

ORIGINAL

IN THE SUPREME COURT OF OHIO

DEBRA MURPHY-KESLING,	:	Case No. 14-1445
	:	
Appellant,	:	On Appeal from the Court of
	:	Appeals, Ninth Appellate
vs.	:	District
	:	
GERALD M KESLING,	:	Court of Appeals Case No.
	:	26957 and 26962
	:	
Appellee.	:	

MEMORANDUM IN OPPOSITION OF JURISDICTION OF
APPELLEE GERALD MICHAEL KESLING

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SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC
OR GREAT GENERAL INTEREST

This case involves a long and tortuous divorce. However, it contains no issues of public or great general interest. This is a matter of one person's resistance to the trial court's enforcement of the equitable division of marital property.

The record which will be before this Court, if it should accept jurisdiction, will unequivocally demonstrate that Ms. Murphy-Kesling has attempted to thwart the property division ordered by the trial court at every turn.

The trial court issued a Division of Property Order as to her STRS benefits, offsetting Mr. Kesling's Social Security benefits. This occurred only after much argument by Ms. Murphy-Kesling. When Ms. Murphy-Kesling took her disability benefits from STRS, Mr. Kesling received the share ordered by the trial court in its DOPO from the first benefit Ms. Murphy-Kesling accessed.

Ms. Murphy-Kesling returned to work for two years and then took her retirement benefits. The trial court determined that it should issue a new Division of Property Order because the term "first" that was used in the original DOPO did not mean "only." It noted that the parties had been married for 19

years and that it would be inequitable if Husband's interest in Wife's retirement benefits could be defeated just because she received disability benefits for a period of time. It, therefore, granted Husband's motion for a second Division of Property Order.

The Court of Appeals upheld the trial court's issuance of a second DOPO, which simply enforced the property division of its decree of divorce. There is no new interpretation of law necessitated by this set of facts.

STATEMENT OF THE CASE AND FACTS

The parties were divorced on August 21, 2002. The parties' Decree of Divorce incorporated their agreement, which provides, in pertinent part, that:

The Plaintiff is a participant in the State Teacher Retirement Systems of Ohio (STRS). A portion of her account is pre-marital property. The parties will employ Pension Evaluators to determine the marital portion and to determine the value of a Social Security offset for the Defendant's right to receive Social Security benefits. **The marital portion of said account less said Social Security offset will then be divided equally between the parties.** For purposes of that determination, the duration of the marriage will be from September 13, 1983, to September 9, 2002. The division of the Plaintiff's STRS benefits shall be based upon a coverture fraction. The parties will equally share the cost for Pension Evaluators to make its determination and to prepare any documents necessary to carry into effect the division of the benefits as set forth herein. (Emphasis added.)

Ms. Murphy-Kesling fought the enforcement of this provision from the moment the decree was filed. She fought over the terms for valuing the parties' offsetting assets. She contested the preparation of the Division of Property Order. Ultimately, the trial court issued a DOPO, which provided that Mr. Kesling would receive payments from the first benefit which Ms. Murphy-Kesling accessed.

Ms. Murphy-Kesling took disability pension and fought Mr. Kesling's right to a share of her STRS benefit. She filed for relief under the United States

Bankruptcy Code in an attempt to thwart the terms of the decree; she failed. When the trial court denied her Civ. R. 60(B) motion, she took her appeal to the Ninth District. She applied to this Court for a discretionary appeal in Case No. 09-1306. This Court rejected the appeal.

Ms. Murphy-Kesling then returned to work. After two years, she took her retirement. She again opposed Mr. Kesling's right to any share of her monthly STRS benefit.

At the direction of STRS, Mr. Kesling moved the trial court for a second Division of Property Order. The trial court entered a second DOPO, holding that "The portion of [Ms. Murphy-Kesling's] lifetime benefit earned during the marriage should be divided during the lifetime of the parties." Ms. Murphy-Kesling appealed, claiming that the first Division of Property Order had *res judicata* effect, limiting Mr. Kesling's interest to the initial disability portion of her STRS benefits.

The Ninth District Court of Appeals affirmed the trial court's issuance of a second DOPO, holding "The new division of property order merely allows Husband to access his share of Wife's STRS retirement benefits that he was awarded in the divorce decree." This ruling does not impact future divorcing

parties or the public pension plans of Ohio. This Court should reject Ms. Murphy-Kesling's application for a discretionary appeal.

