

COURT OF APPEALS  
ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

LORIN SWINEHART	:	JUDGES:
	:	
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 06-COA-020
WRETHA SWINEHART	:	
	:	
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Ashland County Court of  
Common Pleas, Domestic Relations  
Division Case No. D-9147

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 14, 2007

APPEARANCES:

For Plaintiff-Appellee:

NANCY NORDSTROM LOCKE  
34 W. 2<sup>nd</sup> St.  
P.O. Box 366  
Ashland, OH 44805

For Defendant-Appellant:

VINCENT A. DUGAN, JR.  
500 S. 4<sup>th</sup> St.  
Columbus, OH 43206

*Delaney, J.*

{¶1} Defendant-Appellant, Wretha Swinehart, appeals the decision of the Ashland County Court of Common Pleas, Domestic Division, on her Motion for Relief from Judgment.

### **STATEMENT OF THE FACTS AND THE CASE**

{¶2} Appellant and Plaintiff-Appellee, Lorin Swinehart, were divorced through Decree of Divorce entered August 3, 1994. The Decree of Divorce divided Appellee's State Teachers Retirement Service ("STRS") pension benefits between the parties in Paragraph 15 of the Decree. This paragraph states:

{¶3} "The Plaintiff's STRS pension benefits, accumulated up until March 22, 1994, shall be divided at the time of pay-out status. The present value of the Plaintiff's pension is \$217,000.00. The Defendant shall be entitled to 50 percent of the after-tax retirement benefits received by the Plaintiff and attributable to the pension benefits accumulated during the years of marriage, once the benefits are in pay-out status."

{¶4} Neither party appealed the court's decision.

{¶5} Appellee remarried on September 24, 1994. On May 31, 2002, Appellee retired from teaching. When he retired, he chose a joint and survivorship plan of payment for his STRS benefit. Appellee designated his second wife as his survivor and selected zero dependents as his income tax selection. Appellee applied a coverture fraction to his net monthly STRS payment after deductions for federal and state income tax and calculated Appellant would be entitled to \$1,180.34 per month.

{¶6} Appellant filed a Motion for Order to Show Cause on September 16, 2002, alleging Appellee was in contempt of the Divorce Decree for failing to pay her the

appropriate amount of her share of Appellee's STRS pension. The matter was heard by a magistrate and after examining Paragraph 15 of the Divorce Decree, he found there was insufficient evidence to find Appellee in contempt of the Decree. Appellant did not appeal the decision.

{¶7} On November 18, 2004, Appellant filed a Motion for Relief from Judgment. An initial hearing was held before a magistrate on August 3, 2005. The magistrate reviewed Paragraph 15 again and granted Appellant's motion under Civ.R. 60(B)(4) and (5). The magistrate set the matter for a hearing on October 15, 2005.

{¶8} Appellee filed Objections to the Magistrate's Decision. The trial court found the August 11, 2005 Magistrate's Decision was not a decision on the merits, but a determination that sufficient allegations were made to warrant an evidentiary hearing on the merits of the motion.

{¶9} After the evidentiary hearing, the trial court issued its decision on June 16, 2006. In its decision, the court found Paragraph 15 to be unambiguous and the court did not have jurisdiction to modify a property division award in regards to Appellant's request for survivorship rights and cost of living ("COLA") increases in the STRS pension. The trial court went on to clarify Paragraph 15 and how the original property division should be effected.

{¶10} Appellant appeals the June 16, 2006 decision of the trial court and raises three Assignments of Error:

{¶11} "I. THE TRIAL COURT ERRED AS A MATTER OF FACT AND A MATTER OF LAW IN FAILING TO GRANT DEFENDANT-APPELLANT'S REQUEST

FOR SURVIVORSHIP BENEFITS AND COST OF LIVING INCREASES WHEN IT EFFECTUATED ITS DECISION.”

{¶12} “II. THE TRIAL COURT IMPROPERLY EXCLUDED THE COST OF LIVING ADJUSTMENT FROM ITS ARREARAGE REIMBURSEMENT CALCULATION.”

{¶13} “III. THE TRIAL COURT ERRED IN ITS FAILURE TO AWARD THE DEFENDANT-APPELLANT ANY ATTORNEY FEES OR EXPERT WITNESS FEES.”

I., II.

{¶14} We will examine Appellant’s first and second Assignments of Error together as we find them to be interrelated. Appellant asks this Court to find the trial court abused its discretion in regards to its finding that Appellant was not entitled, under the terms of the original Divorce Decree, to survivorship benefits or to COLA increases to her portion of the STRS pension. We disagree.

{¶15} The grant or denial of a motion for relief from judgment under Civ.R. 60(B) rests within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77, 514 N.E.2d 1122. An abuse of discretion connotes more than an error of law or judgment; it implies the court’s attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d, 217, 219, 450 N.E.2d 1140.

{¶16} Pension or retirement benefits accumulated during a marriage are subject to property division in a divorce proceeding. *Erb v. Erb* (1996), 75 Ohio St.3d 18, 20, 661 N.E.2d 175, 177-178. Because it is a division of marital property, a domestic relations court lacks continuing jurisdiction to modify a division of pension or retirement benefits. *Wolfe v. Wolfe* (1976), 46 Ohio St.2d 399, 350 N.E.2d 413. In a case where

a pension or retirement benefit is vested but unmatured, a court may reserve continuing jurisdiction over the distribution of this asset. *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 182, 559 N.E.2d 1292. Failure to reserve jurisdiction deprives the trial court of the ability, that is subject matter jurisdiction, to modify any award of pension benefits in the decree of divorce or dissolution. *Schrader v. Schrader* (1995), 108 Ohio App.3d 25, 28, 669 N.E.2d 878.

