

[Cite as *Carreker v. Carreker*, 2010-Ohio-3411.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93313

ERNESTINE CARREKER

PLAINTIFF-APPELLEE

VS.

JESSE DON CARREKER

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. D-311331

BEFORE: Kilbane, J., Rocco, P.J., and Celebrezze, J.

RELEASED: July 22, 2010

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} Jesse Don Carreker (“appellant”) appeals the judgment entry and decree of divorce entered by the Cuyahoga County Domestic Relations Court, asserting five assignments of error for our review. He argues that the trial court improperly determined when his marriage to Ernestine Carreker (“appellee”) terminated, improperly determined his support obligations to appellee, and misallocated the debt of the parties relative to their foreclosed home, repossessed auto, and a \$3,000 medical bill. Appellant also argues that the trial court failed to equitably divide the parties’ marital property,

including retirement benefits. Finally, appellant argues that he should receive spousal support from appellee.

{¶ 2} After carefully reviewing the facts and the law, we affirm.

Statement of Facts and Procedural History

{¶ 3} On June 30, 2006, after nearly 36 years of marriage, appellee filed her complaint for divorce with Request for Restraining Order and Other Equitable Relief.¹ It was the seventh time appellee filed for divorce against appellant.

{¶ 4} On August 1, 2006, appellant answered and counterclaimed for divorce.

{¶ 5} On November 27, 2006, appellee filed a motion for support pendente lite.

{¶ 6} On February 7, 2007, the trial court issued an order requiring appellant to pay \$369.75 per month in spousal support.

{¶ 7} On December 2, 2008 and March 5 and 6, 2009, the case proceeded to trial. The following facts were adduced at trial.

{¶ 8} Appellant voluntarily retired from Ford Motor Company on January 1, 2004, at the age of 56, after approximately 34 years. When he

¹The parties were married on August 15, 1970. Three children were born as issue of the marriage, all of whom are now emancipated.

retired, appellant elected a 65 percent annual survivor benefit in favor of appellee.

{¶ 9} Appellant's pension is in payout status and classified as marital property. He receives a monthly distribution from his Ford Motor Company pension in the amount of \$2,935. (Defendant's exhibit AA.) This includes a lifetime benefit of \$1,036.13, a supplemental allowance of \$1,693.87, and a cost of living increase. According to the evidence, the supplemental allowance will end in 2011, when appellant turns 62 years and one month, and will be replaced by a monthly social security benefit of approximately \$1,289.

{¶ 10} Appellee works as a teacher's assistant in the Cleveland Municipal School District. At the time of trial, she earned approximately \$30,000 per year. Evidence at trial projected that if appellee retired on May 1, 2011, she would receive monthly benefits totaling \$528.58. Clearly, as she is not retired, appellee's pension benefits are not in payout status. There was no expert testimony and no present value provided for either party's pension benefits.

{¶ 11} Appellee testified that appellant removed her from his health insurance coverage, causing her to incur a \$3,000 medical bill.

{¶ 12} The former family home, located at 9871 Kingsbury Boulevard, Cleveland, Ohio, was foreclosed upon in 2006. The former family

automobile, a Mercury Villager Van, was removed from the family home by appellant upon separating from appellee, and it was repossessed after he stopped making payments. Appellant testified that there was an \$11,000 balance on the automobile but presented no evidence of this claim.

{¶ 13} When trial commenced, appellant was \$961.35 in arrears in his spousal support. (Judgment Entry of trial court dated May 7, 2009, at 7.)

Trial Court's Findings

{¶ 14} At the conclusion of trial, the court granted the parties a divorce pursuant to R.C. 3105.15(K). The trial court found that neither party was responsible for any deficiency in the foreclosed family home, that each party was entitled to household furnishings and appliances that were currently in their own name, and each party was individually responsible for all debts in their own name. The trial court found that appellant violated R.C. 3105.171 when he removed appellee from his health insurance benefits, and found appellant responsible for appellee's \$3,000 medical debt incurred in 2006. (Judgment Entry of trial court dated May 7, 2009, at 10.)

