[Cite as *Obar v. Obar*, 2010-Ohio-1333.]

COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
RICHARD DON OBAR	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellant	:	Patricia A. Delaney, J.
	:	
-vs-	:	Case No. 09 COA 018
	:	
	:	
DIXIE LEE OBAR	:	O P I N I O N

Defendant-Appellee

CHARACTER OF PROCEEDING:	Civil Appeal from Ashland County Court of Common Pleas, Domestic Relations Division, Case No. 06-DIV-072
JUDGMENT:	Affirmed In Part, and Reversed and Remanded In Part
DATE OF JUDGMENT ENTRY:	March 19, 2010

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
THOMAS L. MASON Mason, Mason & Kearns P.O. Box 345 153 West Main Street Ashland, Ohio 44805	DIXIE LEE OBAR P.O. Box 413 Mount Vernon, Ohio 43050

Edwards, P.J.

{¶1} Plaintiff-appellant, Richard Don Obar, appeals from the April 21, 2009, Judgment Entry Decree of Divorce issued by the Ashland County Court of Common Pleas, Domestic Relations Division.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant Richard Don Obar and appellee Dixie Lee Obar were married on October 5, 1984. Two children were born as issue of such marriage, namely, Michael Edward Obar (DOB 4/13/93) and Michelle, who was emancipated as of the time of the filing.

{¶3} On March 29, 2006, appellant filed a complaint for divorce against appellee. Pursuant to Temporary Orders filed on May 15, 2006, appellant was designated temporary residential parent and legal custodian of the minor child and appellee was granted parenting time. Appellee, whose income was listed as unknown at the time, was ordered to pay child support in the amount of $50.00 a month plus processing fee.

{¶4} On November 17, 2006, appellee filed a financial affidavit with the trial court in which she indicated that she was disabled and had no income. On the same date, appellee filed a supplemental affidavit in which she stated, in relevant part, as follows:

{¶5} "I was hospitalized in June, 2006 and was diagnosed as having congestive heart failure. The cost of my current medications is $584.50 per month. I do not know how much my medical expenses will be. In December, 2006, I was to be hospitalized for additional tests. However, my condition worsened and I was admitted

to Med Central Hospital on November 13, 2006. My doctor is considering having a defibrillator and pacemaker implanted. I was told I have an enlarged heart and that only a small part of it is functioning. I am now completely unable to work. I have always relied on just being a hard worker to get by in life and now I am disabled without much I can depend on or hope for the future."

{¶6} On July 26, 2007, the parties appeared before a Magistrate and indicated that they had reached an agreement as to all matters and would like the matter to proceed as an uncontested divorce. The parties indicated, in part, that they had agreed to enter into a shared parenting plan with regard to the minor child and that no child support would be paid by either party.

{¶7} However, before a Decree of Divorce was filed, events occurred that prevented the parties' agreement from being adopted in a decree. The first thing that occurred was that the parties agreed that the minor child could live with appellee in Mount Vernon. After it was discovered that the minor child was frequently absent from school and that a truancy complaint had been filed against him in Mount Vernon, appellant took the minor child back and appellee withdrew her agreement to the agreed allocation of parental rights and responsibilities. In addition, appellant, who had been awarded the marital property in the parties' agreement, received notice of a lien being placed upon the same. This debt, which was incurred by appellee, had not been disclosed. Finally, the trial court, in discussions with the parties, determined that the parties' agreement did not contain a final property division.

{¶8} For such reasons, a contested divorce trial commenced on January 31, 2008. At the trial, appellant testified that appellee had been employed in the past in

various homes doing home health care and also had worked in assisted living. At the trial, an Exhibit (Plaintiff's Exhibit 3) was introduced. Such exhibit was a personal ad that appellee had placed on Yahoo in which she indicated that she earned $75,000.00 to over $99,000.00 a year. Appellant, when asked, indicated that this was untrue and that the most appellee had ever earned was $31,000.00 or $32,000.00 a year.

{¶9} Appellant further testified that he was employed by the Village of Perrysville and that his salary was $1,400.00 every two weeks before taxes. Appellant paid $111.92 every pay period to insure the minor child.

{¶10} At the hearing, appellee testified that she was not employed because she had a heart condition and her doctors would not let her work. She testified that she had cardiomyopathy and diabetes and that she had been hospitalized many times since June of 2006. On cross-examination, appellee testified that, commencing around 2000 and continuing for four or five years, she was making over $30,000.00 a year taking care of the elderly in their homes. Appellee further testified that she had filed for Social Security Disability and that she received $115.00 a month from the county in disability.

{¶11} Pursuant to a Judgment Entry filed on January 26, 2009, the trial court ordered that appellant be designated the minor child's residential parent and legal custodian and that appellee be awarded parenting time. The trial court further ordered that appellee not pay child support based upon appellee's "disability and the disparity in incomes between the parties' homes." The trial court also found that appellant's PERS [Public Employees' Retirement System] pension, the marital portion of which was valued at $46,442.00, was a marital asset and awarded appellee $8,400.00 of the same. The trial court ordered appellant to prepare and submit the final decree of

divorce. A Judgment Entry containing numbered findings of fact and conclusions of law was filed on February 9, 2009.

