COLORADO COURT OF APPEALS

DATE FILED: January 16, 2020
CASE NUMBER: 2018CA2200

Court of Appeals No. 18CA2200
City and County of Denver District Court No. 18DR627
Honorable Catherine A. Lemon, Judge

In re the Marriage of

Katherine Susanne Bergles,

Appellant,

and

Matthew Paul Bergles,

Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE J. JONES
Fox and Tow, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced January 16, 2020

Springer and Steinberg, P.C., Jeffrey A. Springer, Jonathan L. Stein, Craig L. Pankratz, Denver, Colorado, for Appellant

The Demkowicz Law Firm, LLC, Danielle L. Demkowicz, Denver, Colorado, for Appellee

¶ 1 Katherine Susanne Bergles (wife) appeals the property division entered by the district court in the dissolution of her marriage to Matthew Paul Bergles (husband). We reverse and remand the case for further proceedings.

I. Relevant Facts

¶ 2 In 2018, wife petitioned to dissolve the parties' eighteen-year marriage. At that time, wife was forty-eight years old and employed as a school principal earning over $100,000 annually. Husband, on the other hand, was sixty years old, and living primarily on a fixed monthly Public Employees' Retirement Association (PERA) pension annuity of $6,300. He accrued sixteen years of pension benefits before the parties married in 1999.

¶ 3 The parties then engaged in mediation, which resulted in a signed memorandum of understanding (MOU). The MOU included the following provisions:

> The parties understand that [section] 14-10-114[, C.R.S., 2019] contains an advisory guideline to determine spousal maintenance and they have reviewed the same. Each party agrees to waive the receipt of spousal maintenance and each party understands that his or her waiver of maintenance is contractual and non-modifiable, and that the [c]ourt shall

> lose jurisdiction to award maintenance to him or her.
>
> The parties enter into this MOU knowledgably and voluntarily and after receipt of advice of counsel. The parties stipulate that . . . the financial provisions are fair, reasonable and not unconscionable.

Shortly after, the parties asked the court to adopt the entire MOU as an order and to incorporate the specific provision waiving maintenance into the soon-to-be dissolution decree; the court did so.

¶ 4 Following a contested hearing, the district court dissolved the parties' marriage and entered permanent orders. The court found that

- there is a substantial age difference between the parties;
- wife was earning over $100,000 per year and could continue to increase her savings, retirement income, and overall estate for twelve more years until her retirement;
- husband, who had three other retirement accounts, was receiving a monthly PERA pension payment in the amount of $6,300;

- in reaching the MOU, the parties "reviewed the maintenance guidelines" and "utilized [h]usband's pension income stream in deciding to waive maintenance"; and
- under the terms of the MOU, the court lacked jurisdiction to award maintenance.

¶ 5 From those findings, the court incorporated the MOU into the dissolution decree and determined that it was equitable to value the marital portion of husband's PERA pension (which the parties stipulated had a present value of $681,274) at zero and allocate it to husband. The court rested its determination primarily on its finding that the parties had already used husband's monthly PERA payment as gross income in agreeing to waive maintenance under the MOU, and to now award wife a portion of his payments in the property division would constitute an inequitable "double-counting" or "double dipping."

¶ 6 The district court divided the remaining marital assets and debts and ordered wife to make an equalization payment of $69,185:

Marital Asset/Debt	Marital Value	Wife's Portion	Husband's Portion
Marital Residence	$748,433		$748,433

Vehicles	$2,715	$2,715	
Bank Accounts	$6,807	$5,163	$1,644
Life Insurance	$87,079	$41,452	$45,627
Investment Accounts	$21,618		$21,618
Retirement Accounts	$1,577,127	$1,242,733	$334,394
Debts	($1,976)	($1,976)	
Equalization Payment		($69,185)	$69,185
TOTAL	$2,441,803	$1,220,902	$1,220,901

¶ 7 Wife appeals the district court's treatment of husband's PERA payments and the overall property division.

II. Husband's Monthly PERA Pension Payments

¶ 8 Wife contends that the district court erred by failing to include the stipulated present value of the marital portion of husband's PERA account in determining marital assets and liabilities and by failing to award her a portion of husband's PERA payments. We agree with wife's first contention but do not address the second.

¶ 9 A district court must equitably divide the marital property. § 14-10-113(1), C.R.S. 2019; *In re Marriage of Thornhill*, 232 P.3d 782, 787 (Colo. 2010). To that end, the court must consider all relevant factors, including each spouse's contribution to the acquisition of the marital property, the value of each spouse's separate property, each spouse's economic circumstances, and any increases or decreases in the value of separate property during the

marriage or the depletion of separate property for marital purposes. § 14-10-113(1)(a)-(d).

¶ 10 The district court has wide latitude to effect an equitable marital property division based on the facts and circumstances of each case. *See In re Marriage of Balanson*, 25 P.3d 28, 35 (Colo. 2001). And we won't disturb the court's decision unless it abused its discretion. The court abuses its discretion if its decision is manifestly arbitrary, unreasonable, or unfair, or if it misapplies the law. *Interest of Spohr*, 2019 COA 171, ¶ 32.