{¶ 15} Based upon the relative income of the parties, the court found that appellant's Ford Motor Company pension was divisible by virtue of a Qualified Domestic Relations Order ("QDRO"). The trial court did not include appellant's supplemental income allowance in this calculation, since it found appellant responsible for any deficiency in the repossessed family

automobile. The court ordered appellant to pay one-half of his benefits to appellee until appellee begins receiving her share of the pension from the plan administrator.

{¶ 16} Finally, the trial court ruled that appellee was entitled to the 65 percent annual survivor benefit as elected by appellant, and she was entitled to receive the full amount of her own retirement benefits through the State Employees Retirement System (“SERS”), free from any claims by appellant. The court also required appellant to pay any arrearage in spousal support. It is worth noting that, according to the trial court, neither party’s testimony was “entirely credible.” (Judgment Entry of trial court May 7, 2009, at 2)

Analysis

{¶ 17} Appellant presents five assignments of error for our review. Since some of these are related in law and fact, we will analyze them together where appropriate.

{¶ 18} Appellant’s first assignment of error states:

“The trial court erred and abused its discretion in its determination of the parties’ marriage.”

{¶ 19} A court’s decision to use the date of a final hearing as a de facto date is discretionary and will not be reversed absent an abuse of discretion. See *O’Brien v. O’Brien*, 8th Dist. No. 896145, 2008-Ohio-1098, at ¶40. (Internal citations omitted). The term “abuse of discretion” connotes more

than an error in judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Within this assignment of error, appellant argues that the trial court erred in determining that the termination date of the parties' marriage was the first day of trial, as opposed to the date of separation. We disagree. Ohio law is clear that the presumptive date for the termination of a marriage is the first day of trial, pursuant to R.C. 3105.171(A)(2). This court recently affirmed this rule when it determined that a trial court did not abuse its discretion in failing to find that the de facto termination date of a marriage was prior to the first day of trial. *O'Brien* at ¶40-44.

{¶ 20} In the instant case, the trial court did not abuse its discretion in making what amounts to that same determination. Here, as in *O'Brien*, the parties' finances were still intertwined, their financial assets had yet to be separated, and their continuing obligations were yet to be determined. *Id.* Therefore, the court did not err in finding the parties' marriage terminated on the first day of trial. Last, appellant has presented no evidence to support this assigned error, nor has he demonstrated any prejudice as a result of the trial court's determination. Appellant's first assigned error is overruled.

{¶ 21} Appellant's second assignment of error states:

“The trial court erred and abused its discretion by improperly determining the issues of temporary support, the parties’ incomes and the support obligations of appellant.”

{¶ 22} We review matters of spousal support for an abuse of discretion.

Brokaw v. Brokaw, 8th Dist. No. 92729, 2010-Ohio-1053, citing *Booth v. Booth* (1989), 44 Ohio St.3d 142, 144, 541 N.E.2d 1028. R.C. 3105.18(B) permits the court, upon the request of either party and after the division of marital property, to award reasonable spousal support to either party. When determining whether spousal support is appropriate and reasonable, the court must consider the factors set forth in R.C. 3105.18(C).² The trial court is not required to comment on each statutory factor; the record need only

²These factors include: “(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 of 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.”

show that the court considered the statutory factors when making its award. *Carman v. Carman* (1996), 109 Ohio App.3d 698, 703, 672 N.E.2d 1093.

{¶ 23} In the instant case, appellant argues that the trial court unjustly determined the temporary support order, the relative income of the parties, and the current amount of support appellant is required to pay. Appellant does not argue that the trial court failed to consider any of the enumerated factors under R.C. 3105.18(C). In support of this argument, appellant states that appellee hid assets from the court and, as a result of the court's temporary spousal support order, appellee's income was actually greater than appellant's. As such, appellant argues that appellee should pay spousal support to him. The record does not support appellant's arguments.

Temporary Support

{¶ 24} Regarding the temporary support order, the trial court based its order on appellee's income of \$26,038 and appellant's income of \$35,000. Based upon these figures, the trial court determined that a temporary support award of \$369.75 per month was appropriate. Appellant did not object to the use of these figures at trial. The judgment entry of the trial court makes clear that it considered all the factors required by R.C. 3105.18(C)(1)(a)-(n) in rendering its decision. The trial court did not abuse its discretion in doing so.

