

[Cite as *Hardy v. Hardy*, 2010-Ohio-561.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

NANCY HARDY	:	
Plaintiff-Appellant	:	C.A. CASE NO. 22964
vs.	:	T.C. CASE NO. 02LS0003
LAWRENCE HARDY	:	(Civil Appeal from
Defendant-Appellee	:	Common Pleas Court)

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O P I N I O N

Rendered on the 19<sup>th</sup> day of February, 2010.

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GRADY, J.:

{¶ 1} The issue in this appeal is how Nancy D. Hardy should be compensated for her marital property interest in their joint memberships in two clubs that Lawrence Hardy was awarded in the parties' divorce action. In a prior appeal regarding that issue, we wrote:

{¶2} "The facts of the present case make it subject . . . to the rule we applied in *Maloney*.<sup>1</sup> Marital funds were used to purchase the membership in the Moraine Country Club Lawrence was awarded and the Dayton Racquet Club life membership he retained.

Therefore, he should be required to compensate Nancy for her share of the amounts that were paid for those memberships, which are marital in nature. The same does not apply to monthly or other dues or assessments paid to maintain the memberships, because those do not represent an interest which either spouse currently owns and which the court must divide as marital property." *Hardy v. Hardy*, Montgomery App. No. 20865, 2005-Ohio-5528, at ¶23.

{¶3} In *Maloney*, marital funds had likewise been used to purchase a joint membership in the Moraine Country Club. That organization allows either former spouse, but not both, to retain the membership after their divorce. Neither may the membership be sold or transferred to a third person. The membership in *Maloney* was awarded to the former husband. Regarding the former wife's right to be compensated for her interest, we wrote:

{¶4} "Marital property includes all property, real and personal, that either party owns and all interest that either party has in any real or personal property. R.C. 3105.171(A)(3)(i) and

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<sup>1</sup>*Maloney v. Maloney*, 160 Ohio App.3d 209, 2005-Ohio-1368.

(ii). When property is marital, the court must divide it equally, unless an equal division would be inequitable, in which event the court 'shall divide it between the spouses in the manner the court determines equitable.' R.C. 3105.171(C) (1) .

{¶ 5} "The court could not divide the single membership between Joseph and Linda, and so an award of the membership to Joseph is equitable. However, it does not follow that Linda is then not to be compensated for one-half of the value of the membership. Even though in this circumstance it 'has' a value only to the spouse to whom it was awarded, if Joseph elects to retain the membership, Linda is entitled to one-half of the 1996 purchase price. The court is authorized by R.C. 3105.171(E) (2) to make a distributive award of that amount to Linda from Joseph's separate property in order to effectuate the division of the membership the court ordered. The court abused its discretion when it failed to do that." Maloney, 2005-Ohio-1368, at ¶101-102.

{¶ 6} In the present case, on remand from the prior appeal, the domestic relations court ordered Lawrence to reimburse Nancy \$1,500 for her marital interest in the Dayton Racquet Club membership and \$1,500 for her marital interest in the Moraine Country Club membership. Those amounts represent one-half the marital funds that were used to acquire the memberships when they were purchased, many years before.

{¶ 7} Nancy argues on appeal that the domestic relations court abused its discretion when it failed to base its awards on the present value of the two memberships Lawrence was awarded. Nancy offered evidence that a new membership in the Moraine Country Club now costs \$37,500, including taxes. She also calculated the present value of a Dayton Racquet Club membership over her lifetime at \$27,600, which includes monthly fees. Nancy contends that she “can think of no reason why this ‘valuable’ [asset] should be treated any differently than other assets that typically appreciate in value, such as the marital residence.” (Brief, p. 4).

