[Cite as *Chapman v. Chapman*, 2012-Ohio-126.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Deborah Chapman	Court of Appeals No. L-10-1293
Appellee	Trial Court No. DR 2008-1259
v.	
George Chapman	**DECISION AND JUDGMENT**
Appellant	Decided: January 13, 2012

* * * * *

Jerome Phillips, Martin J. Holmes, Sr., and Ralph DeNune, III,
for appellee.

Henry B. Herschel, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal of a divorce judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, which determined and allocated a multitude of marital assets between the parties and awarded spousal support and legal

fees to appellee. For the reasons set forth more fully below, this court affirms the judgment of the trial court, in part, and reverses the judgment, in part.

{¶ 2} Appellant, George Chapman, sets forth the following five assignments of error:

> **{¶ 3}** I. THE COURT ABUSED ITS DISCRETION IN USING THE DATE OF JANUARY 25, 2010 FOR PURPOSES OF VALUATION OF MARITAL ASSETS.
>
> **{¶ 4}** II. THE COURT ABUSED ITS DISCRETION IN THE DIVISION OF MARITAL PROPERTY, AS IT RELATES TO STOCK AND STOCK OPTIONS THAT WERE UNVESTED AS OF THE COURT'S TERMINATION OF THE MARRIAGE DATE OF JANUARY 25, 2010.
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> **{¶ 5}** III. THE COURT ABUSED ITS DISCRETION IN ITS AWARD OF LIFE INSURANCE COVERAGE ON APPELLANT'S LIFE ON BEHALF OF PLAINTIFF/APPELLEE CONSIDERING THE LARGE PROPERTY AWARD TO PLAINTIFF/APPELLEE AND CONTRARY TO OHIO LAW.
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> **{¶ 6}** IV. THE COURT ABUSED ITS DISCRETION IN ITS AWARD OF SPOUSAL SUPPORT CONSIDERING THE LARGE PROPERTY AWARD TO PLAINTIFF/APPELLEE AND CONTRARY TO OHIO LAW.

{¶ 7} V. THE COURT ABUSED ITS DISCRETION IN AWARDING ATTORNEY'S FEES ON BEHALF OF THE PLAINTIFF/APPELLEE CONSIDERING THE LARGE PROPERTY AWARD TO PLAINTIFF/APPELLEE AND CONTRARY TO OHIO LAW.

{¶ 8} This case stems from the termination of a 37 year marriage between the parties. On December 23, 1973, the parties were married in Bowling Green, Ohio. Prior to the marriage, the parties served on the faculty at Maumee Valley Country Day School in Toledo. Following their marriage, the couple relocated to Chicago in order for appellant to attend the University of Chicago Law School.

{¶ 9} After appellant embarked on his legal studies, appellee secured employment at the University of Chicago. Appellee's position entailed conducting various research projects for the Department of Psychology at the University of Chicago. Several years later, as her husband entered his final year of law school, appellee began graduate studies, ultimately receiving a master's degree at the University of Chicago. Appellee never returned to full-time employment.

{¶ 10} In 1976, the parties left Chicago and relocated again. They moved to Minnesota, where appellant commenced employment as an attorney with a large Minneapolis law firm. During their time in Minneapolis, appellee was employed for several years on a part-time basis with the Federal Reserve Bank. In 1979, the parties relocated back to the Toledo area. Appellant had accepted a position with the Toledo law

firm of Shumaker, Loop and Kendrick ("Shumaker"). Over subsequent years, appellant ascended in his career, becoming a partner at Shumaker and working closely with Shumaker client Health Care Reit ("HCR").

{¶ 11} In 1991, appellant stepped down from his partnership at Shumaker in order to accept a position as the executive-vice president and general counsel at his former client HCR. HCR is a large, publicly traded company specializing in the acquisition and ownership of sizeable real estate holdings utilized in the healthcare industry.