{¶17} A trial court, however, always retains the power to enforce the provisions of the divorce decree. *Green v. Green*, 10<sup>th</sup> Dist. No. 05AP-484, 2006-Ohio-2534, at ¶12, citing *Robins v. Robins*, 10<sup>th</sup> Dist. No. 04AP-1152, 2005-Ohio-4969, at ¶13. If the parties dispute, in good faith, the meaning of a provision in a decree, or if the provision is ambiguous, the trial court has the power to hear the matter, to resolve the dispute, and to enforce the decree. *Robins*, at ¶13, citing *Evans v. Evans*, 4<sup>th</sup> Dist. No. 02CA2869, 2003-Ohio-4674.

{¶18} In the present case, Appellant addressed three issues in her motion for relief from judgment: (1) COLA increases in Appellee's STRS pension, (2) her survivorship benefits in Appellee's pension and (3) whether Appellee was required to elect a single-life annuity upon retirement. The trial court examined Paragraph 15 and found that the Divorce Decree did not deal with any of these issues. The next question is whether the trial court retained future jurisdiction over distribution of the STRS pension within Paragraph 15. The trial court determined the court made a property division of the STRS pension in 1994 and did not reserve continuing jurisdiction over the property division in the future. Therefore, the trial court could not grant Appellant

survivorship benefits or COLA increases in the STRS pension as that would be considered impermissible modifications of the property division award.

{¶19} Upon our review of Paragraph 15, we find the trial court did not abuse its discretion in determining the court did not retain jurisdiction over future distribution of the STRS pension. Paragraph 15 of the Divorce Decree, read in conjunction with the Referee's Report, supports the trial court's finding that the court was entering a "deferred distribution" order for the pension. It was not reserving jurisdiction to make the STRS pension division in the future, but ordering that the division as delineated in the 1994 Divorce Decree occur in the future.

{¶20} Based upon this finding, the trial court was also correct in determining that it was not permitted to award Appellant a survivorship in Appellee's STRS pension benefit and COLA increases in the STRS pension. A reading of the clear and unambiguous language of Paragraph 15 shows that the Divorce Decree did not provide for these rights. Because the court did not reserve jurisdiction in the Divorce Decree, this deprives the trial court the ability to modify the award of pension benefits by adding terms more favorable to Appellant. *Schrader v. Schrader* (1995), 108 Ohio App.3d 25, 28, 669 N.E.2d 878.

{¶21} In its June 16, 2006 judgment, the trial court went on to interpret and enforce the terms of Paragraph 15. The trial court found that Paragraph 15 should be implemented via the use of a coverture fraction. There arose an issue about the tax liability associated with the pension. The trial court ordered the parties to determine the actual tax liability associated with the pension payments from Appellee to Appellant. Appellant argues the trial court failed to include the COLA adjustments within its

recomputation. As stated above, we find the trial court did not abuse its discretion as the inclusion of the COLA increases would be a modification of the property division.

{¶22} Appellant's first and second Assignments of Error are overruled.

### III.

{¶23} Appellant next argues the trial court erred in its failure to award her attorneys fees or expert witness fees. We disagree.

{¶24} An award of attorney's fees lies within the sound discretion of the trial court. *Rand v. Rand* (1985), 18 Ohio St.3d 356. R.C. 3105.73(B) states,

{¶25} "In any post-decree motion or proceeding that arises out of an action for divorce, dissolution, legal separation, or annulment of marriage or an appeal of that motion or proceeding, the court may award all or part of reasonable attorney's fees and litigation expenses to either party if the court finds the award equitable. In determining whether an award is equitable, the court may consider the parties' income, the conduct of the parties, and any other relevant factors the court deems appropriate, but it may not consider the parties' assets."

{¶26} Appellant requested attorney and expert fees in her motion from relief from judgment and evidence in regards to these fees was presented at the evidentiary hearing. We will presume the trial court's silence on the issue of attorney and expert fees is an implicit denial of the Appellant's request. "If a trial court fails to mention or rule on a pending motion, the appellate court presumes that the motion was implicitly overruled." *State v. Guenther*, 9<sup>th</sup> Dist. No. 06CA008914, 2007-Ohio-681, at ¶12, citing *Lorence v. Goeller*, 9th Dist. No. 04CA008556, 2005-Ohio-2678, at ¶ 47, citing *Fed. Home Loan Mtge. Corp. v. Owca* (Nov. 17, 1999), 9th Dist. No. 2897-M, at \*2.

{¶27} Upon review of the record, we find the trial court did not abuse its discretion in denying Appellant’s request for attorney fees and expert fees. Although the trial court did grant, in part, Appellant’s request that her assigned share of the pension should be calculated upon a single life annuity rather than upon a joint and survivorship plan of payment, other factors such as the parties’ comparable incomes and course of conduct, demonstrates the trial court’s decision was not unreasonable, arbitrary or unconscionable.

{¶28} Appellant’s third Assignment of Error is overruled.

{¶29} Accordingly, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division, is affirmed.

By: Delaney, J.

Farmer, P.J. and

Wise, J. concur.

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JUDGES

[Cite as *Swineheart v. Swineheart*, 2007-Ohio-6174.]

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

LORIN SWINEHART	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
WRETHA SWINEHART	:	
	:	
Defendant-Appellant	:	Case No. 06-COA-020
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Ashland County Court of Common Pleas, Domestic Relations Division is affirmed. Costs assessed to appellant.

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JUDGES