¶ 11 Section 14-10-114(8)(c)(I)(H), provides that "[p]ension payments and retirement benefits actually received that have not previously been divided as property" in the dissolution action must be included in a party's gross income when determining maintenance. The district court, relying on this section, concluded that the inverse is also true: once a court considers a party's monthly pension payment in determining maintenance, the pension can't also be awarded as property. The court added, "It should be one or the other, but not both, as a matter of broad-brush equitable consideration." Though we express no opinion on the court's view of the equities, we conclude that its reasoning is procedurally

flawed, and that the error requires a redetermination of the property division and maintenance on remand.

¶ 12 Pension benefits are marital property and are therefore potentially subject to division. *In re Marriage of Kelm*, 912 P.2d 545, 547 (Colo. 1996); *In re Marriage of Grubb*, 745 P.2d 661, 665-66 (Colo. 1987). This is true even when, as in this case, a retirement account is in payout status. *See In re Marriage of Gallo*, 752 P.2d 47, 54 (Colo. 1988) (the husband's vested military retirement plan that had matured to payout status was marital property subject to equitable division); *In re Marriage of Zappanti*, 80 P.3d 889, 892-94 (Colo. App. 2003) (portion of the husband's monthly railroad pension payment was marital property that must be divided). One possible approach in dividing such a retirement account is to order the retired spouse to pay a share of the monthly retirement payment to the other spouse. *See In re Marriage of Tagen*, 62 P.3d 1092, 1094-95 (Colo. App. 2002). Thus, the fact that husband's PERA account was in payout status doesn't mean it should be valued at zero in the property division.

¶ 13 As well, property division must precede the consideration of maintenance. *In re Marriage of de Koning*, 2016 CO 2, ¶ 21 ("The

UDMA and our case law contemplate a specific sequence in which the division of property, maintenance, and attorney's fees computations should occur. First, the court must divide the marital property."); *In re Marriage of Huff*, 834 P.2d 244, 248 (Colo. 1992) ("Once the property division is made, the court then decides whether maintenance is necessary to provide for the reasonable needs of one of the parties."); *In re Marriage of Jones*, 627 P.2d 248, 251 (Colo. 1981) ("The history of Colorado's maintenance statute lends further support to the conclusion that the property division must precede the consideration of maintenance."); *see also de Koning*, ¶ 19 ("The [Uniform Dissolution of Marriage Act] requires the [district] court "to make separate property, maintenance, and attorney fees orders based on separate considerations."). And in determining maintenance, the district court must consider the amount of marital property awarded to each spouse. *See* § 14-10-114(3)(a)(I)(B). The intent of the maintenance statute is to encourage courts to provide for the financial needs of the spouses by property disposition instead of by maintenance. *See Jones*, 627 P.2d at 252 (analyzing the former version of section 14-10-114). Here, though we acknowledge that the parties waived maintenance

under their MOU, the district court didn't divide the marital property before adopting the MOU provision on maintenance.

¶ 14 Lastly, we don't see anything in section 14-10-113 or any other authority that justifies the court's process. Section 14-10-113 simply does not remove from the marital property subject to division the marital portion of a retirement account in payout status merely because the retirement income has also been used in determining maintenance.

¶ 15 In sum, we conclude that the district court erred by not properly valuing husband's PERA pension. *Balanson*, 25 P.3d at 35-36; *see also* § 14-10-113(5) (district court is required to value marital property as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree). We therefore reverse the property division and remand the case for the district court to include the marital portion of husband's PERA benefits in the marital estate and to then reconsider the division under section 14-10-113(1) as it deems equitable. Although the court may rely on the evidence presented at the permanent orders hearing, it must also give the parties an opportunity to present new evidence concerning their current

economic circumstances. *See* § 14-10-113(1)(c) (district court considers the parties' economic circumstances at the time the property division "is to become effective"); *see also In re Marriage of Powell*, 220 P.3d 952, 961 (Colo. App. 2009) (district court is required to consider the parties' financial circumstances existing at the time of remand when reconsidering property division and maintenance).

¶ 16 We note that the district court found the MOU conscionable and incorporated it into the decree and that the MOU indicates that the court is without "jurisdiction" to entertain maintenance. But, because we have reversed and remanded the property division, maintenance must be reconsidered as well based on the changes to the property division. *See In re Marriage of Nevarez*, 170 P.3d 808, 815 (Colo. App. 2007) (requiring the district court to reconsider the issue of maintenance on remand of the property division). So, the court on remand should revisit the conscionability of the MOU, including the parties' mutual maintenance waiver in light of the changes to the property division. *See* § 14-10-112(2), C.R.S. 2019 (providing that separation agreement terms are binding on the court "unless it finds, after considering the economic circumstances of

the parties . . . that the separation agreement is unconscionable"); *see also In re Marriage of Salby*, 126 P.3d 291, 295-96 (Colo. App. 2005). On this issue, we also note that wife insists, at length, that she would be better off paying maintenance and receiving a portion of husband's PERA payments.

¶ 17 Given our disposition, we need not address wife's attack on the district court's finding that when signing the MOU, the parties used husband's monthly PERA pension payment as gross income in calculating and eventually waiving maintenance or her challenge to the overall property division.

III. Conclusion

¶ 18 We reverse the property division portion of the district court's judgment and remand the case for further proceedings as provided herein.

JUDGE FOX and JUDGE TOW concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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