

[Cite as *Korzeniowski v. Korzeniowski*, 2002-Ohio-2031.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 79551, 79956

JOANNE R. KORZENIOWSKI

Plaintiff-Appellee/
Cross-Appellant

-vs-

NICHOLAS C. KORZENIOWSKI, ET AL.

Defendant-Appellant/
Cross-Appellee

:
:
: JOURNAL ENTRY
:
: AND
:
: OPINION
:
:
:

Date of Announcement
of Decision:

APRIL 25, 2002

Character of Proceeding:

Civil appeals from Court
of Common Pleas Domestic
Relations Division
Case No. D-267472

Judgment:

Affirmed in part; reversed
and remanded in part.

Date of Journalization:

Appearances:

For Plaintiff-Appellee/
Cross-Appellant:

THOMAS McCORMACK, ESQ.
148 Solon Road
Chagrin Falls, Ohio 44022

For Defendant-Appellant/
Cross-Appellee:

DAVID M. MILLS, ESQ.
BERNARD P. COUTURE, ESQ.
The Superior Bldg., #1810
815 Superior Ave., East
Cleveland, Ohio 44114

JAMES J. SWEENEY, J.:

{¶1} In this divorce action, both parties appeal from judgments of the domestic relations court. Defendant-appellant/cross-appellee, Nicholas C. Korzeniowski (hereinafter "defendant"), urges reversal on certain grounds alleging that the trial court failed to comply with the trial procedures contained in R.C. 2315.01; and/or because the allocation of marital and separate property was not in conformance with R.C. 3105.171; and/or because the trial court failed to order valuation evidence with regard to appellant's LTV Pension. Plaintiff-appellee/cross-appellant, Joanne R. Korzeniowski (hereinafter "plaintiff"), urges reversal on different grounds alleging that the trial court erred in failing to direct an award of spousal support and in offsetting amounts due for temporary support. For the reasons that follow, we affirm in part and reverse and remand in part.

{¶2} A thorough review of the record indicates that the trial in this case commenced on June 5, 2000 before the magistrate. Further references indicate that additional proceedings transpired on June 6, July 14 and July 19, 2000. However, the only record of any of these proceedings provided to us for review on appeal is a short transcript dated July 14, 2000. An affidavit of defendant's trial attorney, a journal entry dated July 19, 2000, and certain

passages of the magistrate's decision provide the sole evidence of the proceedings that occurred on July 19, 2000.

{¶3} The July 14, 2000 transcript adjourned the trial proceedings in anticipation of the testimony of defendant's expert witness who would reportedly testify as to the marital and non-marital proportions of defendant's pension. Apparently, on July 19, 2000, the parties reconvened off the record where the expert indicated a need for additional information from defendant's employer. On that day, the magistrate memorialized the proceedings in a journal entry, in pertinent part, providing as follows:

{¶4} Plaintiff and Defendant shall file Written Closing Arguments no later than August 18, 2000.

{¶5} Third Party Defendant LTV Steel Company shall provide all requested information to David I. Kelly, Pension Evaluators, *** no later than August 4, 2000. This time period may be extended for good cause shown, only by order of Court upon written request.

{¶6} (Tr. 30). The magistrate issued her decision with findings of fact and conclusions of law on October 24, 2000. Therein she notes that neither party had submitted any further evidence nor did they file closing arguments as required by previous order. (Tr. 31). The record is devoid of any objection to the July 19, 2000 journal entry and/or any effort of either party to present further evidence between July 19, 2000 and October 24, 2000, notwithstanding the clearly established August deadline for filing closing arguments.

{¶7} Both parties objected to the magistrate's decision.

Defendant objected that the magistrate erred in rendering the decision before he had "rested his case"; in failing to place a value on the pension benefit; and by failing to consider the non-marital portion in dividing this benefit. (Tr. 36). Plaintiff objected that the magistrate offset the arrearage in temporary spousal support with amounts to be received from the award of pension benefits; by assigning two values to the marital home; and in not awarding spousal support. (Tr. 40). The court overruled all objections except one that is not the subject of this appeal. (Tr. 41).

{¶8} The court issued its judgment entry and qualified domestic relations order on June 13, 2001. Defendant appealed and plaintiff cross-appealed.

{¶9} Defendant asserts three errors for our review that we will address in order. Assignment of Error I states:

{¶10} I. TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT RENDERED ITS DECISION BEFORE APPELLANT HAD RESTED OR CLOSED HIS CASE, BEFORE APPELLANT'S LAST WITNESS WAS GIVEN AN OPPORTUNITY TO TESTIFY, AND BEFORE THE PROPOSED EXHIBITS HAD BEEN MOVED INTO EVIDENCE.

{¶11} Defendant complains that the magistrate issued the decision prior to the conclusion of defendant's case in violation of R.C. 2315.01(C). R.C. 2315.01 sets forth procedures in jury trials which apply equally to trials by the court through the

provisions of R.C. 2315.08. It is within the trial court's discretion to modify the trial procedure. *Oakwood Management Company v. Young* (Oct. 27, 1992), Franklin App. No. 92AP-207, unreported, citing *Lamarand v. National Life & Accident Ins. Co.* (1937), 58 Ohio App. 417. However, when deviating from the order of trial procedure found in 2315.01, the trial court must have good reason. *Polasky v. Stampler* (1971), 30 Ohio App.2d 15.

