

**COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY**

VERNA MAE HELGESON

PLAINTIFF-APPELLANT

CASE NUMBER 8-2000-14

v.

DAVID E. HELGESON

OPINION

DEFENDANT-APPELLEE

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: November 15, 2000

ATTORNEYS:

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For Appellee.

WALTERS, J. This appeal is brought by Plaintiff-Appellant, Verna Helgeson, from a judgment rendered by the Court of Common Pleas of Logan County terminating her twenty-year marriage to Defendant-Appellee, David Helgeson. Appellant specifically assigns error to the trial court's calculation of spousal support, along with the valuation and division of certain portions of the marital estate. Finding no merit to the arguments advanced on appeal, we affirm the trial court's judgment.

The parties married in July 1979 with two children being born as issue of the union, Katherine, d.o.b. May 20, 1981; and Shelly, d.o.b. June 7, 1984. Appellant initiated this lawsuit by filing a complaint for divorce on May 3, 1999, citing gross neglect of duty and extreme cruelty as grounds for termination. Appellee answered the complaint, denying the grounds alleged by Appellant and requesting the court to dismiss the pleading. The matter was then set for a final hearing.

In the meantime, the parties drafted written stipulations regarding many of the contested issues, including parental rights and responsibilities and child support. Hence, the only remaining issues for trial were the valuation and division of the marital assets and spousal support.

The final hearing took place on January 14, 2000. Following the presentation of evidence and the submission of written closing arguments from

both parties, the trial court issued a decision disposing of the contested issues and incorporating the parties' stipulations. An entry of divorce was issued on April 6, 2000. Appellant then perfected this timely appeal.

For her first assignment of error, Appellant sets forth the following:

The trial court erred to the substantial prejudice of the Plaintiff/Appellant in its valuation and division of Defendant/Appellee's pension, including the reduction for social security offset.

Pension or retirement benefits accumulated during the marriage are considered marital property, subject to division in a divorce action. *Erb. v. Erb* (1996), 75 Ohio St.3d 18, 20; *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 132. "When considering a fair and equitable distribution of pension or retirement benefits in a divorce, the trial court must apply its discretion based upon the circumstances of the case, the status of the parties, the nature, terms and conditions of the pension or retirement plan, and the reasonableness of the result." *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, paragraph one of the syllabus.

The evidence in this case shows that Appellee has been employed by the State of Ohio since October 1, 1973, and has been accumulating pension benefits in the Public Employees Retirement System (PERS) since that time. The parties stipulated that seventy-seven percent of the pension is subject to division since a portion of the benefits were earned prior to the 1979 marriage.

Rather than ordering Appellant to receive a lump-sum or immediate installment payments based upon the present value of the marital portion of the pension, the trial court valued the asset according to the estimated monthly benefit and ordered Appellant to receive a monthly payment once Appellee begins to draw, which will most likely occur in 2005 when Appellant reaches the age of fifty-five. Because PERS is not subject to a Qualified Domestic Relations Order (QDRO), the court ordered Appellee to make direct payments to Appellant each month. We note, however, that the trial court specifically retained jurisdiction over the matter in the event that the law regarding the QDRO should change. Although Appellant complains that the trial court should have divided the fund according to its present value, we find no abuse of discretion in this case.

In *Sprankle v. Sprankle* (1993), 87 Ohio App.3d 129, 132, the Medina County Court of Appeals stated that a trial court generally has four options when faced with the task of dividing a pension fund:

The trial court may order (1) withdrawing the employee's interest from the fund; (2) offsetting the present value of the nonemployee spouse's share of the pension with other marital property; (3) offsetting the present value of the nonemployee's share with installment payments; (4) ordering that a percentage of the future benefits be paid directly from the pension fund to the nonemployee spouse, if and when the pension matures. *Smith v. Smith* (Feb. 15, 1989), Summit App. No. 13678, unreported, at 4, 1989 WL 11803.

It is true that the Supreme Court of Ohio, while apparently granting broad discretion to the trial courts in dividing a pension fund, has encouraged the courts to “disentangle the parties’ economic partnership so as to create a conclusion and finality to their marriage.” *Hoyt*, 53 Ohio St.3d at paragraph two of the syllabus. However, the *Hoyt* court also recognized that complete financial disentanglement may not be possible in every case. “*This alternative may be viable only when the parties have other substantial marital assets to offset the nonemployed spouse’s share.*” *Id.* at 133 [emphasis added].

