

[Cite as *Roxburgh v. Richardson*, 2021-Ohio-2229.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

ADAM ROXBURGH, JR.

C.A. No. 29629

Appellant

v.

CYNTHIA J. RICHARDSON

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. DR-1999-09-2311

Appellee

DECISION AND JOURNAL ENTRY

Dated: June 30, 2021

SUTTON, Judge.

{¶1} Plaintiff-Appellant, Adam Roxburgh, Jr., appeals the judgment of the Summit County Court of Common Pleas, Division of Domestic Relations. For the reasons that follow, this Court affirms.

I.

July 18, 2000 Decree of Divorce

{¶2} Mr. Roxburgh and Defendant-Appellee Cynthia Richardson (collectively known as “the Parties”) were married in Cuyahoga Falls, Ohio on June 27, 1981, and divorced in Summit County, Ohio on July 18, 2000. Prior to the divorce being finalized, they reached a Settlement Agreement which was adopted and incorporated in the Decree of Divorce. The relevant portion of the Parties’ Decree of Divorce states as follows:

[Mr. Roxburgh] is currently entitled to a pension through School Employees Retirement System (hereinafter SERS). The parties agree that [Ms. Richardson] shall be entitled to fifty percent (50%) of said pension benefit as of May 5, 2000, multiplied by the fraction created by the number of years that the parties were

married divided by the number of years that [Mr. Roxburgh] participates in the SERS system, offset by the Social Security retirement that [Ms. Richardson] shall be entitled to recover from her own employment. The SERS system [cannot] be divided by means of a [Qualified Domestic Relations Order] QDRO, so the Court shall maintain jurisdiction over the pension only to ensure that [Ms. Richardson] receives the amount that she is entitled to receive under this paragraph.

In 2018, due to Mr. Roxburgh's anticipated retirement, a dispute arose regarding the interpretation of the above-cited provision relating to the offset of Ms. Richardson's Social Security retirement.

Proposed Division of Property Order and Motion for Contempt

{¶3} On July 16, 2018, Mr. Roxburgh, through counsel, sent Ms. Richardson a correspondence requesting a copy of her monthly Social Security benefit, in order to calculate an offset from his SERS pension, along with a proposed Division of Property Order ("DOPO"). Ms. Richardson was instructed to sign and return the DOPO, with a copy of her "Social Security" statement, to Mr. Roxburgh's counsel. On September 4, 2018, Mr. Roxburgh filed a Motion for Contempt and Show Cause Hearing alleging Ms. Richardson "refused, and continues to refuse," to sign and return the DOPO because she believes "she is entitled to a greater distribution[.]"

December 4, 2018 Show Cause Hearing

{¶4} A magistrate of the trial court presided over the December 4, 2018, Show Cause Hearing. Mr. Roxburgh attended with legal representation and Ms. Richardson attended without legal representation. The transcript from the December 4, 2018 Show Cause Hearing reveals that, subsequent to Mr. Roxburgh's filing the Motion for Contempt, Ms. Richardson, in fact, signed the proposed DOPO, and the trial court cancelled the original Show Cause Hearing. However, after Ms. Richardson signed the DOPO, Mr. Roxburgh's counsel handwrote a provision regarding a dollar-for-dollar offset of Ms. Richardson's full Social Security disability from her portion of the SERS pension payout. The trial court contacted Ms. Richardson to verify whether she agreed with

this handwritten change to the DOPO. Ms. Richardson indicated she did not agree and the trial court re-set the Show Cause Hearing.

{¶5} At the December 4, 2018 Show Cause Hearing, Ms. Richardson testified, in relevant part:

* * *

I did sign the first division of property order. But when I received the phone call from the judge's clerk asking me did I agree with the paragraph that [Mr. Richardson's counsel] [handwrote] on the document *after I signed it*, which I thought was unethical to add anything to a document after it's been signed, [the] judge stopped it and called me.

That's why we are here because I don't agree with that paragraph. That it's by law that the government will deduct my offset from my Social Security disability which is what I'm on, disability. I'm not retired and I don't plan to retire for what? Another six years, but when it - - if and when it is to be done, they will do that.

SERS does not have to deduct anything. It's done by law and I'm afraid that if they implement this thing with SERS saying that they need to deduct, well, it's going to be a double offset, two deductions instead of just one from the government.

And the fact that I don't receive retirement, I'm not retired. I'm on disability[.]