{¶12} Thereafter, a Judgment Entry Decree of Divorce was filed on April 21, 2009.

{¶13} Appellant now raises the following assignments of error on appeal:

{¶14} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT CONSIDERING THE HYPOTHETICAL SOCIAL SECURITY OFFSET AGAINST THE APPELLANT'S PUBLIC EMPLOYEE RETIREMENT SYSTEM (PERS) PENSION.

{¶15} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY NOT ORDERING APPELLEE TO PAY CHILD SUPPORT."

I

{¶16} Appellant, in his first assignment of error, argues that the trial court erred by not considering the hypothetical Social Security offset against appellant's PERS pension. Appellant specifically argues that because "[a]ppellee's social security retirement benefits are not subject to division, then the fact that [appellant's] PERS is subject to division, and was, in fact, divided by the trial court, such division would obviously be unfair unless the PERS value is adjusted for the discrepancy." The hypothetical Social Security benefit for appellant was $20,583.76.

{¶17} In *Neel v. Neel* (1996), 113 Ohio App.3d 24, 680 N.E.2d 207, the court stated, in relevant part, as follows: "Thus, the question which remains unanswered for the domestic relations practitioner is the manner in which one party's interest in Social Security is to be evaluated in relation to the other party's interest in a public pension. A

number of possibilities have been presented. Considering that this matter has been to this court on two previous occasions, illumination of this issue is warranted. * * *

{¶18} "In the leading case of *Cornbleth v. Cornbleth* (1990), 397 Pa.Super. 421, 427, 580 A.2d 369, 372, the court stated:

{¶19} "'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. This process should result in equating, as near as possible, the two classes of individuals for equitable distribution purposes.'

{¶20} "This formula, which calculates a 'hypothetical Social Security benefit' for a party who has, in reality, participated in a public retirement plan, not Social Security, and then deducts that hypothetical amount from the public pension, has been adopted by several appellate districts in Ohio. * * *

{¶21} "[T]he *Cornbleth* method seems to be both the most thorough and the most equitable under the circumstances presented herein. Specifically, this method appears to give both parties comparable credit in terms of the years of participation in their respective programs, whereas, in practice, the other methods may well penalize the PERS participant by subjecting a larger proportionate share of that spouse's retirement to division as a marital asset. On remand, the trial court should apply the *Cornbleth* formula of calculation* * *." Id. at 30-32.

{¶22} In *Bourjaily v. Bourjaily* (July 3, 2000), Licking App. No. 99 CA 120, 2000 WL 968509, the appellant argued that the trial court erred in failing to offset the value of his "hypothetical" social security benefits against his civil service pension before dividing retirement benefits between the parties. The appellant, in *Bourjaily*, specifically noted that the Ninth District Court of Appeals, in *Stovall v. Stovall*, (Sept. 23, 1992), Summit App. No. 15335, 1992 WL 236770, had relied on *Cornbleth*.

{¶23} In *Stovall*, one spouse maintained a State Teachers' Retirement System (STRS) pension, while the other spouse had held employment in the private sector. The trial court in *Stovall* adjusted the value of the STRS pension to exclude a calculated "hypothetical social security" figure, i.e., that part of the STRS public employee pension which might, figuratively, be considered "in lieu of" social security benefits. This method was approved by the Ninth District on appeal, which held that no abuse of discretion had occurred. *Id*. at 4.

{¶24} However, in *Bourjaily*, this Court overruled the appellant's assignment of error stating, in relevant part, as follows:

{¶25} "However, as appellant concedes, the Ohio Supreme Court has not mandated the *Cornbleth* approach as the preferred method of addressing these types of private/public retirement benefit scenarios. Moreover, our most recent ruling in this realm can be found in *Back v. Back* (Dec. 29, 1999), Richland App. No. 99 CA 46, unreported. In that case, appellant wife was employed by the City of Mansfield and participated in PERS, the public employees' retirement plan. Appellee husband worked for a waste management company, participating in social security but not in any pension plans. We held: Upon reconsideration, we find the trial court did not abuse its discretion

in calculating the division of retirement benefits on remand even though the trial court did not follow the mandate of this court. We conclude, as did the trial court, the proper division of retirement benefits is to subtract appellee's potential social security benefit from appellant's potential PERS benefit and divide the remaining portion of the potential monthly PERS benefit equally between the parties. *Id.* at 2." Id at 2.

{¶26} In sum, this Court has not adopted the *Cornbleth* method for addressing the public pension-social security issue for property division purposes. We have adopted the setting off of the non-public pension spouse's social security benefits against the public employee spouse's public pension. But, as the Ohio Supreme Court in *Neville v. Neville*, 99 Ohio St.3d 275, 2003-Ohio-3624, 791 N.E.2d 434, has stated, even this procedure is not a requirement.

