "starting point" for dividing any marital assets and debts; however, the court may divide the marital assets and debt in some other fashion if it finds that an equal division would be inequitable. *Kraft v. Kraft*, 2d Dist. Montgomery No. 25982, 2014-Ohio-4852, ¶ 62, citing *Arnett v. Arnett*, 2d Dist. Montgomery No. 20332, 2004-Ohio-5274, ¶ 8; see also *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791

² The actual amount awarded to Ms. Fisher was \$409,161.53.

N.E.2d 434, ¶ 5 (2003). In order to determine what is equitable, a trial court must consider the factors set forth in R.C. 3105.171(F).

{¶ 7} The trial court has broad discretion to divide property in domestic relations cases, and its decision will not be disturbed on appeal absent unreasonable, arbitrary, or unconscionable conduct. *Middendorf v. Middendorf*, 82 Ohio St.3d 397, 401, 696 N.E.2d 575 (1998) (citations omitted); *Majeski v. Majeski*, 2d Dist. Montgomery No. 24668, 2012-Ohio-731, ¶ 11. “If there is some competent, credible evidence to support the trial court’s decision, there is no abuse of discretion.” *Middendorf* at 401. The question before this court is not whether the trial court’s division of marital assets was the only way or even the best way to divide the parties’ assets; rather, we must determine whether the division was inequitable as a matter of law or whether the specific method of division chosen by the trial court demonstrated an abuse of discretion.

{¶ 8} Based on evidence submitted by the parties, the trial court valued the parties’ numerous investments and financial accounts that were submitted to the court for distribution at a total of \$1,116,233.32; the parties do not dispute this valuation. Of these accounts, some were held jointly, and some were held in the name of one of the parties. The accounts held in Ms. Fisher’s name totaled \$120,625.56 more than the accounts held in Mr. Fisher’s name (\$387,161.53 vs. \$266,535.97), and the joint accounts totaled \$462,535.82. Additionally, the parties owned 554 shares of stock.

{¶ 9} With respect to Ms. Fisher’s pension, it was undisputed that 90.83% accrued during the marriage and was marital property. The parties also agreed that the total value of Ms. Fisher’s retirement account was \$682,221.30, and the value of the marital portion was \$619,659.52 ($\$682,221.30 \times .9083$ (90.83%) = \$619,659.52).

{¶ 10} However, the trial court used the parties' monthly benefit amounts, rather than the total value of the pension account, to calculate the percentage of Ms. Fisher's pension to which Mr. Fisher was entitled. The court's award with respect to the pension benefits was calculated as follows: Ms. Fisher's total monthly benefit was \$3,165.17, so the marital portion of her monthly retirement benefit was \$2,874.92 ($\$3,165.17 \times .9083 = \$2,874.92$). Mr. Fisher received \$1,482.00 per month in Social Security benefits. The difference between the marital portion of Ms. Fisher's monthly benefit and Mr. Fisher's monthly benefit was \$1,392.92 ($\$2,874.92 - \$1,482.00 = \$1,392.92$). Mr. Fisher was entitled to half of the difference, or \$696.46 per month.

{¶ 11} An award of \$696.46 per month to Mr. Fisher would constitute 24% of Ms. Fisher's marital monthly portion of the pension ($\$696.46 \div \$2,874.92 = .24225$, or approximately 24%). Twenty-four percent of the marital portion of the principal of Ms. Fisher's STRS account was \$148,718.28 ($\$619,659.52 \times .24 = \$148,718.28$). In an apparent effort to sever on-going financial ties between the parties, the trial court awarded the pension payments to Ms. Fisher in their entirety, and awarded Mr. Fisher an additional \$148,718.28 (24% of the marital portion of the STRS pension) to Mr. Fisher in the distribution of other assets. In other words, instead of awarding Mr. Fisher this portion (24%, or \$696.46) of Ms. Fisher's monthly benefit, payable in monthly installments pursuant to a qualified domestic relations order, the court awarded him a disproportionate share of the parties' other assets.

{¶ 12} To effectuate this division, the court awarded all of the jointly-held assets (\$462,535.82) and those held in Mr. Fisher's name (\$266,535.97) to Mr. Fisher, and all of the assets held in Ms. Fisher's name (\$387,161.53) to Ms. Fisher. Additionally, the court

ordered Mr. Fisher to pay Ms. Fisher \$22,000 to partially offset the award, to him, of all the joint accounts. Thus, in terms of actual assets, the trial court awarded Mr. Fisher \$729,071.79 and Ms. Fisher \$409,161.53,³ plus the entire marital portion of her pension, valued at \$619,659.52. The disparity in these amounts reflects Mr. Fisher's receipt of Social Security benefits. Each of the parties was also awarded half of the shares of each type of stock held at the time of the divorce.