* * *

(Emphasis added.) Ms. Richardson also explained to the magistrate that she did not know whether she would receive the same amount in benefits from Social Security retirement as she currently receives in Social Security disability. The magistrate, however, simply instructed Mr. Roxburgh's counsel to type, instead of handwriting, the provision offsetting Ms. Richardson's portion of the pension by the full amount of Ms. Richardson's Social Security disability, and to re-send the DOPO to Ms. Richardson for signature. The magistrate further held the Motion for Contempt in abeyance until the Parties resolved this issue but did not issue a court order in this regard.

Motion for Relief from Judgment

{¶6} Ms. Richardson, through counsel, filed a Motion for Relief from Judgment, pursuant to Civ.R. 60(B)(4) and (5), regarding only the disputed portion of the Parties' Decree of Divorce. In the Motion, Ms. Richardson requested the trial court set aside the provision in the Decree of Divorce requiring a Social Security offset. Further, Ms. Richardson sought to compel Mr. Roxburgh to revise the proposed DOPO to exclude her Social Security disability, as well as any Social Security benefits accruing during the Parties' marriage. In response, Mr. Roxburgh contended the Motion for Relief from Judgment was inappropriate because eighteen years passed since the Parties' divorce and Ms. Richardson had legal representation during divorce negotiations. This, along with Mr. Roxburgh's Motion for Contempt, was set for a hearing before the trial court on June 10, 2019.

June 10, 2019 Motions Hearing

{¶7} At the hearing, the Parties' counsel had the opportunity to confer with the judge about the disputed provision in the Decree of Divorce. On the record, the trial court explained to the Parties as follows:

* * *

I have discussed this matter with both attorneys, and the problem with the situation that you're in is that at the time of your divorce decree, the law was not clear as to how these pensions should be divided. [C]urrently nowadays, they are divided by what's called a division of property order which was not in effect at the time of your divorce decree. And the Courts of Appeals have generally provided for how the person with the public pension is to receive an offset of the Social Security benefits of the nonparticipant.

That needs to be done in your case in my opinion. So I suggested to the attorneys that we defer [] my decision on the motions until you've had a chance to consult with a company called Pension Evaluators which are very knowledgeable in this area and help many attorneys in many cases prepare the appropriate division of property order.

* * *

{¶8} The Parties, through counsel, were provided the opportunity to speak on the record as to the judge’s proposed solution. Mr. Roxburgh’s counsel agreed to the proposal to hire Pension Evaluators and only expressed concern regarding Ms. Richardson turning over the appropriate Social Security documentation, as well as splitting the cost of Pension Evaluators. Ms. Richardson agreed to splitting this cost and the trial court put on an order holding both motions in abeyance pending further “guidance” from Pension Evaluators.

Motion to Approve the DOPO and December 5, 2019 Hearing

{¶9} Subsequent to receiving Pension Evaluator’s Social Security offset calculation and proposed DOPO, which included the fair market value of Ms. Richardson’s Social Security retirement discounted by the portion earned outside the marriage, Ms. Richardson filed a Motion to Approve Division of Property Order. At the December 5, 2019 Hearing, Mr. Roxburgh’s counsel stated:

Without * * * waiving any rights with regard to our *interpretation* of paragraph 6 of the divorce decree, we did at the Court’s request have [Pension Evaluators] do an analysis which would determine what the value of Mr. [Roxburgh’s] SERS benefits are, determine the [fractional] share that was to be appropriated for the marital portion, and [Pension Evaluators] went ahead at that point and did also a calculation of Ms. Richardson’s Social Security benefits and what would be the fractional share that would be, you know, due to the term of marriage and use the offset of the fractional share.

(Emphasis added.) Mr. Roxburgh’s counsel further indicated that, “it was our position that [in] the Social Security offset never was there a reference to any sort of fractional share of the Social Security benefits of Ms. Richardson. * * * [The pension is] to be offset by the full amount of Social Security that she is going to receive. That *seems* to be the plain language of paragraph 6.”

(Emphasis added.)

{¶10} In response, Ms. Richardson’s counsel urged the trial court to approve the proposed DOPO drafted by Pension Evaluators because it set forth “the appropriate [Social Security] retirement offset” per the Parties’ Decree of Divorce.