The evidence in this case demonstrates that aside from the marital home, the only other substantial asset is the pension fund. The trial court awarded the home to Appellant, presumably because the parties agreed that she would exercise residential parent rights over the two children. In addition, the trial court ordered Appellant to receive monthly spousal support payments for a period of five years. We also note that the trial court emphasized that it divided the pension in this manner because it cures an otherwise inequitable situation that will occur upon Appellee’s death. The court stated, “[t]he value that we have set off against the Defendant [by using the present value of the fund] is a quarter of a million dollars, but the value that actually will be received by his estate to go to his heirs, assuming there is no additional benefit to be paid to survivors at that time, is most

probably less than half of that amount.” In light of these circumstances, we fail to see how the trial court abused its discretion.

We also cannot find an abuse of discretion with the trial court’s decision to offset the total monthly benefit by a “hypothetical Social Security benefit.” In adopting the rule that Social Security benefits should be considered in order to effect a more equitable division of a public pension, the Eighth District Court of Appeals explained:

To facilitate a process of equating [public pension participants] and Social Security participants we believe it will be necessary to compute the present value of a Social Security benefit had the [public plan] participant been participating in the Social Security System. This present value should then be deducted from the present value of the [public pension] at which time a figure for the marital portion of the pension could be derived and included in the marital estate for distribution purposes. * *
*.

Neel v. Neel (1996), 113 Ohio App.3d 14, 30 quoting *Cornbleth v. Cornbleth* (1990), 397 Pa.Super. 421, 427, 580 A.2d 369, 372. This appears to be precisely what the trial court did.

The evidence shows that the monthly hypothetical Social Security benefit equals \$844. This amount was subtracted from the total monthly pension amount, \$1,982, to equal \$1,138. The \$1,138 was then multiplied by the marital coverture factor, seventy-seven percent, to equal approximately \$875 in monthly marital benefits. The court then divided this amount equally to conclude that Appellant is

entitled to receive \$437.68 per month in pension benefits. Again, based upon the reasoning set forth in *Neel, supra*, we cannot find that the trial court abused its discretion in this respect.

Appellant's first assignment of error is overruled.

For her second assignment of error, Appellant sets forth the following:

The trial court erred to the substantial prejudice of the Plaintiff/Appellant in its spousal support award.

In this case, the trial court ordered Appellee to pay spousal support for a period of five years in an amount of \$1,020 per month for the first twenty-four months, and \$825 per month for the remaining thirty-six months. The Ohio Revised Code vests the trial courts with the authority to issue a spousal support award upon the request of either party. See R.C. 3105.18. In making a determination as to whether spousal support is appropriate and, if so, the amount and duration of the award, the trial court is required to consider the following enumerated factors:

(a) The income of the parties, from all sources, including, but not limited to, income derived from property divided, disbursed, or distributed under section 3105.171 of the Revised Code.

(b) The relative earning abilities of the parties;

(c) The ages and the physical, mental, and emotional conditions of the parties;

(d) The retirement benefits of the parties;

- (e) The duration of the marriage;**
- (f) The extent to which it would be inappropriate for a party, because that party will be custodian of a minor child of the marriage, to seek employment outside the home;**
- (g) The standard of living the parties established during the marriage;**
- (h) The relative extent of education of the parties;**
- (i) The relative assets and liabilities of the parties; including but not limited to any court-ordered payments by the parties;**
- (j) The contribution of each party to the education, training or earning ability of the other party, including, but not limited to, any party's contribution to the acquisition of a professional degree of the other party;**
- (k) The time and expense necessary for the spouse who is seeking spousal support to acquire education, training or job experience so that the spouse will be qualified to obtain appropriate employment, provided the education, training or job experience and employment is, in fact, sought;**
- (l) The tax consequences, for each party, of an award of spousal support;**
- (m) The lost income production capacity of either party that resulted from that party's marital responsibilities;**
- (n) Any other factor that the court expressly finds to be relevant and equitable.**

R.C. 3105.18(C).

“The application of these factors, together with a consideration of the particular circumstances of each case, provides a trial court with broad discretion

to determine the amount and duration of any spousal support award.” *Stevenson v. Stevenson* (May 30, 2000), Allen App. No. 1-99-98. See also, *Shaffer v. Shaffer* (1996), 109 Ohio App.3d 205. Accordingly, a spousal support award is not subject to reversal on appeal in the absence of an abuse of discretion. See *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 24; *Shaffer*, 109 Ohio App.3d at 209-210. A trial court abuses its discretion when it issues an arbitrary, unreasonable or unconscionable decision. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

The written decision issued herein demonstrates that the trial judge examined each of the factors listed in R.C. 3105.18(C). For instance, the court considered the length of the marriage; the fact that Appellant stayed home to care for the parties’ children during their youth; and that Appellant currently has no retirement benefits of her own. Notwithstanding these apparent hardships, the court also took into account that although both parties appeared to be in relatively good physical and mental health at the time of the hearing, Appellee has been previously diagnosed with cancer on four separate occasions.