{¶ 13} At the hearing in the trial court, Ms. Fisher requested that the court “basically just take each marital asset and divide it in two rather than try to guess the value of one or the other and try to make a group offset” or “a big global settlement.” But the reason she cited for this request was that “it’s not that easy to determine the value of each asset on its face” and there may be “capital gains or other issues inside.” Ms. Fisher did not specifically express a concern about the distribution of liquid assets. She did request, however, that she not “be forced to buy out” Mr. Fisher from STRS, because of the large sum of money involved. Mr. Fisher requested that the assets be “divided up” rather than “split * * * down the middle” and, with respect to STRS in particular, he expressed a preference to “not receiv[e] payments over time through that system.”

{¶ 14} The trial court’s manner of calculating the distribution of the STRS account gave each of the parties some of what they requested: Mr. Fisher did not have to receive payments from STRS over time, and Ms. Fisher did not have to “buy out” Mr. Fisher for half the value of her plan, which would have amounted to over \$300,000. We cannot conclude that the trial court’s method “imposed an unreasonable risk of loss” on Ms.

³ We note that Ms. Fisher was awarded \$409,161.53 in “liquid assets,” rather than \$387,161.53, as she states in her brief. Ms. Fisher’s number fails to account for the \$22,000.00 that Mr. Fisher was ordered to pay her to offset the unequal distribution of financial accounts.

Fisher due to income taxes, capital gains, and risks involving cuts to government pensions, as she asserts in her brief. All investments pose some degree of risk, and Ms. Fisher did not present any evidence at the hearing about disparate tax consequences or that some of the investments were inherently more risky than others.

{¶ 15} Under the facts of this case, the unequal distribution of liquid assets does not appear to have been inequitable or to have created a hardship for Ms. Fisher. She is receiving a pension and received over \$400,000 in liquid assets in the divorce. This is not a situation in which an award of real property or a business interest, while of substantial value, leaves a party without the means to pay for housing or other living expenses.

{¶ 16} Moreover, Ms. Fisher had separate assets from an inheritance exceeding \$550,000. Although these were not marital assets subject to division by the court, the trial court could have reasonably considered Ms. Fisher's separate property in determining whether she needed additional liquid assets and whether the award it made was equitable. We also note that the portion of the property settlement on which the parties agreed, under which Ms. Fisher was awarded substantial non-liquid assets (e.g., real estate and a construction company) in exchange for making a cash payment to Mr. Fisher, did not evince a concern on Ms. Fisher's part about the liquidity of her assets, and the agreement did not contain any provision that the trial court consider liquidity in distributing the parties' disputed assets.

{¶ 17} Ms. Fisher argues that the trial court misapplied *Hoyt v. Hoyt*, 53 Ohio St.3d 177, 559 N.E.2d 1292 (1990). Addressing the division of pension or retirement benefits, *Hoyt* held that "flat rules have no place" and that the trial court "must have the

flexibility to make an equitable decision based upon the circumstances of the case, the status of the parties, the nature, terms, and conditions of the pension plan, and the reasonableness of the result.” *Id.* at 180. Speaking in general terms, *Hoyt* also advised that a trial court “should attempt to preserve the pension or retirement asset in order that each party can procure the most benefit” and “should attempt to disentangle the parties’ economic partnership so as to create a conclusion and finality to their marriage.” *Id.* at 179. *Hoyt* recognized, however, that factors such as the parties’ ages, whether retirement benefits have vested, matured, and/or are currently payable, and the parties’ overall financial situation play key roles in decisions regarding distribution of such retirement benefits, such that “trial courts must exercise their fullest discretion” in such matters. *Id.* at 183. The parties in *Hoyt* were in their 30s and, presumably, far from retirement.

{¶ 18} Relying on *Hoyt*, Ms. Fisher contends that the trial court “ignored” the “status of the parties, i.e., that both were in pay status for their pension accounts.” The record refutes this contention, as the trial court relied on the monthly payments that each party was receiving in determining the distribution of the pension.

{¶ 19} She also contends that 1) the trial court’s distribution of assets was not “reasonable,” 2) the “circumstances” of the parties, i.e., that there “were plenty of liquid assets to award to both parties equally,” compelled a different distribution, and 3) the *Hoyt* guidelines of “sever[ing] the economic relationship” and maximizing pension benefits were inapplicable and “misapplied” in this case, because both parties had already retired. The trial court expressly acknowledged the value of disentangling the parties’ financial affairs, citing *Hoyt*; it made no reference to maximizing the value of the retirement account

and, consistent with the fact that both parties were retired, there was no reason to consider such a goal. The court also stated that it had considered many factors, including the liquidity of the assets, keeping assets intact as far as possible, giving each party similar tax consequences, and avoiding having to give instructions to various financial institutions to transfer or partition assets. Neither the court's discussion of these factors nor its distribution of assets demonstrates a disregard for or misunderstanding of the guidelines discussed in *Hoyt*.

{¶ 20} The trial court did not abuse its discretion in distributing the parties' assets as it did.

{¶ 21} The judgment of the trial court will be affirmed.

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FAIN, J. and DONOVAN, J., concur.

Copies mailed to:

Eric H. Brand
Douglas B. Gregg
Hon. Jonathan P. Hein