December 10, 2019 Judgment Entry

{¶11} On December 10, 2019, the trial court journalized a Judgment Entry disposing of (1) Mr. Roxburgh’s Show Cause Motion; (2) Ms. Richardson’s Motion for Relief from Judgment; and (3) Ms. Richardson’s Motion to Approve the DOPO. In sustaining Ms. Richardson’s Motion regarding the DOPO, the trial court stated:

Paragraph 6 of the decree provided for a division of [Mr. Roxburgh’s] [SERS], taking into account [Ms. Richardson’s] Social Security benefit.

[Pension Evaluators] has submitted a report determining the impact that [Ms. Richardson’s] Social Security benefit has on the division of [Mr. Roxburgh’s] SERS pension.

Further, the trial court overruled Mr. Roxburgh’s Motion to Show Cause and Ms. Richardson’s Motion for Relief from Judgment. The trial court also signed and journalized the DOPO submitted by Ms. Richardson, as drafted by Pension Evaluators, as a separate order of the court. Subsequently, the Summit County Clerk of Courts submitted the DOPO to SERS for review and approval. On January 24, 2020, SERS approved the DOPO as compliant under Ohio law.

{¶12} On appeal, Mr. Roxburgh raises a single assignment of error.

II.

ASSIGNMENT OF ERROR

**THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN
CONSTRUING THE PARTIES’ SEPERATION AGREEMENT[.]**

{¶13} In his Brief, Mr. Roxburgh indicated the sole issue on appeal is “whether the trial court erred in finding the Social Security offset provision of the [P]arties’ separation agreement to be ambiguous and therefore subject to interpretation.”

Standard of Review

{¶14} “Separation agreements are contracts, subject to the same rules of construction as other contracts[.]” *Musci v. Musci*, 9th Dist. Summit No. 23088, 2006-Ohio-5882, ¶ 42. They are to be interpreted so as to honor the intent of both parties, “as evidenced by contractual language.” *Miller v. Miller*, 9th Dist. Medina No. 10CA0034-M, 2011-Ohio-4299, ¶ 22. The interpretation of any terms of a separation agreement is a question of law, as is the determination of whether a contract is ambiguous. *Ivanov v. Ivanov*, 9th Dist. Summit No. 24998, 2010-Ohio-1963, ¶ 18-20; *Zlocki v. Zlocki*, 9th Dist. Summit No. 24747, 2009-Ohio-5797, ¶ 8. This Court reviews both propositions de novo. *Miller* at ¶ 22; *Zlocki* at ¶ 8.

{¶15} If ambiguity in a separation agreement exists, however, a trial court has discretionary authority to interpret the agreement and clarify the ambiguity. *Ivanov* at ¶ 18. Indeed, the trial court holds this authority because it “enjoys broad discretion in fashioning an equitable division of marital property.” *Helms v. Helms*, 9th Dist. Summit No. 15791, 1992 WL 380602, *1 (Dec. 16, 1992), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 218 (1983). *See also Bond v. Bond*, 69 Ohio App. 3d 225, 228, (9th Dist.1990). (“Whenever a clause in a separation agreement is deemed to be ambiguous, it is the responsibility of the trial court to interpret it. The trial court has broad discretion in clarifying ambiguous language by considering not only the intent of the parties but the equities involved.”) Thus, this Court employs an abuse of discretion standard of review regarding a trial court's discretionary rulings on a separation agreement. *Buttolph v. Buttolph*, 9th Dist. Wayne No. 09CA0003, 2009-Ohio-6909, ¶ 9. An abuse of

discretion means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore* at 219.

Division of Property Orders

{¶16} A qualified domestic relations order (“QDRO”) “creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a [retirement] plan.” *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, ¶ 6, quoting 29 U.S.C. 1056(d)(3)(B)(i)(I). Further, when the retirement plan at issue is a public retirement plan, such orders are referred to as “division of property orders” (“DOPO”) because they must comply with additional statutory requirements. “R.C. 3105.80 et seq., enacted in January 2002, allowed domestic relations courts to enter a [DOPO] regarding divorced parties’ public retirement plans.” *Romans v. Romans*, 9th Dist. Summit No. 23181, 2006-Ohio-6554, ¶ 13. “A DOPO permits a pension plan to make direct payment of benefits to an alternate payee, such as a former spouse.” *Id.* See also R.C. 3105.80 et seq. (detailing the legal requirements for a DOPO).

{¶17} R.C. 3105.89, states:

Notwithstanding division (I) of section 3105.171 of the Revised Code:

(A) The court shall retain jurisdiction to modify, supervise, or enforce the implementation of an order described in section 3105.81 of the Revised Code.