{¶27} The cases appellant cites pre-date the Ohio Supreme Court's decision in *Neville.* In *Neville*, the Court held that "to make an equitable distribution of marital property, [the trial court] *may* consider the parties' future Social Security benefits in relation to all marital assets." (Emphasis added.) Id at paragraph 11. As noted by the court in *Rorick v. Rorick,* Lorain App. No. 09CA009533, 2009-Ohio-3173. "*Neville* clearly does not mandate that the trial court consider Social Security benefits when equitably dividing marital assets." Id at paragraph 12.

{¶28} Subsequent to *Neville*, R.C. 3105.171(F)(9) was adopted, effective April 7, 2009. It states, "In making a division of marital property and in determining whether to make and the amount of any distributive award under this section, the court shall consider all of the following factors: …. (9) Any retirement benefits of the spouse, excluding the social security benefits of a spouse except as may be relevant for

purposes of dividing a public pension,…" While *Neville* allowed social security benefits to be considered against all martial assets, this section limits social security benefits to be considered "as may be relevant" in dividing public pensions. This statute took effect only days before the decree in this case. And this statute still seems to leave it to the discretion of the trial court as to whether to consider said benefits in dividing a public pension. In addition, the statement of this assignment of error by the appellant specifically argues for the *Cornbleth* method, not the procedure set forth by us in *Bourjaily* or by the Ohio Supreme Court in *Neville* or by R.C. 3105.171(F)(9).

{¶29} We find, therefore, that the trial court did not err in refusing to consider appellant's hypothetical social security offset against appellant's PERS pension.

{¶30} Appellant's first assignment of error is, therefore, overruled.

II

{¶31} Appellant, in his second assignment of error, argues that the trial court erred by not ordering appellee to pay child support.

{¶32} R.C. 3119.06 states, in relevant part, as follows: "Except as otherwise provided in this section, in any action in which a court issues or modifies a child support order or in any other proceeding in which a court determines the amount of child support to be paid pursuant to a child support order, the court shall issue a minimum child support order requiring the obligor to pay a minimum of fifty dollars a month. The court, in its discretion and in appropriate circumstances, may issue a minimum child support order requiring the obligor to pay less than fifty dollars a month or not requiring the obligor to pay an amount for support. The circumstances under which a court may issue such an order include the nonresidential parent's medically verified or

documented physical or mental disability or institutionalization in a facility for persons with a mental illness or any other circumstances considered appropriate by the court." (Emphasis added).

{¶33} In the case sub judice, the trial court did not order appellee to pay child support based upon appellee's "disability and the disparity in incomes between the parties' homes." Appellee testified that she was not employed because, due to her cardiomyopathy and diabetes, her doctors would not let her work. However, appellee did not present any medical verification or documentation as to her physical disabilities.

{¶34} In *Moore v. Moore,* 166 Ohio App.3d 429, 2006-Ohio-1431, 850 N.E.2d 1265, a divorce case, appellant's husband appealed after the trial court overruled his motion to impose a child support obligation upon appellee, his former wife. The trial court found that appellee wife suffered from anxiety attacks and other physical ailments that prevented her from performing her job functions and that she had not intentionally lost her job.

{¶35} Appellant then appealed, arguing that the trial court had erred and abused its discretion by finding that appellee had no income and by failing to establish a child support obligation for her. The court sustained such assignment of error stating, in relevant part, as follows: "While the court found that Ms. Moore did not intentionally cause her termination at Stein Mart but rather was unable to perform her job functions because of her mental health problems, it did not specifically address the proof required by R.C. 3119.06 or relate it to the exception to the requirement that the section imposes. Even assuming that the standard was satisfied, the fact remains that Ms. Moore now has $22,470.00 additional annual income [her share of a former husband's

retirement] from which she can contribute to her children's needs, income unaffected by any psychiatric condition. When that is added to whatever spousal support she receives, which is now $24,000.00 annually, no good reason is shown to wholly relieve Ms. Moore of an obligation to pay child support in at least the minimal amount that R.C. 3119.06 requires, if not more. “Id at paragraph 18. (Emphasis added).

{¶36} Because appellee failed to present any medical verification or documentation as to her physical disabilities, appellant’s second assignment of error is sustained.

{¶37} Accordingly, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is affirmed in part and reversed and remanded in part.

By: Edwards, P.J.

Hoffman, J. and

Delaney, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES

JAE/d0115

[Cite as *Obar v. Obar*, 2010-Ohio-1333.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO

FIFTH APPELLATE DISTRICT

RICHARD DON OBAR	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DIXIE LEE OBAR	:	
Defendant-Appellee	:	CASE NO. 09 COA 018

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is affirmed in part, and reversed and remanded in part. Costs assessed 75% to appellant and 25% to appellee.

s/Julie A. Edwards

s/William B. Hoffman

s/Patricia A. Delaney

JUDGES