{¶ 12} In 1995, appellant was appointed as CEO of HCR. Appellant continues to serve as the CEO of HCR up to the present time. During his ongoing tenure as CEO, appellant's total annual gross compensation package burgeoned, exceeding $1,000,000. That trend has continued. In recent years, appellant's total annual gross compensation has regularly exceeded $4,000,000. At the time of divorce, the total assets of the parties exceeded $27,000,000.

{¶ 13} On September 27, 2007, appellant relocated from the marital home in Maumee, Ohio, to a residence he had covertly purchased on Chevy Chase Lane in the nearby Toledo Country Club neighborhood. Appellee was out of town when the move to a separate residence occurred. Appellant had not disclosed to appellee the purchase of the separate home or his impending move to it.

{¶ 14} On November 25, 2008, appellee filed for divorce. In January 2010, a four-day divorce hearing was conducted before the trial court. On September 8, 2010, the trial court issued a final judgment entry of divorce.

{¶ 15} Given that the parties' children had reached the age of majority prior to the relevant times herein, the appeal pertains solely to various financial disputes. As specifically relevant to the bulk of this appeal, the trial court utilized the R.C. 3105.171 statutorily presumptive and favored date as the legal termination of the marriage date for purposes of marital asset determination, valuation and division.

{¶ 16} In conformity with the magnitude and complexity of the assets involved, the record reflects that the trial court thoroughly and exhaustively evaluated all assets, most notably a substantial amount of stock-based assets, particularly in order to deem various assets as marital in conjunction with the term of the marriage and divide them between the parties accordingly. In addition, the trial court awarded monthly spousal support to appellee in the amount of $22,500. The trial court also awarded life insurance coverage to be secured by appellant for the benefit of appellee. Lastly, the trial court awarded $63,953.61 in legal fees and expenses to appellee. Timely notice of appeal was filed.

{¶ 17} In the first assignment of error, appellant asserts that the trial court abused its discretion in utilizing January 12, 2010, for purposes of valuation of marital assets. R.C. 3105.171(A)(2) expressly establishes the term "during the marriage" to constitute, "the period of time from the date of the marriage through the date of the final hearing in an action for divorce or in an action for legal separation." The statute conditionally enables a trial court to select an alternative beginning or end date on a discretionary basis

if it concludes from the evidence that use of either of the presumptive dates "would be inequitable." R.C. 3105.171(A)(2)(b).

{¶ 18} In support of his first assignment of error, appellant proposes that an end of marriage date of September 1, 2007 or, alternatively, November 25, 2008, is necessary for the disputed judgment to be equitable.

{¶ 19} The significance of the first proposed alternative end of marriage date is that it is the date that appellant unilaterally moved out of the marital residence while appellee was out of town. The significance of the second proposed alternative end of marriage date is that it is the date that appellee filed for divorce.

{¶ 20} Our review of the record reveals that this contentious end of marriage date dispute was thoroughly argued, countered, and considered by the trial court exhaustively in the proceedings below. This debate was highly charged given the context of stock asset ramifications adverse to appellant should the statutory date be applied.

{¶ 21} Throughout the course of this case, appellant goes to great lengths to highlight a proposed pilates studio that appellee considered, but never opened or operated, in a commercial space in Maumee, Ohio. Appellant zealously suggests that this theoretical business concept is relevant to his financial obligations to appellee. We do not concur in appellant's interpretation of the proposed business or the proposed legal relevance.

{¶ 22} The record clearly reflects that the business was never launched, never generated revenue, and never actually existed as a potentially revenue generating

enterprise. Appellant's position would have us treat a speculative concept as an established, proven, ongoing, viable business concern. We find that the acquisition of a property a year before her cancer diagnosis and preliminary planning by appellee of a potential pilates studio that never actually opened or operated is not relevant.

{¶ 23} Although appellant summarily points to several Ohio cases that selected an alternative date for asset valuation as more equitable for various reasons not analogous to the present case, appellant fails to demonstrate any material, determinative analogy between those cases and the stock asset division dispute underlying the present case. The materially distinguishable cases cited by appellant do not demonstrate inequity or an allocation of the stock assets conceivably constituting an abuse of discretion in the instant case.