(B) The court may modify an order issued under section 3105.171 or 3105.65 of the Revised Code that was effective prior to the effective date of this section for the purpose of enforcing the order or carrying into effect the manifest intentions of the parties. A modified order must meet the requirements of section 3105.82 of the Revised Code.

As this Court previously explained, “R.C. 3105.89(B) allows the trial court to modify an order dividing marital property that was in effect prior to January 1, 2002, ‘for the purpose of enforcing the order or carrying into effect the manifest intentions of the parties.’” *Ivanov* at ¶ 14.

Application of the Law to this Record

{¶18} Here, the record indicates that the Parties divorced on July 18, 2000, prior to the enactment of R.C. 3105.80 et seq., which mandates a DOPO be used to divide Mr. Roxburgh’s SERS pension and provide direct payment to Ms. Richardson. As such, pursuant to R.C. 3105.89(A) and (B), the trial court retained “jurisdiction to modify, supervise, or enforce” the Parties’ Decree of Divorce relating to the provision regarding division of Mr. Roxburgh’s SERS pension. The provision at issue, as indicated above, states:

[Mr. Roxburgh] is currently entitled to a pension through School Employee Retirement System (hereinafter SERS). *The parties agree that [Ms. Richardson] shall be entitled to fifty percent (50%) of said pension benefit as of May 5, 2000, multiplied by the fraction created by the number of years that the parties were married divided by the number of years that [Mr. Roxburgh] participates in the SERS system, offset by the Social Security retirement that [Ms. Richardson] shall be entitled to recover from her own employment.* The SERS system [cannot] be divided by means of a [Qualified Domestic Relations Order] QDRO, so the Court shall maintain jurisdiction over the pension only to ensure that [Ms. Richardson] receives the amount that she is entitled to receive under this paragraph.

(Emphasis added.)

{¶19} In anticipation of his own retirement, Mr. Roxburgh attempted to implicate Ms. Richardson’s Social Security *disability*, which is Ms. Richardson’s separate property, in the calculation of Ms. Richardson’s portion of his SERS pension.¹ In so doing, Mr. Roxburgh, through counsel, provided Ms. Richardson with a DOPO wherein her Social Security disability would be subtracted, dollar-for-dollar, from her portion of the SERS pension. Ms. Richardson has not

¹ This Court has “recognize[d] a distinction between disability retirement and old-age retirement” where “disability benefits constitute income replacement benefits,” instead of “retirement pay.” *Ivanov* at ¶ 29-30. However, this distinction is not at issue in this appeal because the DOPO in question was calculated based upon Ms. Richardson’s social security retirement, and not her social security disability.

retired, and, therefore, has not yet begun receiving Social Security *retirement* through her employment, as contemplated in the Decree of Divorce. (*See Ivanov*, 2010-Ohio-1963 at ¶ 24, “Marital property” includes retirement benefits of the spouses. It does not, however, include any “separate property,” which includes “[c]ompensation to a spouse for the spouse's personal injury.” Disability benefits constitute compensation received for personal injury.” (Internal citations omitted.))

{¶20} Throughout this dispute, Mr. Roxburgh claimed the language in the Decree of Divorce, regarding the “offset by [] Social Security retirement,” was unambiguous, entitling him to subtract the full amount of Ms. Richardson’s Social Security benefits directly off the top of her portion of the SERS pension. At the December 5, 2019 Motions hearing, however, even Mr. Roxburgh’s counsel used the term “interpretation” when discussing the language in paragraph 6 of the Parties’ Decree of Divorce, and further stated it “*seems* to be the plain language of paragraph 6.” (Emphasis added.) The plain language in the Decree of Divorce is ambiguously silent as to the type of “offset” intended by the Parties. Specifically, the Decree of Divorce does not clearly specify that Mr. Roxburgh should receive a dollar-for-dollar or full offset of Ms. Richardson’s Social Security retirement, including any and all non-marital portions which accrued prior to the Parties’ marriage or subsequent to the Parties’ divorce. Further, Ms. Richardson indicated, on the record, she did not intend or agree to a full or dollar-for-dollar offset of her Social Security benefits.