{¶ 8} Lawrence argues that the domestic relations court did not abuse its discretion. He contends that our prior decision creates a res judicata bar to any award different from the award the trial court made. That contention invokes the “law of the case” doctrine. “The law-of-the-case doctrine holds that the decision of the reviewing court in a case remains the law of that case on the questions of law involved for all subsequent proceedings at the trial and appellate levels. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 11 OBR 1, 462 N.E.2d 410. The doctrine functions to compel trial courts to follow the mandates of reviewing courts. *Thatcher v. Sowards* (2001), 143 Ohio App.3d 137, 757 N.E.2d 805. ‘Moreover, the trial court is without authority to extend or vary the mandate.’ *Id.* at 142.” *Blust v. Lamar Advertising of Mobile, Inc.*, 183 Ohio

App.3d 478, 2009-Ohio-3947, at ¶10. Nevertheless, “[t]he doctrine is considered to be a rule of practice rather than a binding rule of substantive law and will not be applied so as to achieve unjust results.” *Thatcher*, 143 Ohio App.3d 141.

{¶ 9} R.C. 3105.171(A)(2) requires the domestic relations court, when it orders a division of marital property that R.C. 3105.171 requires, to adopt a value for that property in the amount of its value as of the date of the final hearing in the action, unless the court selects a different date on a finding that it would be more equitable. In the present case, the court did not expressly find that the dates when the two club memberships were purchased would be a more equitable date for their valuation. Instead, the court relied on our holding in *Maloney* adopting that date, as we said it should.

{¶ 10} We are aware of no holding, other than our holding in *Maloney*, which addresses the value to be assigned to club memberships of this kind. Further, *Maloney* did not explain the basis for the valuation it ordered. The present appeal presents an opportunity to revisit the issue.

{¶ 11} The two club memberships at issue are marital property, being assets that were acquired during the marriage and purchased with marital funds. The domestic relations court is required by R.C. 3105.171(C)(1) to divide marital property equally. However,

and unlike a marital residence, a club membership is an intangible asset. Furthermore, being non-transferrable, these two memberships are illiquid assets that lack any fair market value.

Lawrence will not gain a benefit he does not now enjoy by retaining the memberships. Nancy will, however, relinquish a benefit she formerly enjoyed because she will no longer be a member of the two clubs.

{¶ 12} In dividing marital property, the domestic relations court is charged by R.C. 3105.171(F)(5) to consider "[t]he economic desirability of retaining intact an asset or interest in an asset."

An award of the memberships to one of the parties to the divorce action, in this case Lawrence, preserves intact the memberships that would otherwise lapse. The issue is the amount of compensation for her loss that Nancy should be awarded.

{¶ 13} R.C. 3105.171(E)(1) states: "The court may make a distributive award to facilitate, effectuate, or supplement a division of marital property." R.C. 3105.171(A)(1) defines a distributive award to mean "any payment or payments, in real or personal property, that are payable in a lump sum or over time, in fixed amounts, that are made from separate property or income, and that are not made from marital property and do not constitute payments of spousal support, as defined in section 3105.18 of the Revised Code."

{¶ 14} The goal of any property division the court orders is equity. R.C. 3105.171(B). The nature and character of these club memberships favor determining their monetary value as marital property for purposes of division as of the date they were acquired, not at their current cost. Therefore, the domestic relations court did not abuse its discretion when the court valued and divided the memberships as it did, awarding Nancy \$1,500 for each. However, where it is impractical or burdensome to reach an equitable division comprised of marital property alone, the court may also make an R.C. 3105.171(E)(1) distributive award to supplement the marital property division the court orders.

{¶ 15} Our mandate to the domestic relations court in the prior appeal was to require Lawrence "to compensate Nancy for her share of the amounts that were paid for the memberships, which are marital in nature." The court complied with that mandate. The law of the case doctrine would not permit that court to extend or vary the mandate. *Blust*. Nevertheless, in view of the benefits of the memberships of which Nancy will be deprived, the compensation ordered was unjust, and the law of the case doctrine should not be applied to an unjust result. *Thatcher v. Sowards*. Therefore, the case will be remanded to the domestic relations court to consider whether to order a distributive award to Nancy to supplement the court's monetary awards to her when it divided the

two memberships as marital property.

{¶ 16} The assignment of error is sustained. The judgment of the domestic relations court will be affirmed, in part, and reversed, in part, and the case will be remanded for further proceedings, consistent with this opinion.

DONOVAN, P.J., And BROGAN, J., concur.

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Hon. Denise L. Cross