

Bisker v. Bisker (1994), 69 Ohio St.3d 608, 609. The court's judgment will be disturbed only upon finding that it abused its discretion. Such an abuse is more than an error of law or judgment; it is rather a decision fairly characterized as arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

I

{¶ 3} Marital property is statutorily considered to be owned equally by both spouses. See R.C. 3105.171(C)(2). A trial court must begin its task of dividing the marital property with an equal split, as this is presumed most equitable. R.C. 3105.171(C)(1). If, however, the court finds that equality will offend equity, the statute directs the court to sacrifice equality on equity's altar. *Id.* Importantly (to a reviewing court in particular), the statute directs the trial court to "make written findings of fact that support the determination that the marital property has been equitably divided." R.C. 3105.171(G). In other words, a court must give a reason for its sacrifice of equality. With this general framework in mind, we turn to Sandra's assignments of error.

First Assignment of Error

{¶ 4} "THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE THE INTERPLAY BETWEEN APPELLANT'S WRIGHT PATT CREDIT UNION ACCOUNTS AND APPELLANT'S 403B ACCOUNT WITH GREEN HEALTH PARTNERS."

{¶ 5} Sandra contends that the trial court awarded her the same marital property twice. The court valued Sandra's 403(b) retirement account at \$44,371.39, which reflects the value stated on a June 2006 account statement. Sandra testified, however,

that sometime after this date she withdrew \$20,000 from the account, though she actually received only \$16,000 because \$4,000 was held to pay taxes. Sandra said that she deposited the \$16,000 at the Wright-Patt Credit Union. She corroborated this testimony with a transaction summary, printed by Wright-Patt on December 4, 2007, which suggests that she deposited this amount, divided among three accounts.² Sandra's testimony was not disputed, nor did the trial court indicate that it found her testimony uncredible. Yet in its final decree the court, without comment or explanation, valued the Wright-Patt accounts at \$16,000 and the 403(b) at \$44,371.39. Thus, it appears that Sandra was awarded \$16,000 less in marital property than the trial court intended to award her, which suggests that she received \$16,000 less than the court believed was equitable.

{¶ 6} While the value assigned by the court appears to be a simple mistake of double counting, we cannot be certain because the court fails to explain how it arrived at these values.³ “A fair and reasonable valuation,” we have said, is critical to an equitable division of marital property. *Rammel v. Rammel* (Jan. 20, 1995), Montgomery App. No. 14362. So a trial court's failure to explain how it arrived at a particular value “in sufficient

²It is not entirely clear what year this was done. The “Post Date” column in the summary of the three initial deposit transactions is not wide enough so the date is truncated to “11/25/2...” We observe, though, that subsequent columns in these transactions note a “Check hold release” on December 6, 2006.

³There are several problems with the trial court's valuations here. Ordinarily, marital property is assigned the value it has on the day of the final divorce hearing (or other date the court finds equitable). See R.C. 3105.171(A)(2). The value assigned to the 403(b) account is the value it had on June 30, 2006, and the values assigned to the Wright-Patt accounts are the values they had on November 25, 2006. It seems unlikely that this property had the same values in 2008. As neither party raises this issue, however, we will set it aside.

detail for us to understand the basis of its decision prevents our determination of the ultimate issue,” that is, whether the award of the particular marital property “produced an equitable division of the marital estate.” Sandra asks that we disregard the Wright-Patt Credit Union accounts and simply award her the 403(b) account as valued by the trial court. We decline this option. Instead, to help ensure the division is equitable, we will remand to allow the trial court to explain, and perhaps amend, the values that it assigned to these marital assets. The first assignment of error is sustained.

Second Assignment of Error

{¶ 7} “THE TRIAL COURT ERRED IN FAILING TO PROPERLY DIVIDE IN THE JUDGMENT ENTRY AND DECREE OF DIVORCE THE 2006 TAX REFUNDS OF THE PARTIES.”