Appellant asserts that the five-year award is “woefully inadequate”, in part because of the large disparity in earning capacities between herself and Appellee. We cannot agree. While it is true that Appellee earns approximately \$64,000 per year as a state employee, we also find it significant that Appellant has a Master of Science degree in home economics from Miami University, and that prior to the

birth of the parties' first child, Appellant worked as a home economics teacher in the Zanesville City School System. Indeed, we find, as did the trial court, that Appellant's current income potential is significantly higher than the \$3,000 she earns annually by doing home sewing and alteration projects. Furthermore, with respect to future employment, Appellant testified that she is physically able to return to teaching or a comparative occupation. Although she will be required to enroll in some college courses in order to have her teaching license recertified, if she should choose to pursue this goal, Appellant will be able to complete this process in one to three years, depending on the amount of credit hours needed.

In considering the totality of the circumstances surrounding this case, particularly Appellant's current and future income earning ability, we conclude that the trial court issued a reasonable spousal support order in both amount and duration. Appellant's second assignment of error is overruled.

For her third assignment of error, Appellant sets forth the following:

The trial court erred to the substantial prejudice of the Plaintiff/Appellant in failing to properly credit her with the present value of her pre-marital interest in the real estate.

At the time of the hearing, the parties owned a home in Huntsville, Ohio, with an appraised value of \$130,000. Neither party disputes that Appellant advanced two sources of separate pre-marital funds to make a down payment on the home. The first is in the amount of \$7,910. These funds were realized from

the sale of Appellant's pre-marital property. The money was used to purchase the parties' first home, and upon the sale of that real estate, the proceeds were then used to purchase the Huntsville residence. Both parties agree that the trial court correctly classified this amount as separate property when dividing the marital estate.

The second is in the amount of \$5,129.39. The evidence illustrates that in 1982, Appellant withdrew all moneys that had accumulated in her State Teacher's Retirement Fund (a total of \$8,261.04), which she apparently earned prior to the marriage, and eventually applied \$5,129.39 of that to the purchase of the Huntsville home. The trial court also classified this amount as separate property when dividing the marital estate.

On appeal, Appellant complains that the trial court should have credited her with separate property for the present value of her pension funds, rather than merely crediting with the amount of the initial contribution. In support of this argument, Appellant points to an exhibit admitted during the hearing, which reveals that the present cost of restoring her entire pension is \$29,109. The present value of approximately sixty-two percent of the pension, or \$5,129.39, is \$18,067.96. Thus, Appellant argues that this amount, along with the additional \$7,190, is what the court should have deemed as separate property since the

Huntsville real estate has necessarily appreciated over the years in a manner similar to the growth of the pension.

Initially, we are compelled to note, as did the trial court, that the appreciation of the pension fund has “absolutely no relation to [Appellant’s] separate interest in the real estate.” The mere fact that property such as pension funds and real estate are generally subject to a certain amount of growth over the span of time does not in any way link the two for purposes of a specific valuation.

Moreover, we agree that relevant case law does appear to suggest that the definition of separate property, as contained in R.C. 3105.171(A)(6)(a) (iii), includes any appreciation of that property due to inflation. See *Munroe v. Munroe* (1997), 119 Ohio App.3d 530; *Bugos v. Bugos* (Oct. 15, 1999), Trumbull App. No. 98-T-0141, unreported. However, we also agree with the trial court that in order to make an accurate calculation of any appreciation, the evidence must reflect certain facts like “the amount of moneys provided by the parties jointly, the sale price of the initial property, the purchase and sale prices of any subsequent properties as well as the cost of any remodeling or payment upon the principal balance of the mortgage.” The record in this case contains no such evidence.

Therefore, since we believe that it would have been totally inappropriate for the trial court to calculate any appreciation on the \$5,129.39 by using the present value of the pension fund, and since Appellant failed to present any relevant

evidence to assist the court in this endeavor, we find that the trial court did not err in refusing to award as separate property anything other than the initial down payment. Appellant's third assignment of error is overruled.

For her fourth assignment of error, Appellant sets forth the following:

The trial court erred to the substantial prejudice of the Plaintiff/Appellant in its property division award.

This argument is premised on a finding that the trial court erroneously valued and divided the marital estate, and issued an unreasonable spousal support award. Because we have already concluded that the trial court did not abuse its discretion in disposing of these issues, Appellant's fourth assignment of error must be overruled.

Having found no error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby affirmed.

Judgment affirmed.

HADLEY, P.J., and BRYANT, J., concur.

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