{¶ 24} While the proposed date modification would culminate in a division of assets, particularly the stock assets, more favorable to appellant, appellant fails to furnish compelling or persuasive indicia that the trial court judgment, in using the statutorily favored date for the end of the marriage, leads to any objectively egregious results so as to be deemed inequitable. Nothing reflects that appellee received a majority or an objectively, disproportionately high percentage of the assets.

{¶ 25} The record reflects that appellee was awarded approximately $2,700,000 in real property in Maumee, Ohio, while appellant was awarded real property of approximately $4,500,000. The record further reflects that the trial court divided a multitude of other accounts, investments and other assets on a one-half or better basis to

appellant. Appellant has failed to establish that use of the statutory date caused an objectively inequitable asset allocation or was in any way an abuse of discretion sufficient to negate the date set by statute. Wherefore, we find appellant's first assignment of error not well-taken.

{¶ 26} In appellant's second assignment of error, appellant contends that the trial court abused its discretion in the division of marital property, as it relates to stock and stock options that were unvested as of the termination of marriage date of January 25, 2010. Again, we note that the record clearly reflects that these arguments were exhaustively presented and considered by the trial court prior to its judgment.

{¶ 27} In essence, appellant objects to the trial court's determination that approximately $8,000,000 of various vested and unvested stock and stock options accumulated by appellant in his capacity as CEO of HCR constituted marital property and were thereby subject to division with appellee. In reaching the disputed conclusion, the trial court utilized its own prior analogous analysis in the case of *Heine v. Heine*, 127 Ohio Misc.2d 66, 2003-Ohio-7365, 805 N.E.2d 1145.

{¶ 28} *Heine* noted that vested and unvested stock and stock options are not uniformly treated throughout the country in divorce cases. *Heine* proceeded to adhere to the prevailing method of the majority of jurisdictions in deeming the determinative issue to be whether the disputed stock based assets were granted for past, present or future employment services. Those that were granted for past and present services are deemed

marital property subject to division. Those that were granted for future services are not considered to be marital property and thus are not subject to division.

{¶ 29} In reaching these stock asset determinations, the trial court painstakingly and precisely considered all relevant factors necessary to ascertain whether these stock assets had been tendered for past, present or future employment services rendered by appellant. The trial court found ample evidence establishing that appellant received regular, quarterly dividends throughout the marriage on 30,725 of the disputed 65,542 shares of unvested restricted HCR shares and also on 231,344.5905 vested shares, reflecting compensation of the above-described portion of the disputed shares for past and present services. The trial court further found that appellant had executed a non-compete clause in connection with his receipt of these shares so as to likewise evidence compensation for past and present, not future, employment services.

{¶ 30} With regard to contested performance award stock shares, the trial court similarly found that appellant regularly received quarterly dividends on the shares and the evidence showed that no further performance was required by appellant at the time of final hearing to entitle him to these disputed shares. As such, the trial court found them to reflect compensation for past and present, not future, employment services, thereby being subject to marital asset division. The trial court noted that although the vesting date for the shares did not occur until several days after the final hearing date, the only circumstances in which the shares may even theoretically not have vested would have been appellant's termination for cause or voluntary separation from employment prior to

that date. Neither of these unlikely contingencies occurred. Regardless of that consideration, the trial court properly concluded based upon the evidence that the shares required no future services by appellant at the date of the final hearing.

{¶ 31} Lastly, with respect to disputed unvested stock options, the trial court similarly determined, based upon ample objective evidence before it, encompassing detailed employment agreements and corresponding precisely defined compensation provisions, that the ultimate vesting of these options was a certainty at the date of the final hearing, thereby reflecting compensation for past and present services and subjecting a portion of them to be treated as marital property pursuant to the fractional factor set forth in *Heine*.

{¶ 32} Clear and ample evidence was before the trial court demonstrating that the disputed stock shares and stock options all stemmed from past and present employment services at the time of final hearing and their award to appellant was not conditioned upon future employment services. While appellant strenuously argues that the stock options and restricted stocks inherently entail future performance so as to not be construed as marital property even under *Heine*, we are not persuaded by appellant's arguments which are rooted in speculative future scenarios such as an unforeseeable future termination for cause that could speculatively diminish awarded but not vested shares or options.