Parties' Incomes

{¶ 25} Regarding the income of the parties, the evidence at trial was clear that appellee's income in 2006 was \$22,652 and she received an additional \$7,552.90 distribution from Ford. (See plaintiff's exhibits 19 and 22.) Appellee's income was approximately \$31,614.19 in 2008. (See plaintiff's exhibit 23.)

{¶ 26} Prior to his voluntary retirement in 2004, at the age of 56, appellant earned approximately \$55,000 per year. At the time of trial, appellant showed evidence that he was receiving a monthly distribution from his Ford pension in the amount of \$2,935, including his supplemental allowance. However, it is impossible to determine an exact calculation of his income at the time of trial, since appellant never submitted W-2 or 1040 forms for 2008.

{¶ 27} At trial, appellant was cross-examined specifically about his home repair business and the amount of his monthly rent. Appellant did not answer these and other questions about his income and rental arrangement, including how much monthly rent he pays and how regularly he pays rent. Appellant could not remember the phone number of his landlord, though he stated that he called her to arrange rental payments. It was revealed at trial that he and his landlord had been romantically involved for at least five years and that they shared utility expenses. Appellant refused to provide any information regarding the secondary income he made from his home repair

business. Taken together, appellant's testimony at trial regarding his assets and income was less than candid.

{¶ 28} Based upon the evidence in the record and the parties' testimony, the trial court found that "[appellee's] income, through employment, is slightly less than [appellant's] pension." (Judgment Entry of trial court dated May 7, 2009, at 7.) There is nothing unreasonable or arbitrary about this determination. As the trier of fact, the trial court was in the best position to assess the credibility of witnesses and the weight to be given their testimony; we will not substitute our judgment for that of the trial court on that issue. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81, 461 N.E.2d 1273. Upon review of the testimony, exhibits presented, and the arguments of the parties, we conclude that competent, credible evidence supported the trial court's finding regarding the parties' income levels. The trial court did not abuse its discretion in making this determination.

Appellant's Support Obligations

{¶ 29} Likewise, the trial court made both its temporary support order and spousal support order based exclusively on the exhibits submitted to the court and the factors set forth in R.C. 3105.18(C). The appellant argues that appellee should reimburse him for his prior spousal support payments, and he should receive spousal support from appellee if appellee were to receive a share of his Ford pension. Appellant reasons that he should receive these

benefits because the Temporary Support Order allegedly allowed appellee to receive over \$5,000 more in income than appellant. There is no evidence in the record to support this figure or appellant's argument. Even if there were, the trial court's spousal support calculation was based on appellant's pension, which is marital property that appellee was clearly entitled to.

{¶ 30} Appellant's argument is predicated upon the assumption that the trial court's original temporary support award was erroneous. We have already determined that the trial court did not abuse its discretion in making the original temporary support award.

{¶ 31} Further, the trial court found that an award of spousal support to either party was not warranted. (Judgment Entry of trial court dated May 7, 2009, at 9.) Based upon the relative income of the parties and the evidence in the record, nothing in the record suggests that this order was unreasonable. We note that, contrary to appellant's argument that appellee received too much temporary support, appellant had in fact failed to pay his court-ordered temporary support, as he was \$961.35 in arrears at the time of trial. What is more, the trial court expressly reserved jurisdiction to revisit these issues once appellee retires. The trial court did not err in making its spousal support determination. Appellant's second assignment of error is overruled.

{¶ 32} Since they are related in law and fact, we consider appellant's final three assignments of error together.

“The trial court erred and abused its discretion in failing to properly allocate the indebtedness associated with the parties’ marital residence located at 9871 Kingsbury Boulevard, Cleveland, Ohio, appellee’s alleged medical bill, and the parties’ villager van.

The trial court erred and abused its discretion in failing to equitably divide the marital property.

The trial court erred and abused its discretion in dividing the parties’ retirement benefits, in dividing appellant’s retirement benefits now, and in failing to order that the appellee pay appellant spousal support.”

{¶ 33} Generally, this court reviews the overall appropriateness of a trial court's property division in divorce proceedings under an abuse of discretion standard. *Cherry v. Cherry* (1981), 66 Ohio St.2d 348, 421 N.E.2d 1293.

Allocating the Parties’ Indebtedness

{¶ 34} Appellee argues that the trial court abused its discretion regarding three of the parties’ alleged debts: appellee’s \$3,000 medical bill, the parties’ foreclosed home, and the parties’ repossessed van. Appellant’s arguments are not well taken on this point.

