

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
FULTON COUNTY

Jimmy E. Brooks

Court of Appeals No. F-11-020

Appellant

Trial Court No. 98DV000199

v.

Kathleen M. Brooks

**DECISION AND JUDGMENT**

Appellee

Decided: February 8, 2013

\* \* \* \* \*

Gary L. Smith, for appellant.

\* \* \* \* \*

**PIETRYKOWSKI, J.**

{¶ 1} This is an appeal from a judgment of the Fulton County Court of Common Pleas in a post-divorce action involving the proper interpretation and enforcement of a qualified domestic relations order (“QDRO”). Plaintiff-appellant, Jimmy E. Brooks, challenges that judgment through the following assignments of error:

I. The trial court erred as a matter of law by modifying the terms of a property settlement provision contained in the judgment entry for divorce and the qualified domestic relations order in violation of O.R.C. Section 3105.171.

II. The trial court erred as a matter of law when finding that the appellant breached the parties' agreement in the QDRO when he applied for social security disability benefits.

III. The trial court's finding that the reimbursement plan from Benefit [sic] Express constituted a disproportionate award in favor of the appellant and to the detriment of the appellee is against the manifest weight of the evidence.

IV. The trial court abused its discretion by ordering the appellant to pay one-half of the appellee's legal fee to her attorney, William Kimmelman.

{¶ 2} Appellant and defendant-appellee, Kathleen M. Brooks (now Kutzli), were divorced through a final judgment entry of divorce entered by the lower court on February 8, 2000. Through that judgment, the court ordered that appellant's pension with Chrysler Corporation be evenly divided through a QDRO and that the QDRO be governed by the following assumptions:

A. The QDRO shall be a separate interest QDRO, meaning the alternate payee's (Defendant's) benefits shall be independent of those of the participant (Plaintiff).

B. The division of benefits shall be based on the language of the case of *Hoyt v. Hoyt*, 53 Ohio St.3d 177 (1999), and its progeny.

C. The benefits assigned to the alternate payee shall include any and all temporary and supplemental benefits. Further, the benefits assigned to the alternate payee shall include all early retirement subsidies and, should the alternate payee commence receipt of benefits prior to participant's retirement, the alternate payee's benefits will be recalculated to reflect the subsidy.

D. The alternate payee shall be deemed to be the surviving spouse of the participant to the extent of benefits assigned for the purpose of a pre-retirement survivor annuity.

{¶ 3} The court expressly retained jurisdiction with respect to the QDRO to enter further orders as necessary to enforce the assignment of benefits to appellee or to make an award of spousal support in the event that appellant failed to comply with the provisions of the order. In addition, the court stated that appellant "shall not take actions, affirmative or otherwise, that can circumvent the terms and provisions of the QDRO, or that may diminish or extinguish the rights and entitlements of [appellant or appellee]."

The QDRO was filed with the court on September 21, 2000, and provides in relevant part:

This Order assigns to the alternate payee an amount equal to Fifty Percent (50.00%) of the “marital interest” in the participant’s retirement benefit under the Plan as of the earlier of the date either the participant’s or alternate payee’s benefits commence (the valuation date).

\* \* \*

If the participant retires prior to the participant’s normal retirement date and is eligible to begin receiving subsidized early retirement pension benefits from the Plan, then after the participant’s retirement, the amount of the alternate payee’s benefit payments will be increased by a share of the early retirement subsidies in the proportion specified above in this paragraph 6.

{¶ 4} On February 25, 2008, Benefits Express, the Daimler/Chrysler pension plan administrator, notified appellee that as a result of the QDRO on file, she was entitled to receive a monthly benefit of \$567.38, payable on the first of the month following the day on which appellant would turn 65 years old. The letter, however, further notified appellee that she had the option of choosing to receive an adjusted benefit beginning as early as March 1, 2008, when appellant would become 58 years and 5 months old. Appellee elected to receive the adjusted benefit, and on May 1, 2008, she received a check for \$932.25 (\$310.75 per month backdated to March 1, 2008).

{¶ 5} On March 1, 2009, appellant elected to retire early from Daimler/Chrysler, effective January 1, 2009. As a result of his early retirement, appellant was eligible to receive both his basic pension benefit of \$885.80 per month and an early retirement supplement of \$1,163.86 per month, effective January 1, 2009. In addition, appellant's retirement resulted in an increase in appellee's benefits, effective January 1, 2009, to \$484.75 per month as the basic pension benefit and \$624.81 per month as an early retirement supplement. At the time of his retirement, appellant was in very poor health and applied for Social Security Disability benefits. On May 10, 2010, appellant was notified by the Social Security Administration that his application for SSD benefits had been accepted, and that he was entitled to monthly disability benefits of \$2,303, backdated to February 2010.

{¶ 6} Benefits Express received a copy of the Social Security Administration Award letter. Thereafter, in letters dated January 25, 2011, it notified both parties that appellant could not receive both SSD benefits and an early retirement supplement and that they had both been overpaid retirement benefits. As a result, Benefits Express made a redetermination of both parties' benefits. It determined that appellant had been overpaid \$5,491.84 and that appellee had been overpaid \$6,413.41. To recoup the overpayments, Benefits Express suspended appellant's benefits through June 1, 2011, and suspended appellee's benefits through January 1, 2012. On July 1, 2011, appellant received a payment of \$896.72. Then, commencing on August 1, 2011, he received his basic pension benefit of \$893.24 per month plus his reduced early retirement supplement

of \$186.52 per month. On November 6, 2011, appellant turned 62 years and one month old, making him eligible for his full pension benefit of \$1,064.76 per month, plus cost of living adjustments (COLA), and extinguishing his eligibility for an early retirement supplement.

{¶ 7} The January 25, 2011 letter to appellee noted that her monthly pension benefit would be restored to the full amount of \$582.16 as of February 2012, which would include the basic pension benefit of \$488.81 plus the early retirement supplement of \$93.35. Appellee's entitlement to the early retirement supplement, however, expired when appellant turned 62 years and one month old, fully retired, and became ineligible to receive the early retirement supplement.

{¶ 8} On March 1, 2011, appellee filed a motion with the lower court for enforcement of the prior QDRO and restoration of all amounts due her under the QDRO. Attached to appellee's motion was a letter from William C. Kimmelman, the attorney who drafted the original QDRO in 2000. Appellee had sought an opinion from Kimmelman regarding the effect of appellant's receipt of SSD payments on her right to her share of appellant's pension benefits. In the letter, Kimmelman opined that "but for Mr. Brooks' receipt of these [SSD] benefits, the Early Retirement Supplements would have continued in full until his age 62." As such, Kimmelman believed that "Mr. Brooks should be paying a share of the Social Security Disability Benefits to Ms. Kutzli to make up the decline in her Early Retirement Supplement and a back payment to make up for the recoupment Chrysler is seeking."

{¶ 9} The lower court held a hearing on the motion, at which Mr. Kimmelman testified. In addition, numerous documents were admitted into evidence. The court filed its judgment entry ruling on appellee's motion on December 1, 2011. The court held that appellant's development of a debilitating health condition was not a term contemplated by the QDRO, the final separation decision rendered by the magistrate or the final divorce decree issued by the court. The court also determined that appellant had a legal right to apply for SSD benefits and that his receipt of those benefits was his separate property not subject to division. The court, however, then held:

To the extent the Plan Administrator is attempting to recoup \$6,413.41 from Defendant, and \$5,491.84 from the Plaintiff, it is clear that Plaintiff's unilateral actions cannot be disproportionately rewarded to Defendant's detriment. Accordingly Plaintiff should and shall reimburse Defendant \$3,206.71, or one-half of the amount being recouped from Defendant by the Administrator, on or before January 1, 2012. He will also pay the full amount of his own share being recouped by the Administrator.

{¶ 10} Appellant now challenges that judgment on appeal.

{¶ 11} Appellant's first and second assignments of error are related and will be discussed together. Appellant asserts that the lower court erred as a matter of law by requiring him to pay one-half of appellee's reimbursement amount. That order, appellant contends, constituted an improper modification of the terms of the parties' original property settlement, contained in the original divorce decree and QDRO, and resulted in

an award to appellee of a larger portion of appellant's pension than she was entitled to. Appellant further asserts that the court abused its discretion in finding that he breached the parties' agreement, as expressed in the QDRO, when he applied for and was granted SSD benefits.

{¶ 12} It is well-established that retirement benefits accumulated during a marriage are marital property, subject to division upon divorce. *Erb v. Erb*, 75 Ohio St.3d 18, 20, 661 N.E.2d 175 (1996); R.C. 3105.171(A)(3)(a). In order to divide such assets, a court issues a QDRO or an equivalent judgment entry. *Weller v. Weller*, 115 Ohio App.3d 173, 178, 684 N.E.2d 1284 (6th Dist.1996). The QDRO implements some of the terms of the divorce decree by assigning to an alternate payee the right to receive all or a portion of benefits payable with respect to a participant under a retirement plan. *See Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, 878 N.E.2d 16, ¶ 6-7, citing 29 U.S.C. 1056(d)(3)(B)(i)(I) and 26 U.S.C. 414(p)(1)(A)(i).

{¶ 13} As a general rule, once a court orders the division of retirement benefits in a divorce decree, it lacks jurisdiction to subsequently modify the asset distribution. R.C. 3105.171(I). *Wolfe v. Wolfe*, 46 Ohio St.2d 399, 350 N.E.2d 413 (1976), paragraph one of the syllabus, *superseded by statute and overruled on other grounds*, *Cherry v. Cherry*, 66 Ohio St.2d 348, 355, 421 N.E.2d 1293 (1981). A trial court, however, always retains the power to enforce the provisions of a divorce decree. *Green v. Green*, 10th Dist. No. 05AP-484, 2006-Ohio-2534, ¶ 12; R.C. 3105.89. Moreover, if a decree is ambiguous, a trial court has continuing jurisdiction to "clarify and construe its original property



division so as to effectuate its judgment.” *Gordon v. Gordon*, 144 Ohio App.3d 21, 24, 759 N.E.2d 431 (8th Dist.2001). Finally, a trial court may reserve jurisdiction to modify a property distribution by providing for such authority in the original decree. *Schrader v. Schrader*, 108 Ohio App.3d 25, 28, 669 N.E.2d 878 (6th Dist.1995).

{¶ 14} We first note that the trial court clearly reserved jurisdiction in the original divorce decree to enter further orders as necessary to enforce the assignment of benefits to appellee or to make an award of spousal support in the event appellant failed to comply with the provisions of the order. Under the terms of the original divorce decree and the QDRO, appellee was awarded an amount equal to 50 percent of the marital interest in appellant’s retirement benefits. The QDRO further provides:

If the participant retires prior to the participant’s normal retirement date and is eligible to begin receiving subsidized early retirement pension benefits from the Plan, then after the participant’s retirement, the amount of the alternate payee’s benefit payments will be increased by a share of the early retirement subsidies in the proportion specified above in this paragraph 6 [i.e. 50 percent].

{¶ 15} Accordingly, the intent of the divorce decree and QDRO, was to ensure that if appellant retired early and began collecting early retirement benefits, appellee also, and independently, would be entitled to a share of those benefits. Initially, when appellant retired early, both parties did share in the early retirement supplement. As determined by the lower court, however, the parties did not anticipate that appellant

would become gravely ill and need to apply for SSD benefits. When appellant was awarded SSD benefits, he was no longer eligible for an early retirement benefit and, accordingly, neither was appellee. Accordingly, when appellant was awarded SSD benefits, the award operated to appellee's detriment.

{¶ 16} As set forth above, a trial court has continuing jurisdiction to enforce the provisions of a divorce decree and may expressly reserve jurisdiction to revisit the division of property. *Sullivan v. Sullivan*, 6th Dist. No. L-09-1022, 2010-Ohio-3064, ¶ 24. A trial court therefore has the "right and privilege" to amend a court order that does not reflect a divorce decree's intent. *Id.*, citing *Schneider v. Schneider*, 5th Dist. No. 2009CA00090, 2010-Ohio-534, ¶ 19. In the present case, the original divorce decree ordered appellant to not take any action that could circumvent the terms and provisions of the QDRO or that would diminish or extinguish appellee's entitlement to benefits. The court retained jurisdiction to enter further orders as necessary to enforce the assignment of benefits if appellant did take such action. Appellant clearly had a right to SSD benefits but his collection of those benefits extinguished appellee's entitlement to benefits under the QDRO. By ordering appellant to pay appellee one-half of the amount being recouped from her by Benefits Express, the court essentially made a distributive award in order to achieve equity between the parties. *See* R.C. 3105.171(E). Such an award was authorized by the court's original divorce decree.

{¶ 17} Under the circumstances of this case, we cannot say that the lower court abused its discretion in making this award. Accordingly, the first and second assignments of error are not well-taken.

{¶ 18} In his third assignment of error, appellant asserts that the lower court's finding that the Benefits Express reimbursement plan constituted a disproportionate award in favor of appellant was against the manifest weight of the evidence. Appellant contends that a careful review of the exhibits in the case shows that he paid \$1,550.99 more in reimbursement to Benefits Express than did appellee and, therefore, he was not "disproportionately rewarded to Defendant's detriment."

{¶ 19} An appellate court will not reverse a trial court's judgment on the grounds of manifest weight of the evidence if "some competent, credible evidence going to all the essential elements of the case" supports the trial court's judgment. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978). A reviewing court presumes that a trial court's findings of fact are correct, and will not substitute its judgment for that of the trial court when the findings are adequately supported. *Seasons Coal Co., Inc. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 20} The lower court based its findings that appellant had been overpaid \$5,491.84 and that appellee had been overpaid \$6,413.41 on letters sent to the respective parties by Benefits Express on January 25, 2011, which listed these amounts as the overpayments. Appellant did not challenge these amounts in the trial court proceedings.

Accordingly, we find that there was competent credible evidence in the record to support the trial court's award, and the third assignment of error is not well-taken.

{¶ 21} Finally, in his fourth assignment of error, appellant challenges the lower court's order that he pay one-half of appellee's "legal fee to her attorney, William Kimmelman."

{¶ 22} During the proceedings below, William Kimmelman, although an attorney, did not represent appellee as her counsel. Rather, he was hired to provide an expert opinion as to the effect of appellant's collecting SSD benefits on the QDRO. He also testified at the hearing below. In its judgment entry, the lower court ordered appellant to pay appellee one half of Kimmelman's bill for his opinion on the QDRO, or \$218.75. Appellant contends that this order was in error because Ohio has long adhered to the American Rule that a prevailing party in a civil action may not recover attorney fees as part of the costs of litigation.

{¶ 23} We first note that the lower court's order did not constitute an award of attorney fees. The court expressly ordered each party to pay their own attorney fees and ordered each party to pay one-half of the court costs. Rather, the order was in the form of an award of litigation expenses. R.C. 3105.73(B) reads:

In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court

finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets.

{¶ 24} An award of litigation expenses under R.C. 3105.73 lies within the sound discretion of the trial court and will only be reversed on appeal upon a showing that the trial court abused its discretion. *Garritano v. Pacella*, 6th Dist. No. L-07-1171, 2009-Ohio-2928, ¶ 101-102. Although the lower court did not expressly find that the award of one-half of Kimmelman's fee was equitable, the court did note that appellee requested to be reimbursed for the entire fee. In that Kimmelman's written opinion and testimony regarding the QDRO were relevant to the entire case, we cannot find that the lower court abused its discretion in ordering the parties to share this expense equally.

{¶ 25} The fourth assignment of error is not well-taken.

{¶ 26} On consideration whereof, the court finds that substantial justice has been done the party complaining and the judgment of the Fulton County Court of Common Please is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

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JUDGE

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

CONCUR.

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JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
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