ARGUMENT IN OPPOSITION TO PROPOSITION OF LAW

Counter-Proposition of Law No. 1: A trial court does not err in issuing a DOPO enforcing the terms of its decree of divorce. *Res judicata* does not apply where the trial court enforces the original decree.

Throughout this tumultuous post-decree litigation, Ms. Murphy-Kesling has attempted to deprive Mr. Kesling of his right to a portion of her STRS benefits, as set forth in the decree of divorce. Her most recent argument is that the second DOPO modifies the decree. At the court of appeals level, she argued that the first DOPO had *res judicata* effect. In previous litigation, she argued that he only could receive retirement benefits, not disability. In this case, she argued that he only could receive disability benefits, not retirement.

In fact, this Court has held that a Division of Property Order merely implements the retirement property division terms of a decree of divorce. *Wilson v. Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, ¶ 7. A DOPO "does not in any way constitute a further adjudication on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree." *Id.* at ¶ 16. It is simply "a ministerial tool used by the trial court in order to aid the relief that the court had previously granted." *Id.* at ¶ 18, quoting *Lamb v. Lamb*, 3d Dist. Paulding No. 11-98-09, 1998 WL 833606, *2 (Dec. 4, 1998).

The Summit County Court of Appeals decision in this case noted that:

It is apparent from the language of the decree that it was the intent of the trial court to award Husband a share of Wife's STRS retirement benefits. While the original division of property order may have allowed Husband to receive part of Wife's pre-retirement disability benefits, the fact that he received those benefits does not foreclose his right to a share Wife's retirement benefits as well. In this case, because STRS refused to pay Husband his share of Wife's retirement benefits without a new division of property order, the trial court correctly determined that it was appropriate to issue a new order. The court's action is consistent with the purpose of such orders, which is to implement the terms of a divorce decree. *Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, at ¶ 16. The trial court was also expressly allowed to modify its original division of property order under Section 3105.89(A).

The first DOPO in this case provided for continuing jurisdiction to modify, supervise, or enforce the implementation of the order. R. 43 at ¶ VIII. R.C. 3105.171(I). The trial court appropriately exercised its jurisdiction to enforce the implementation of its decree of divorce: it properly assigned the coverture fraction, less credit for Social Security benefits, to Husband.

This Court should decline this case, which was appropriately disposed of by the lower courts.

CONCLUSION

This case does not involve matters of public and great general interest and substantial constitutional questions. The appellee requests that this Court decline jurisdiction in this case.

Respectfully submitted,



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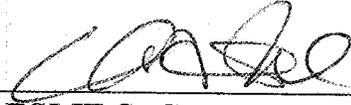
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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Opposition of Jurisdiction was sent by ordinary U.S. Mail to Debra Murphy-Kesling, 15392 Serfass Road, Doylestown, OH 44230 on September 16, 2014.



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COUNSEL FOR APPELLEE
GERALD MICHAEL KESLING

APPENDIX

Decision and Journal Entry of the Summit County Court
of Appeals April 30, 2014 I

STATE OF OHIO

COUNTY OF SUMMIT

)ss:

2014 APR 30 AM 8: 34

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

DEBRA J. MURPHY-KESLING

Appellant

v.

GERALD M. KESLING

Appellee

CLERK OF COURTS

C.A. No. 26957
26962

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. 2001-05-01866

DECISION AND JOURNAL ENTRY

Dated: April 30, 2014

HENSAL, Presiding Judge.

{¶1} Debra Murphy-Kesling appeals a judgment of the Summit County Court of Common Pleas, Domestic Relations Division that granted Gerald Kesling’s motion for division of property order. For the following reasons, this Court affirms.

I.

{¶2} As this Court explained in *Murphy-Kesling v. Kesling*, 9th Dist. Summit No. 24176, 2009-Ohio-2560, the Keslings married in 1983 and had two children together. They divorced in 2002. Throughout their marriage, Wife worked as a public school teacher and contributed to the State Teachers’ Retirement System (STRS). At the time of the divorce, Husband’s income was solely from Social Security Disability and Veteran’s Administration Disability. The parties agreed that Husband should receive part of Wife’s STRS pension. In its decree, the court directed them to “employ Pension Evaluators to determine the marital portion [of Wife’s STRS account] and to determine the value of a Social Security offset for [Husband’s]

right to receive Social Security benefits. The marital portion of said account less said Social Security offset will then be divided equally between the parties.” Neither party appealed the decree nor the division of property order that the court subsequently issued.

{¶3} In 2007, Wife began receiving disability benefits from STRS. Based on the language of the division of property order, STRS paid some of her benefits to Husband. Wife moved to modify the order, arguing that Husband was only entitled to receive a share of her retirement benefits, not pre-retirement disability benefits. The trial court denied her motion and this Court affirmed, concluding that neither the decree nor the division of property order excluded Husband from receiving Wife’s STRS disability benefits. *Kesling* at ¶ 20.

{¶4} Wife later returned to work, and she continued working until she retired in February 2013. After she retired, STRS did not pay any of her benefits to Husband because the division of property order directed it to distribute only the “first” benefit payment she received to him, which it had already done. Husband, therefore, moved for a new division of property order so that he could share in her retirement benefits. Following a hearing, the trial court granted his motion and entered a new division of property order. Wife has appealed, assigning as error that the court incorrectly granted his motion.

II.

ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ENTERING A NEW DIVISION OF PROPERTY ORDER WHERE THE EXISTING DIVISION OF PROPERTY ORDER HAD BEEN DETERMINED IN A FINAL PROCEEDING TO CORRECTLY ALLOCATE HUSBAND’S INTERESTS IN WIFE’S PENSION PLAN.

{¶5} Wife notes that, in her previous appeal, this Court determined that some of her arguments were barred because she had not timely appealed the decree or original division of

property order. *Kesling*, 2009-Ohio-2560 at ¶ 18. She argues that the trial court should have denied Husband's motion for the same reason. According to Wife, since Husband did not appeal the original division of property order, he is barred from arguing that he is entitled to anything other than the "first benefit" that she received from STRS.

{¶6} A qualified domestic relations order "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). When the retirement plan at issue is a public retirement plan, such orders are referred to as "division of property orders" because they must comply with additional statutory requirements. *See Romans v. Romans*, 9th Dist. Summit No. 23181, 2006-Ohio-6554, ¶ 13 ("A [division of property order] permits a pension plan to make direct payment of benefits to an alternate payee, such as a former spouse."); R.C. 3105.80 et seq. (detailing the requirements for a division of property order).

{¶7} In *Wilson*, the Ohio Supreme Court explained that a qualified domestic relations order "implements a trial court's decision of how a pension is to be divided incident to divorce or dissolution." *Wilson* at ¶ 7. It "does not in any way constitute a further adjudication on the merits of the pension division, as its sole purpose is to implement the terms of the divorce decree." *Id.* at ¶ 16. It is simply "a ministerial tool used by the trial court in order to aid the relief that the court had previously granted." *Id.* at ¶ 18, quoting *Lamb v. Lamb*, 3d Dist. Paulding No. 11-98-09, 1998 WL 833606, *2 (Dec. 4, 1998).

{¶8} The trial court determined that it should issue a new division of property order because the term "first" that was used in the original order did not mean "only." It noted that the parties had been married for 19 years and that it would be inequitable if Husband's interest in

Wife's retirement benefits could be defeated just because she received disability benefits for a period of time. It, therefore, granted Husband's motion for division of property order.

{¶9} Revised Code Section 3105.89(A) provides that the court that issues a division of property order "shall retain jurisdiction to modify, supervise, or enforce the implementation of [the] order * * *." The original division of property order contained language to that effect. In the divorce decree, the trial court explained that part of Wife's STRS benefits were pre-marital property. It also explained that whatever share that Husband had the right to receive should be offset by his own Social Security benefits. It ordered that "[t]he marital portion of said account less said Social Security offset will then be divided equally between the parties."

{¶10} It is apparent from the language of the decree that it was the intent of the trial court to award Husband a share of Wife's STRS retirement benefits. While the original division of property order may have allowed Husband to receive part of Wife's pre-retirement disability benefits, the fact that he received those benefits does not foreclose his right to a share Wife's retirement benefits as well. In this case, because STRS refused to pay Husband his share of Wife's retirement benefits without a new division of property order, the trial court correctly determined that it was appropriate to issue a new order. The court's action is consistent with the purpose of such orders, which is to implement the terms of a divorce decree. *Wilson*, 116 Ohio St.3d 268, 2007-Ohio-6056, at ¶ 16. The trial court was also expressly allowed to modify its original division of property order under Section 3105.89(A). We, therefore, reject Wife's argument that Husband's motion was barred under the doctrines of res judicata and law of the case.

{¶11} The new division of property order merely allows Husband to access his share of Wife's STRS retirement benefits that he was awarded in the divorce decree. Wife's assignment of error is overruled.

III.

{¶12} The trial court did not err when it granted Husband's motion for division of property order. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division 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.



JENNIFER HENSAL
FOR THE COURT