{¶ 8} Sandra contends here that the trial court failed to equitably divide federal and state income tax refunds. Based on their jointly-filed 2006 tax returns, Randy and Sandra were entitled to a combined refund of \$3,382. The trial court found that it was fair and equitable to award Randy the entire amount and to give Sandra credit for one-half. Sandra argues that she did not receive the \$1,691 of marital property the court intended to award her.

{¶ 9} The court’s use of the word “credit” here is somewhat ambiguous. What the trial court intended, it seems, is to offset Randy’s total marital property award by \$1,691. Crunching the numbers, we find that Sandra is correct that the court failed to apply an offset, or “credit.” When a trial court’s division of marital property is contested, “[t]he question on appellate review is whether the trial court’s division of property,

examined in its entirety, is so inequitable that it rises to the level of an abuse of discretion.” *Stafford v. Stafford* (Mar. 8, 1995), Greene App. No. 94-CA-54. But here the trial court did not do what it decreed that it would and thus what it presumably believed was equitable. On remand the trial court should correct the error or explain why it is not an error. The second assignment of error is sustained.

Third Assignment of Error

{¶ 10} “THE TRIAL COURT ERRED IN FAILING TO PROPERLY ACCOUNT FOR THE TEN SHARES OF STOCK IN NEW CARLISLE DEVELOPMENT CORPORATION AND IN ALLOCATING THE EQUITY FROM THE MARITAL RESIDENCE.”

{¶ 11} Sandra contends that the trial court failed to equitably divide ten shares of corporate stock. The court found that it was fair and equitable to award ten shares of stock, which it valued at \$3,020,⁴ to Randy and “to take into account its [the shares’] value in the property division herein.” August 11, 2008 Final Judgment and Divorce Decree, p. 10. Sandra contends that the court did not take the value of the shares into account. She appears to be correct. It appears that Randy was awarded the entire value of this marital asset while Sandra received nothing. On remand the trial court should correct this error or explain why it is not an inequitable division of the property.

{¶ 12} Sandra contends next that the court mis-allocated the equity she and

⁴According to the court, each share has a fair market value of \$302. Randy points out, however, that the only evidence in the record of the shares' value—which the trial court expressly cites in its judgment—says that each share is worth only \$203. The total value, then, is only \$2,030 (not \$3,020), making Sandra’s marital interest

Randy built up in their marital residence. Near the end of 2007, the residence sold for \$195,000, and in early January 2008, a check for \$38,670.45 representing the net proceeds from the sale was deposited into an escrow account, as the trial court had ordered. The trial court then awarded all of the proceeds to Sandra.

{¶ 13} Sandra and Randy granted a mortgage to AMC Mortgage Services in exchange for a loan to purchase the home. On March 1, 2005, they granted a second mortgage to Fifth Third Bank in exchange for a \$30,165 debt consolidation loan. Roughly half of this amount, \$15,043.61, went to pay off the debt they had incurred to purchase a Subaru Baja (pick-up truck) for Randy. The rest paid off various other unspecified debts and expenses.

{¶ 14} In December 2006, after divorce proceedings had begun, the trial court issued temporary orders granting Sandra exclusive use of the home and making Randy responsible for the monthly payment of both mortgages. It also directed that the residence be sold. The last monthly payment Randy made was in March 2007. Randy admitted that he failed to make a total of nine months of mortgage payments (April - December). In early May 2007, AMC sent Sandra a letter saying that it intended to foreclose if it did not receive payment soon. Sandra, jointly with their son Ryan, consolidated the mortgages into one with the Wright-Patt Credit Union. The payoff was \$112,716.81 to AMC and \$17,283.39 to Fifth Third Bank. There was also a \$4,226.12 payoff to the Clark County Treasurer for delinquent taxes.