{¶ 33} By contrast, the disputed trial court judgment on stock and stock options was rooted in objective evidence and actual events. Regardless, none of appellant's

arguments negate the trial court's conclusion from the evidence that the disputed stock and stock options were not conditioned or in any relevant way contingent upon future employment services on the part of appellant. Wherefore, we find appellant's second assignment of error not well-taken.

{¶ 34} In appellant's third assignment of error, he contends that the trial court abused its discretion in its award of life insurance coverage on appellant's life on behalf of appellee. The parties concur, as do we, in the merits of this assignment.

{¶ 35} In order for the disputed life insurance coverage to have properly been awarded to appellee, the trial court was required to clearly state that spousal support would extend beyond the life of appellant. *Forbis v. Forbis*, 6th Dist. No. WD-04-063, 2005-Ohio-5881, 2005 WL 2931851. The trial court did not so state in its judgment. As such, the life insurance provision was improper. Wherefore, we find appellant's third assignment of error well-taken.

{¶ 36} In appellant's fourth assignment of error, he argues that the trial court abused its discretion in its award of spousal support considering the large property award to appellee. In support of this argument, appellant again professes his speculative belief that appellee's theoretical pilates studio, which the record reflects never actually opened or operated, can and should be construed as generating income to appellee. Appellant further opines and delineates speculative potential future investment income of appellee based upon the division of marital assets. Lastly, appellant notes the claimed future potential need to borrow funds to comply with the ordered marital asset distribution.

Appellant's conjecture regarding appellee's future income potential given the distribution of assets or based upon a non-existent pilates studio does not negate the propriety of the trial court's spousal support judgment.

{¶ 37} On the contrary, given the magnitude of the assets and appellant's annual total gross compensation typically in excess of $4,000,000, we find that appellant's concerns do not demonstrate that a monthly spousal support award of $22,500 is arbitrary, unreasonable or unconscionable in the context of the unique facts and circumstances of this case.

{¶ 38} Appellant has failed to demonstrate that the disputed spousal support amount is grossly disproportionate to his income so as to conceivably be perceived as unreasonable or unconscionable. The record reflects that the disputed spousal support amount is less than an earlier temporary order of $30,150 per month issued in December 2008, and is roughly equivalent to six percent of appellant's total annual gross compensation. Given these facts, we cannot find the amount to be arbitrary, unreasonable or unconscionable. Wherefore, we find appellant's fourth assignment of error not well-taken.

{¶ 39} In appellant's fifth assignment of error, he contends that the trial court abused its discretion in awarding attorney's fees on behalf of appellee considering the large property award to appellee. R.C. 3105.73 authorizes the trial court to award legal fees and expenses to either party when doing so is found to be equitable. In this case, appellee had not engaged in full-time employment for approximately the last 30 years of

the marriage. By contrast, appellant's career culminated in his serving as CEO of a publicly traded company earning total gross annual compensation packages in excess of $4,000,000. In addition, the disputed asset division judgment results in appellee receiving approximately 37 percent of the assets, while appellant received the balance and larger share of the assets. Although appellant believes the judgment to be unreasonable, the facts simply do not comport with that position. Given the highly disparate income earning histories and abilities of the parties, we cannot say that the disputed award to appellee was arbitrary, unreasonable or unconscionable. Wherefore, we find appellant's fifth assignment of error not well-taken.

{¶ 40} On consideration whereof, the judgment of the Lucas County Court of Common Pleas, Domestic Relations Division, is affirmed, in part, and reversed, in part. Appellant is ordered to pay four-fifths of the cost of this appeal and appellee is ordered to pay one-fifth of the cost of this appeal pursuant to App.R. 24.

Judgment affirmed, in part, and
reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

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JUDGE

Arlene Singer, P.J.

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JUDGE

Thomas J. Osowik, J.
CONCUR.

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JUDGE