{¶21} In recognizing the ambiguity in the Decree of Divorce, and the deficiency in the law regarding the division of public pensions in the year 2000, the trial court *suggested* the Parties engage Pension Evaluators to prepare a compliant DOPO. The Parties clearly agreed to engage Pension Evaluators and even split the cost for preparing the DOPO. The DOPO, prepared by Pension Evaluators and adopted by the trial court, included a calculation of the fair market value

of Ms. Richardson's Social Security retirement, discounted by the portion earned outside the marriage, which offset Ms. Richardson's portion of Mr. Roxburgh's SERS pension by the marital portion of her Social Security retirement.

{¶22} In light of the ambiguous language in the Parties' Decree of Divorce regarding the Social Security offset, and the fact that the trial court specifically retained jurisdiction to ensure Ms. Richardson received her entitled amount from Mr. Roxburgh's SERS pension, this Court cannot say the trial court abused its discretion in clarifying the ambiguous "offset" language in the Decree of Divorce and considering both the intent of the Parties and the equities involved. Specifically, the trial court did not act unreasonably, arbitrarily, or unconscionably in suggesting the Parties employ Pension Evaluators, which the Parties did on their own accord, or in adopting the resulting DOPO which divided the SERS pension pursuant to Ohio law.

III.

{¶23} For the reasons stated above, Mr. Roxburgh's sole assignment of error is overruled. The Judgment of the Summit County Court of Common Pleas, Division of Domestic Relations, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETTY SUTTON
FOR THE COURT

TEODOSIO, J.
CONCURS.

CARR, P. J.
DISSENTING.

{¶24} I respectfully dissent from the majority's judgment.

{¶25} Mr. Roxburgh contends that the trial court erred in concluding the Social Security offset provision in the separation agreement was ambiguous and subject to interpretation. Whereas Ms. Richardson maintains that it is ambiguous and that she never intended to agree to a dollar-for-dollar offset of her Social Security retirement benefits.

{¶26} However, the trial court did not make a specific finding that the offset provision was ambiguous. The trial court indicated the confusion with the offset provision was due to the fact that, in the year 2000, there was no statutory mechanism (i.e. DOPO) to divide a public pension. This is not equivalent to a finding of ambiguity. Nonetheless, absent a finding of ambiguity, there was no basis to interpret the language in the separation agreement. *See Miller v.*

Miller, 9th Dist. Medina No. 14CA0083-M, 2015-Ohio-5447, ¶ 15 (“Separation agreements are contracts, subject to the same rules of construction as other contracts, to be interpreted so as to carry out the intent of the parties. The intent of the parties is presumed to reside in the language they chose to use in their agreement. If the separation agreement is not ambiguous, the trial court may not construe, clarify or interpret the parties’ agreement to mean anything outside of that which it specifically states.”) (Internal citations and quotations omitted). Further, “a trial court possesses jurisdiction to adopt a DOPO consistent with its divorce decree, but, absent express reservation of jurisdiction or express consent of the parties, it may not adopt a DOPO that changes the award the decree granted. A DOPO is inconsistent with a decree when it modifies the division of retirement benefits ordered in the decree, and a DOPO modifies a division of retirement benefits when the DOPO varies from, enlarges, or diminishes the awards the court ordered in the decree.” *Cameron v. Cameron*, 10th Dist. Franklin No. 12AP-349, 2012-Ohio-6258, ¶ 13; *see also Kalbaugh v. Kalbaugh*, 9th Dist. Nos. 29184, 29185, 29219, 29328, 2020-Ohio-3873, ¶ 21 (citing to *Cameron*).

{¶27} Here, the trial court’s orders are not consistent with the plain language of the separation agreement. While the trial court may have been trying to effectuate what it viewed as more equitable than the plain language of the separation agreement, such was not its role given the circumstances.

{¶28} I also note that the offset in the decree does not refer to social security disability but social security retirement. At the time of the proposed offset, Ms. Richardson was receiving social security disability not social security retirement. These are completely different payments. Social Security Disability payments are made to certain disabled workers under age 65 who are found to be disabled following a determination process. *See State Healthcare Laws Library – Arizona*, Paragraph 606, 2021 WL 2051297. Whereas Social Security Retirement payments

involve payments “to a retired worker who has earned a minimum of 40 Social Security work credits (10 years of work). An individual may earn a maximum of 4 credits per year. A qualified worker may retire as early as age 62 and receive a reduced “early retirement’ benefit.” *Id.*

APPEARANCES:

JEFFREY N. JAMES, Attorney at Law, for Appellant.

JEFFREY V. HAWKINS, Attorney at Law, for Appellee.