{¶12} Defendant does not contend that the trial court deviated from the proper procedural order in allowing plaintiff to present her case-in-chief first. Rather, defendant claims that the trial court improperly truncated the procedure by issuing an order prior to the close of his evidence and closing arguments. We are not persuaded by this contention.

{¶13} A simple review of the record clearly indicates that on July 19, 2000, the magistrate ordered closing arguments by a date certain, August 18, 2000. This was done within the context of the defense expert obtaining further information relative to his purported testimony by August 4, 2000. The expert received the information by that date. Nonetheless, defendant took no further action until after the magistrate's decision of October 24, 2000 (issued over a month after closing arguments were due).

{¶14} Several months after the magistrate's decision was issued, defendant's trial counsel submitted an affidavit indicating that defendant intended to call his expert to establish the value

of the marital and non-marital values of defendant's pension. Despite reasonable opportunity, defendant failed to present this information to the court. Defendant failed to submit a closing argument as required by the magistrate's order. In the alternative, defendant could have objected to the explicit August deadline for closing arguments or attempted to secure further proceedings in the matter. It appears from the record that defendant did nothing. A party can waive compliance with the procedure outlined in R.C. 2315.01. *Oakwood, supra*. Accordingly, we do not find any error arising from the magistrate rendering a decision over a month after closing arguments were due. Defendant's first assignment of error is overruled.

{¶15} II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT OVERRULED APPELLANT'S OBJECTIONS AND ADOPTED A MAGISTRATE'S DECISION WHICH DID NOT CONFORM TO THE MANDATES OF R.C. 3105.171 WITH REGARD TO THE ALLOCATION OF MARITAL AND SEPARATE PROPERTY.

{¶16} This assignment of error focuses on the value of defendant's pension in regard to the marital and non-marital proportions. It is undisputed that defendant worked and accumulated a portion of his pension benefits for eight years prior to the marriage. It is also undisputed that the part-marital/part-non-marital pension merged with another pension benefit that was entirely marital when defendant retired. Defendant is currently retired and the pension is in pay-out status. In dividing the property, the magistrate noted that a portion of the benefits were

earned before the marriage, but simply divided the monthly pension benefit on a fifty/fifty basis. In making this division, the magistrate made note that there is value to the health insurance coverage provided to defendant that is not equally available to plaintiff.

{¶17} A trial court is vested with broad discretion in dividing the marital and separate property of the parties equitably. R.C. 3105.171(B); *Cherry v. Cherry* (1981), 66 Ohio St. 2d 348, 355. We will not reverse a trial court's valuation if it is supported by some competent, credible evidence. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶18} R.C. 3105.171 governs the equitable division of marital and separate property. In accordance with R.C. 3105.171(D) "the court shall disburse a spouse's separate property to that spouse. If a court does not disburse a spouse's separate property to that spouse, the court shall make written findings of fact that explain the factors that it considered in making its determination that the spouse's separate property should not be disbursed to that spouse."

The statute further provides that "the commingling of separate property with other property of any type does not destroy the identity of the separate property as separate property, except when the separate property is not traceable." R.C. 3107.171.

{¶19} In order to divide property equitably, the trial court must place a value on each contested item of property. *Pawlowski*

v. Pawlowski (1992), 83 Ohio App.3d 794, 799. While the magistrate's decision notes the existence of a "premarital component" of the pension benefit, it does not place a value on the premarital portion. Similarly, there is no explicit finding that the separate property is not traceable. The trial court has broad discretion to develop some measure of value and can instruct the parties to submit evidence on the particular matter. *Willis v. Willis* (1984), 19 Ohio App.3d 45. If the trial court did not intend to award to the defendant the value of the premarital interest, it must explain the factors it considered in making this determination.

{¶20} We are unable to discern from the record whether the trial court deemed the separate property not traceable, or, if not, why the trial court failed to value and award the non-marital portion of defendant's pension benefits to defendant. Accordingly, this assignment of error is sustained and remanded to clarify the court's intention in dividing this part-marital/part-non-marital property in accordance with R.C. 3105.171.

{¶21} III. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT FAILED TO VALUE OR ORDER VALUATION EVIDENCE WITH REGARD TO APPELLANT'S LTV PENSION.

{¶22} As defendant points out, this assignment of error is interrelated with Assignment of Error II. It is not necessary to assign present value to vested matured retirement benefits currently due and payable where the court opts to consider the

pension as earnings in determining the amount of alimony or support. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177. However, in making this award, the court was dividing the marital and non-marital property, not determining the amount of alimony or support.

We agree that the court should determine the value of the separate property where it is traceable. R.C. 3105.171(6)(b). Accordingly, this assignment of error is sustained in conjunction with Assignment of Error II and remanded for clarification as to the court's intention in dividing this part-marital/part-non-marital property.

CROSS-APPEAL

{¶23} In the cross-appeal, plaintiff assigns two assignments of error for our review. Assignment of Error I states:

{¶24} I. THE TRIAL COURT ERRED IN SETTING OFF AMOUNTS DUE AS TEMPORARY SUPPORT WITH AMOUNTS AWARDED AS PROPERTY SETTLEMENT, TO WIT, APPELLANT'S PENSION BENEFITS.

{¶25} The trial court did not abuse its discretion in setting off amounts due in temporary spousal support with amounts received from the pension income. In particular, the court found that defendant's only income, once he retired after working thirty-three years, was his pension income. Amounts paid to defendant from his pension during the pendency of the divorce proceedings were held under restraining order. The court only used a set-off for amounts accrued subsequent to defendant's retirement and prior to the entry of the divorce decree. Defendant remained responsible for

\$1,590.00 of temporary support that was due and owing prior to his retirement. "[W]hen a court awards spousal support under R.C. 3105.18, a trial court must consider income in the form of retirement benefits, even if they already were distributed as marital property under R.C. 3105.171." *Briskey v. Briskey* (July 23, 1998), Cuyahoga App. No. 73368, unreported, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128. Thus, the court did not abuse its discretion and this assignment of error is overruled.

{¶26} II. THE TRIAL COURT ERRED IN NOT AWARDING SPOUSAL SUPPORT, AND IN NOT ORDERING THE DEFENDANT HUSBAND TO SEEK UNEMPLOYMENT EVEN THOUGH VOLUNTARILY UNDEREMPLOYED, IN EFFECT HOLDING THAT A HUSBAND'S DECISION TO RETIRE EVEN THOUGH AGE 52 AND ABLE TO BE EMPLOYED, WAS A VALID DEFENSE TO A CLAIM FOR SPOUSAL SUPPORT.

{¶27} Plaintiff complains that defendant should be held accountable for spousal support despite his retirement after thirty-three years of employment at LTV Steel. A review of the magistrate's decision and court's order reveals compliance with R.C. 3105.18 and an appropriate exercise of discretion. Further, the court has retained jurisdiction over the issue of spousal support for a period of seven years. In denying spousal support at this time, the court considered the award of pension income allocated to plaintiff in the division of property. This was appropriate under the law. A court does not abuse its discretion, but merely follows the unambiguous language of the law, when it

considers pension income for both property division and spousal support. *Ibid.* This assignment of error is overruled.

Judgment affirmed in part; reversed and remanded in part.

It is ordered that appellant/cross-appellee and appellee/cross-appellant shall each pay their respective costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Domestic Relations Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., CONCURS.
TIMOTHY E. McMONAGLE, A.J., CONCURS
IN PART AND DISSENTS IN PART. (SEE
CONCURRING AND DISSENTING OPINION
ATTACHED) .

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

[Cite as *Korzeniowski v. Korzeniowski*, 2002-Ohio-2031.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NOS. 79551 and 79956

JOANNE R. KORZENIOWSKI	:	
	:	
PLAINTIFF-APPELLEE/	:	C O N C U R R I N G
CROSS-APPELLANT	:	A N D
	:	D I S S E N T I N G
v.	:	O P I N I O N
	:	
NICHOLAS C. KORZENIOWSKI, et al.	:	
	:	
DEFENDANT-APPELLANT/	:	
CROSS-APPELLEE	:	

DATE: APRIL 25, 2002

TIMOTHY E. McMONAGLE, A.J., CONCURRING IN PART AND DISSENTING IN PART:

{¶4} I am compelled to respectfully dissent as to the majority's disposition of the second and third assignments of error.

{¶5} This court has, on occasion in the past, been critical of the Domestic Relations Division's practice of engaging in trial in short segments resulting in cases being tried over extended periods of time. See *Leff v. Leff* (Mar. 2, 2000), Cuyahoga App. Nos. 75551 & 75581, unreported at 29, 2000 Ohio App. Lexis 766; *Coseriu v. Coseriu* (July 24, 1997), Cuyahoga App. Nos. 70972 & 71041, unreported at 3, 1997 Ohio App. Lexis 3211. The majority opinion serves to perpetuate this criticized practice by reversing and remanding this case to the trial court.

{¶6} In the instant case, defendant/appellant claimed a separate property interest in a marital pension. For whatever reason, he was unable to produce evidence of the value of this separate property at trial. In an effort to accommodate appellant, the magistrate extended the trial in order to enable counsel to produce evidence of the missing valuation. Appellant did nothing.

He ignored the dates set by the magistrate for production, offered no excuse for the failure to produce and even failed to request a further extension of time to produce the valuation. The magistrate, who by this time had no other alternative, finally wrote the decision and recommendation. Since there was no evidence whatsoever produced by the appellant as to the value of the separate property, the magistrate made the award herein.

{¶7} To permit appellant to successfully appeal his own negligence and to obtain yet another "bite of the apple" is in fact to place the burden of obtaining and producing evidence upon the trier of fact. We do not do this in any other legal matter. The burden of proof is upon appellant, not only to establish that some portion of the pension was separate property, but also to value that portion. Despite the consideration extended by the magistrate in continuing matters, appellant failed in his burden of proof. Accordingly, I would affirm the decision of the trial court in its entirety.