{¶ 35} First, the trial court determined that neither party was financially responsible for any residual debt from the foreclosed family home

on Kingsbury Boulevard. Appellant therefore cannot complain about financial responsibility for this debt.

{¶ 36} Second, the trial court determined appellant was responsible for appellee's \$3,000 medical bill because he surreptitiously removed her from his health insurance policy during their marriage without her knowledge. This is in direct violation of R.C. 3105.71, which states in part:

“(A) If a party to an action for divorce, annulment, dissolution of marriage, or legal separation was the named insured or subscriber under, or the policyholder, certificate holder, or contract holder of, a policy, contract, or plan of health insurance that provided health insurance coverage for that party’s spouse and dependents immediately prior to the filing of the action, that party shall not cancel or otherwise terminate or cause the termination of such coverage for which the spouse and dependents would otherwise be eligible until the court determines that the party is no longer responsible for providing such health insurance coverage for that party’s spouse and dependents.

(B) If the party responsible for providing health insurance coverage for that party’s spouse and dependents under division (A) of this section fails to provide that coverage in accordance with that division, the court shall issue an order that includes all of the following:

(1) A requirement that the party make payment to that party’s spouse in the amount of any premium that party failed to pay or contribution that party failed to make that resulted in that party's failure to provide health insurance coverage in compliance with division (A) of this section;

(2) A requirement that the party make payment to that party’s spouse for reimbursement of any hospital, surgical,

and medical expenses incurred as a result of that party's failure to comply with division (A) of this section;

(3) A requirement that, if the party fails to comply with divisions (B)(1) and (2) of this section, the employer of the party deduct from the party's earnings an amount necessary to make any payments required under divisions (B)(1) and (2) of this section."

{¶ 37} Therefore, the trial court did not err in ordering appellant to be financially responsible for appellee's medical bill.

{¶ 38} Finally, the trial court determined that appellant was financially responsible for any financial deficiencies regarding the repossessed family van because he took it from appellee's home without her consent, used it for his own purposes, and failed to make payments. In view of this obligation, however, the trial court expressly did not include appellant's monthly supplemental allowance as an asset to be divided in the QDRO. The trial court therefore balanced appellant's responsibility to pay for the automobile he took from appellee and decreased the corresponding amount from his pension to be divided by the QDRO. Though not exact, these amounts are certainly equitable and do not constitute an abuse of discretion.

**Allocating Remaining Marital Property:
Pension and Retirement Benefits**

{¶ 39} Appellant can point to no discrepancy in the record regarding the trial court's division of marital property. Here, the trial court specifically ordered that appellant's Ford pension be divided by the QDRO, but did not include appellant's supplemental allowance of \$1,693.87 that was being received as a substitute for social security in its order, based on its factual finding that appellant was obligated to make up any financial shortfall in the repossessed family van. Thus, the only amount subject to the QDRO was appellant's Ford pension. (Judgment Entry of trial court dated May 7, 2009, at 8.)

{¶ 40} Appellee testified at trial that she is still working and that her pension benefits under SERS are not yet in payout status. Therefore, neither party is eligible to receive these benefits, and they were not included in the trial court's calculation. See. R.C. 3105.171.

{¶ 41} Appellant has failed to demonstrate that there was anything unreasonable in the trial court's determination that appellee is entitled to a portion of his retirement benefits. Though not expressly mentioned in the decision, Ohio law is clear that retirement benefits, pensions, and social security benefits acquired during the course of a marriage must be considered when making an equitable distribution of the marital estate. R.C. 3105.171(A)(3)(a)(ii). While federal law prohibits a domestic relations court from dividing social security benefits, state courts may consider the

effect of these benefits when dividing property. *Id.* There is no indication in the record that the trial court erred in making its determination, nor has appellant demonstrated that he suffered any prejudice in the trial court's division of these assets presently as opposed to some future time.

{¶ 42} Finally, while appellant continues to claim that he is entitled to an award of spousal support from appellee, the trial court found neither party entitled to such an award. We see no abuse of discretion in the trial court's findings.

{¶ 43} Appellant's third, fourth, and fifth assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 domestic relation division of the common pleas court 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.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR

