

[Cite as *Schetter v. Schetter*, 2011-Ohio-246.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

DIANNE M. SCHETTER :
Plaintiff-Appellant : C.A. CASE NO.
2010 CA 35

v. :
T.C. NO. 99DS1009

JEFFREY L. SCHETTER : (Civil appeal from Common
Defendant-Appellee : Pleas Court, Domestic Relations)
:

.....
OPINION

Rendered on the 21st day of January, 2011.

.....
VALERIE JUERGENS WILT, Atty. Reg. No. 0040413, 333 N. Limestone Street, Suite 104,
Springfield, Ohio 45503
Attorney for Plaintiff-Appellant

RODD S. LAWRENCE, Atty. Reg. No. 0040051, 496 South Third Street, Columbus, Ohio
43215
Attorney for Defendant-Appellee

.....
DONOVAN, P.J.

{¶ 1} Petitioner-appellant Dianne M. Schetter appeals a decision of the Clark County
Court of Common Pleas, Domestic Relations Division, overruling her objections and adopting
in part and modifying in part the decision of the magistrate regarding the division of

petitioner-appellee Jeffrey L. Schetter's retirement pensions. Dianne's appeal also involves the trial court's refusal to vacate the two Court Orders Acceptable for Processing (COAPs) which purported to divide Jeffrey's military and civil service retirement pensions.

{¶ 2} The magistrate's decision was filed on September 14, 2009. The judgment and entry adopting in part and modifying in part the decision of the magistrate was filed by the trial court on February 23, 2010. On March 24, 2010, Dianne filed a timely notice of appeal with this Court.

I

{¶ 3} Dianne and Jeffrey were married in Springfield, Ohio, on October 6, 1979. Three children were born during the marriage: Michael Schetter, d.o.b. 10/28/84; Marc Schetter, d.o.b. 9/22/87; and M.S., d.o.b. 2/15/93. On October 25, 1999, the parties filed a petition for the dissolution of their marriage. Both Dianne and Jeffrey were represented by private counsel throughout the pendency of their dissolution. Attached to the petition was a separation agreement which outlined the responsibilities of the parties during the interim preceding the execution of the dissolution decree. Subsequently, the judgment entry granting the parties' dissolution was filed on November 30, 1999. The dissolution decree specifically adopted and incorporated the terms and duties set forth in the separation agreement in regards to the responsibilities of the parties. The dissolution decree stated that Diane was "awarded a one-half (50%) interest in both the United States Military Retirement Pension Plan benefits and the Civil Service retirement interest with the United States Air Force earned by [Jeffrey], during the marriage of the parties."

{¶ 4} Contemporaneous to the filing of the dissolution decree, the parties submitted a Civil Service COAP and a Military COAP to the court. Each COAP was designed to

effectuate the equitable division of Jeffrey's military and civil service retirement pensions. Each of the COAPs expressly provided Dianne with 50% division of the "marital portion" of Jeffrey's retirement benefits to be determined "as of the date of dissolution of marriage." Moreover, both COAPs expressly state that Dianne "shall have no interest *** nor creditable service" in Jeffrey's retirement pensions "after the date of dissolution of marriage."

{¶ 5} The record establishes that in early 2000, Dianne submitted the COAPs to the appropriate governmental agencies for processing. The civil service COAP was approved on March 17, 2000, by the Civil Service Retirement System (CSRS), but the military COAP was denied. Dianne, however, took no action to correct the military COAP after it was denied, and in October of 2000, Dianne and Jeffrey reconciled and began living with each other, but did not remarry. The parties' domestic relationship lasted until July of 2006, when the parties separated for a final time.

{¶ 6} Two years after the relationship ended, Dianne resubmitted the military COAP to the Defense Financing and Accounting Service (DFAS). In a letter dated October 24, 2008, the DFAS rejected the application a second time. In the same letter, the DFAS advised Dianne to obtain a clarifying order from the trial court regarding the drafting of the military COAP. On March 3, 2009, Dianne filed a motion to clarify the trial court's orders with respect to the division of Jeffrey's civil service and military retirement benefits. Dianne also sought a court order vacating the COAPs that were filed with the original dissolution decree. Specifically, Dianne argued that the language in the separation agreement and the dissolution decree were ambiguous regarding the formula to be used to divide Jeffrey's retirement benefits. Additionally, Dianne sought to add provisions to the COAPs which would entitle her to benefits that were not drafted into any of the original dissolution documents or

otherwise agreed upon by the parties. Specifically, Dianne proposed new COAPs in which she requested: 1) an award of survivorship benefits for herself and her children; 2) that the court use the best three years of Jeffrey's military service for calculating Dianne's portion of the civil service and military benefits, even if those best years occurred after the termination of the marriage; and 3) that the court provide a cost of living (COLA) adjustment increase in the military benefits.

{¶ 7} After a hearing held on August 31, 2009, the magistrate issued a decision on September 14, 2009, holding that Dianne's portion of Jeffrey's retirement benefits was limited to that which accrued only during the marriage and not after. The magistrate also held that Dianne was entitled to apply for survivorship benefits for herself if she pays the entire cost to secure the benefit. The magistrate did find that the military COAP contained a COLA adjustment for Dianne. Lastly, the magistrate held that the language in the COAPs properly effectuated the intent of the parties as stated in the separation agreement and dissolution decree to provide Dianne with half of Jeffrey's retirement benefits accrued during the marriage.

{¶ 8} Dianne filed objections to the magistrate's decision on September 28, 2009. The trial court held a hearing regarding Dianne's objections on December 16, 2009. On February 23, 2010, the trial court issued a judgment entry modifying the magistrate's decision to the extent that Jeffrey's military COAP did not contain a COLA adjustment for Dianne. In all other respects, the trial court overruled Dianne's objections and adopted the magistrate's decision.

{¶ 9} It is from this judgment that Dianne now appeals.

{¶ 10} Because they are interrelated, Dianne’s first and second assignments of error will be discussed as follows:

{¶ 11} “THE TRIAL COURT ERRED AS A MATTER OF LAW BY LIMITING THE APPELLANT’S RIGHTS TO FULLY SHARE IN THE MARITAL PORTION OF THE APPELLEE’S MILITARY RETIREMENT BENEFITS AND CSRS BENEFITS, CONTRARY TO THE TERMS OF SEPARATION AGREEMENT, DECREE OF DISSOLUTION AND JUDICIAL PRECEDENT.”

{¶ 12} “THE COURT AS A MATTER OF LAW AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN IT CONCLUDED THAT THE TERMS OF THE COAPS, NOT THE SEPARATION AGREEMENT AND DECREE OF DISSOLUTION CONTROLLED THE TERMS OF THE PROPERTY DIVISION.”

{¶ 13} In her first assignment of error, Dianne contends that the trial court erred when it held that, based on the unambiguous language in the separation agreement, dissolution decree and COAPS, her portion of Jeffrey’s retirement benefits was limited to 50% of the amount accrued only during the marriage. Specifically, Dianne argues she is entitled to not only her portion of the benefits accrued during the marriage, but also a portion of benefits which were earned after the marriage was terminated upon Jeffrey’s retirement when the benefits would vest. We note that at the time of this appeal, Jeffrey has not retired from his position with the Ohio National Guard or the United States Air Force. Accordingly, while his interests in his civil service and military retirement benefits have vested, the funds remain unmatured until his actual retirement.

{¶ 14} It is well established that “pension or retirement benefits accumulated during the course of the marriage are marital assets subject to property division in a divorce action.”

Erb v. Erb (1996), 75 Ohio St.3d 18, 20. Regarding the division of pension or retirement benefits, the “trial court must have the flexibility to make an equitable decision based upon the circumstances of the case, the status of the parties, the nature, terms, and conditions of the pension plan, and the reasonableness of the result.” *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 180. A trial court “should attempt to preserve the pension or retirement benefit asset in order that each party can procure the most benefit,” and that a court “should attempt to disentangle the parties’ economic partnership so as to create a conclusion and finality to their marriage.” *Id.*

{¶ 15} The trial court has broad discretion to divide property in domestic relations cases, and its decision will not be disrupted on appeal absent unreasonable, arbitrary, or unconscionable conduct. *Middendorf v. Middendorf* (1998), 82 Ohio St.3d 397, 401, citing *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131; *Martin v. Martin* (1985), 18 Ohio St.3d 292, 294-295; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219; *Berish v. Berish* (1982), 69 Ohio St.2d 318, 319. “If there is some competent, credible evidence to support the trial court’s decision, there is no abuse of discretion.” *Middendorf*, 82 Ohio St.3d at 401.

{¶ 16} Generally, we have held that where the pension benefits were vested but unmaturing at the time of divorce, it may not be possible or equitable to effect a final division of retirement benefits. *Layne v. Layne* (1992), 83 Ohio App.3d 559. In this situation, the Ohio Supreme Court held in *Hoyt* that a trial court could divide retirement benefits by deferred distribution through a Qualified Domestic Relations Order (QDRO). 53 Ohio St.3d 177. The parties in the instant case utilized a similar device, a COAP, to effect the division of Jeffrey’s retirement benefits. A COAP is a

current distribution of the right in a retirement account that is payable in the future. “When the amount to be paid can only be determined at the later point of maturity at retirement, a current order should divide and distribute only the right to receive a share of the unmatured pension benefit, reserving determination of exact amounts to the later time when they are known.” *Layne*, 83 Ohio App.3d at 566. At that time, the non-employee spouse will be entitled to her share of the pension’s “value at maturity in proportion to the years of marriage.” *Id.* at 567. We reasoned that this method allows the non-employee spouse to share in “the benefit of any increase in the value of his or her unmatured proportionate share after divorce attributable to the continued participation of the other spouse in the retirement plan.” *Procuniar v. Procuniar* (Sept. 8 1995), Greene App. No. 95-CA-19, citing *Layne*, 83 Ohio App.3d at 567.

{¶ 17} At the time the decree of dissolution was filed in this case, both parties were represented by counsel, and had reached agreement about the terms in the decree. Agreements incorporated into divorce decrees are contracts and are subject to the rules of construction governing other contracts. *Pavlich v. Pavlich*, Summit App. No. 22357, 2005-Ohio-3305. Typically, we review contractual questions *de novo*, except where the contract is ambiguous. *Dzina v. Dzina*, Cuyahoga App. No. 83148, 2004-Ohio-4497. The trial court has broad discretion to clarify ambiguities, but whether a contract is ambiguous is a decision that is made as a matter of law. *Pavlich*, 2005-Ohio-3305. If an ambiguity does not exist, the trial court “may not construe, clarify or interpret the parties’ agreement to mean anything outside of that which it specifically states.” *Id.*

{¶ 18} The magistrate held, and the trial court agreed, that Jeffrey and Dianne’s decree of dissolution unambiguously stated that Dianne was entitled to only one-half of the value of the pension benefits that Jeffrey had accrued as of the date of the parties’ dissolution. The magistrate further found that Dianne was not entitled to share in any of the benefits accrued after the marriage was dissolved. The parties’ decree of dissolution specifically states that Dianne was awarded a one-half (50%) interest in both the military pension and the civil service pension “earned by [Jeffrey] during the marriage of the parties.” In our view, this language unambiguously evidences the intent of the parties to limit Dianne’s interest to the value of the pension funds as they existed on the date of the termination of the marriage. As is clear from the record, the parties agreed on terms and conditions, including the property division, and filed a decree reflecting their agreement. Notably, the parties did not allocate retirement benefits as the Ohio Supreme Court had suggested in *Hoyt* or as we did in *Layne*. Instead, the parties themselves chose to limit Dianne’s interest to one-half the value of the pension funds as they existed on the date of the dissolution.

{¶ 19} Additionally, we find that the language in both the COAPS that were filed contemporaneously with the decree of dissolution also support Jeffrey’s position that Dianne’s interest in the pensions was limited to the date the parties dissolved their marriage. The civil service COAP and the military COAP contain the same general language regarding the division of the respective retirement funds, and provide Dianne with 50% division of the “marital portion” of Jeffrey’s retirement benefits to be determined “as of the date of dissolution of marriage.” Moreover, both COAPs expressly state that Dianne “shall have no interest *** nor creditable service”

in Jeffrey's retirement pensions "after the date of dissolution of marriage."

{¶ 20} We also note that the testimony adduced at the hearing before the magistrate supported the division of benefits effectuated by the unambiguous language in the decree of dissolution and the COAPs. Even if we were to have to resort to a review of extrinsic evidence in order to interpret the intent of the parties, the uncontradicted testimony of Jeffrey and his attorney at the time of the dissolution, Anthony Pennington, established that the purpose of the decree and the COAPs was to limit Dianne's interest in the retirement benefits to the date of the termination of the marriage, and to preclude Dianne from pursuing any interest in the benefits after the marriage was over.

{¶ 21} Similarly, in *Jackson v. Hendrickson*, Montgomery App. No. 20866, 2005-Ohio-5231, we held that the language of the settlement agreement evidenced the parties' intent to restrict the former wife's interest in the former husband's pension benefits to the value of the retirement fund as it existed on the date of the parties' divorce. In *Jackson*, we held that the following language in the divorce decree established that the former wife was only entitled to one-half the accrued value of the former husband's pension on the date of the divorce:

{¶ 22} "Husband is a participant in the Police and Fireman's Disability and Pension Fund ('Retirement Plan'). Wife hereby is awarded one-half of any monthly benefit accrued to Husband in said Retirement Plan through September 16, 1992 [the date of the parties' divorce]."

{¶ 23} In the instant case, both parties in this case were represented by counsel. The parties could have used the apportionment method we suggested in

Layne, but chose a different manner of valuing the retirement funds. “This was their right, and we cannot intervene now simply because one side is dissatisfied with a choice that was freely made.” *Jackson*, 2005-Ohio-5231.

{¶ 24} “The sanctity of agreements (and the chaos that would be introduced if they could easily be set aside) are why parties normally cannot present extrinsic evidence of contractual intent. As the Ohio Supreme Court has said:

{¶ 25} “[t]he intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement. * * * A court will resort to extrinsic evidence in its effort to give effect to the parties’ intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning.’ *Kelly v. Medical Life Ins. Co.* (1987), 31 Ohio St.3d 130, 132.” *Jackson*, 2005-Ohio-5231.

{¶ 26} Dianne notes that the language in the separation agreement states only that “each party shall receive an equal share *** of all retirement benefits, pensions, 401k plans, etc. of the other.” Dianne argues that this language is ambiguous and inconsistent with the trial court’s holding that Dianne is entitled to only those benefits which accrued as of the date of the parties’ dissolution. As we have stated recently, however, the terms of the final decree of divorce or dissolution govern the parties’ obligations to each other. *Luther v. Luther*, Clark App. No. 2009 CA 112, 2010-Ohio-5388. “If the agreement is incorporated in the divorce decree, the agreement is superseded by the decree, and any obligations previously imposed by contract are thereafter imposed by decree.” *Leblanc v. Leblanc* (May 31, 1996), Greene App. No. 95-CA-43, citing, *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 417.

Thus, the controlling documents in this case are the dissolution decree and the COAPs which limit Dianne's interest in Jeffrey's pensions to one-half of the value accumulated during the marriage. Additionally, neither the dissolution decree nor the COAPs provide that Dianne is entitled to survivorship benefits for her or her children. During the hearing before the magistrate, Jeffrey acquiesced to Dianne's demand that she be able to apply for survivorship benefits for herself. Jeffrey's only condition was that she pay for the benefits herself, and the magistrate found this to be acceptable. Since the dissolution and the COAPs contain no mention of survivorship benefits, we must assume that the parties chose not to include them. Thus, if Dianne decides at a later date that she wants survivorship benefits to attach to Jeffrey's pensions, she is free to apply for the benefits at her own cost.

{¶ 27} After a thorough review of the terms and language contained in the parties' decree of dissolution and COAPS, we hold that the trial court did not err as a matter of law when it adopted the decision of the magistrate and found that Dianne's interest in Jeffrey's retirement benefits was restricted to the value of the pension funds as they existed on the date of the termination of the marriage.

{¶ 28} Dianne's first and second assignments of error are overruled.

III

{¶ 29} Dianne's third assignment of error is as follows:

{¶ 30} "THE JUDGE ON OBJECTION ERRED IN FAILING TO REMEDY THE DISCREPANCIES IN THE COLA LANGUAGES [sic] OF THE COAPS."

{¶ 31} In her third assignment, Dianne asserts that the magistrate mistakenly found that each COAP contained a cost of living adjustment (COLA) for her. In fact,

while the language of the civil service COAP clearly provides Dianne with a COLA, the military COAP does not. When this misstatement was brought to the attention of the trial court on objections to the magistrate's decision, the trial court properly modified the magistrate's decision to reflect that Dianne was not entitled to a COLA from the military COAP. Dianne argues that the magistrate's error established that he did not understand the terms of the COAPs, and therefore, was ill-equipped to make any determination regarding the division of Jeffrey's retirement benefits. On this basis, Dianne asserts that the trial court should have reversed the magistrate's decision in its entirety, rather than merely modify the decision to correct the magistrate's error.

{¶ 32} Upon review, we conclude that the magistrate's error in finding that the language of the military COAP entitled Dianne to a COLA was harmless and did not require reversal of the entire decision. Thus, the trial court did not err when it simply modified the magistrate's decision to clarify that while Dianne was entitled to a COLA under the civil service COAP, she was not entitled to a COLA from the military COAP. With the exception of one minor misstatement, the magistrate's decision was thoughtful, well reasoned, and reached the appropriate conclusion in light of the unambiguous language in the decree of dissolution and the COAPs.

{¶ 33} Dianne's third assignment of error is overruled.

IV

{¶ 34} Dianne's fourth assignment of error is as follows:

{¶ 35} "THE JUDGE ON OBJECTION ERRED IN FAILING TO CORRECT THE FURTHER REDUCTION THE MAGISTRATE CREATED IN APPELLANT'S

INTEREST IN APPELLEE'S MILITARY RETIREMENT BENEFITS.”

{¶ 36} In her fourth assignment, Dianne argues that the magistrate erred by specifically excluding any adjustments to Dianne's portion of the military pension after the date of dissolution of the marriage. Specifically, Dianne asserts that the magistrate's decision results in a decrease in her portion of the military benefits the longer Jeffrey works and accumulates “points” before retirement.

{¶ 37} As previously stated, the military COAP entitles Dianne to one-half of Jeffrey's military pension calculated at the date of the termination of the marriage. The military COAP also clearly states that Dianne is not to receive any additional interest or credit associated with Jeffrey's continued employment after the date of dissolution. The use of a coverture fraction in the military COAP does not result in a decrease of the net benefit to which Dianne is entitled. While the formula *does* result in a decrease of her share of the overall benefit in proportion to Jeffrey's share of the military pension the longer that he works after the dissolution, there is no decrease in the net benefit she would otherwise

{¶ 38} receive.

{¶ 39} Dianne's fourth assignment of error is overruled.

V

{¶ 40} Dianne's fifth and final assignment of error is as follows:

{¶ 41} “THE JUDGE, ON OBJECTION, ERRED IN DIRECTING COUNSEL FOR THE PARTICIPANT TO PREPARE THE SUBSEQUENT COAPS WHEN IT IS NOT THE DUTY OF PARTICIPANT'S LAWYER TO PROTECT THE RIGHTS OF THE FORMER SPOUSE.”

{¶ 42} In her fifth assignment, Dianne argues that the trial court erred when it ordered counsel for Jeffrey, rather than Dianne's counsel, to prepare a court order regarding the division of his military benefits. Dianne argues that this ruling prejudices her and unfairly benefits Jeffrey. Dianne asserts that her attorney should have been instructed to prepare any document relating to the division of the military pension in order to preserve and protect her rights.

{¶ 43} Upon review, we find that Dianne misinterpreted the court instructions to Jeffrey. Rather than "assuming the responsibility for preparing the Order for the Court concerning the division of [Jeffrey's] military retirement benefits," the trial court simply instructed Jeffrey's counsel to submit a *proposed order* setting forth Jeffrey's months of creditable service accumulated during the marriage. The trial court reasoned that the Defense Finance and Accounting Service required that information in order to perform a proper division of the military pension based on the formula agreed to by the parties in the dissolution decree and the military COAP. After an independent review of the information contained in the proposed order, Dianne could then present the order to the DFAS for processing.

{¶ 44} Under the circumstances, the trial court's instruction to Jeffrey's counsel to prepare the proposed order was entirely acceptable and did not prejudice Dianne or unfairly benefit Jeffrey. Were Jeffrey's counsel to include incorrect information in the proposed order, Dianne would surely have the opportunity to review and identify any potential problems before the document was submitted to the DFAS for processing.

{¶ 45} Dianne's fifth assignment of error is overruled.

VI

{¶ 46} All of Dianne’s assignments of error having been overruled, the judgment of the trial court is affirmed.

.....

OSOWIK, J., concurs.

FROELICH, J., concurring:

{¶ 47} I concur in the decision to affirm the trial court, but on a different basis. I disagree with the magistrate and the trial court that the language concerning retirement benefits is unambiguous. Rather, I would hold that there was ambiguity, but that the trial court did not abuse its discretion in clarifying the ambiguity. This may be a distinction that only an appellate judge could love, but it is important especially in the arcane world of QDRO’s, COAP’s, DOPO’s, COLA’s, CSRS’s, FERS’s, and ERISA.

{¶ 48} The Final Entry orders that the retirement benefits be divided according to the Separation Agreement and that each party “specifically waives any interest therein. . . .” In the very next paragraph, Appellant is awarded a one-half interest in the retirement “earned by [Appellee] during the marriage.” The Separation Agreement (which, according to the Final Entry is “adopted by virtue of its incorporation into this decree as if fully rewritten herein and shall be the final order unless or until modified by [the] Court”) provides that each party shall receive an “equal share” of all retirement benefits; but also allows that the parties “shall divide evenly or shall set off the present value of same against other property,” and that

QDRO's shall be prepared "[i]f set offs are not accomplished as agreed to by and between the parties." The parties apparently did not agree to "set off the present value of [the retirement benefits] against other property;" the QDRO/COAPs, signed by the parties, were filed the same day as the Final Entry.

{¶ 49} As we held in *Procuniar*, a non-employee spouse should normally share in the benefit of any increase in the value of his or her unmatured proportionate share after divorce, which is attributable to the continued participation of the other spouse in the retirement plan. So, for example, if the eventual, matured monthly payments are greater because the employee spouse worked after the divorce than if the employee spouse retired the day of the divorce, then the non-employee spouse's monthly benefit would also be greater.

{¶ 50} That being said, the parties, represented by separate counsel, entered into a separation agreement, drafted COAP's, and did not appeal the underlying Judgment Entry for Dissolution.

{¶ 51} The appellant recognizes (see, e.g., pg. 6 of Appellant's brief) that these documents "concerning the retirement benefits are quite general and broad." The trial court could have considered that an agreement to set off the "present value" of the plans was an indication that such marital share or interest "earned during the marriage" was fixed at that time; how could a value that could only be determined in the future have a present value to be set off against other property present at the time of the divorce? This, combined with other language in the Separation Agreement, the Final Entry, the proposed COAP's and the testimony, resulted in an interpretation that was not unreasonable or arbitrary.

.....

(Hon. Thomas J. Osowik, Sixth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio).

Copies mailed to:

Valerie Juergens Wilt
Rodd S. Lawrence
Hon. Thomas J. Capper