{¶ 15} In 2005, Randy, who had dabbled in real estate from many years, invested \$7,623 of the parties' money in a business called HouseValues. The money came from

\$1,015.

an insurance settlement of \$17,805, received after Randy totaled his Subaru while driving under the influence of alcohol. Randy explained that “House Values is a real estate company, and that was a business investment that I made, which unfortunately didn’t turn out to be as profitable as I hoped. It wasn’t very profitable at all.” (4/25/2008 Tr. 27). Not only was it not profitable but Randy did not recover his initial investment. The issue at trial regarding this investment was whether Sandra knew about it. Randy testified that he discussed the investment with her beforehand. Sandra, however, remembered things differently. She testified that “[t]he proceeds from the loss of that [truck] was paid, was spen[t] on a real estate gamble Mr. Young undertook without even my knowledge. It was called housevalues.com.

{¶ 16} “* * *

{¶ 17} “Q. Did you authorize this investment?

{¶ 18} “A. No, I knew nothing about it until much later after the fact I discovered it.” (1/7/2008 Tr. 14).

{¶ 19} Sandra testified that, while she agreed that the first mortgage and the delinquent taxes were joint obligations, she did not believe the same of the second mortgage. She said, “I’m not sure that I believe that second mortgage was a joint obligation because we had the payoff check to pay off that [pickup] that he bought with the second mortgage and instead he used it on a gamble without my knowledge and still I’m stuck with the second mortgage and paying it off. And it’s like for money that was used on a gamble on something that I didn’t agree to or did not know about. I, no, I don’t feel that that was my obligation.” (1/7/2008 Tr. 24). The trial court says in its decree that it agrees with Sandra that the second mortgage obligation should be entirely

Randy's responsibility, for two reasons. One is Randy's admitted failure to make nine months of mortgage payments. The second is the investment he made, which the court characterizes as having been made without consulting Sandra.

{¶ 20} The trial court then explains how it is going to divide the proceeds from the sale of the residence:

{¶ 21} "If this Court were to award the entire net real estate sale proceeds of \$38,670.45 to Ms. Young, then the total value of marital assets awarded to her would be \$108,344.08.

{¶ 22} "Likewise, the total value of all marital assets awarded to Mr. Young would be \$80,499.91. The difference between these two amounts is \$27,844.17, one-half of which is \$13,922.08. In other words, to exactly equally allocate the assets, thus far, between the parties if this Court were to award all real estate proceeds to Ms. Young, she would thereafter owe Mr. Young the sum of \$13,922.08, however, because Mr. Young should have been responsible, in this Court's opinion, for the payoff of the second mortgage with Fifth Third Bank which was refinanced in August of 2007 for \$17,283.39, for the reasons set forth hereinbefore, this Court finds that it is both fair and equitable to award the entire net real estate sale proceeds to Ms. Young and not require any additional distributive award between either of the parties in order to achieve equity in this matter." August 11, 2008, Judgment Entry and Decree of Divorce, p. 13-14.

{¶ 23} Sandra contends that, because the court found that Randy should have been solely responsible for paying off the second mortgage, it also should have found that she was entitled to a credit of \$17,283.39 (the balance at pay off). Instead, the trial court awarded her, she claims, what is in essence, a credit of only \$13,922.08. As a

result, Sandra concludes, Randy received a windfall of more than \$3,000. Randy does not respond directly to Sandra's arguments, but rather indirectly addresses them in his own appeal's first assignment of error, considered separately below, which alleges that the trial court erred by characterizing the second mortgage as his sole obligation. For our purposes here, we note in Randy's assignment of error that he refers to the \$17,283.39 as a "debt" that the trial court "offset" with \$13,922.08 of his marital property. Both parties seem to misunderstand the nature of this second mortgage and what the court is doing in this section of the decree.

{¶ 24} The second mortgage is not marital property. "Marital property" means all real and personal property that "currently is owned by either or both spouses," and all interest in real and personal property that "either or both of the spouses currently has." R.C. 3105.171(A)(3)(a)(i), (ii). The second mortgage ceased to exist, at the latest, when the residence was sold. When the trial court embarked upon its divisive task, then, no mortgage was currently owned by Sandra or Randy. All that remained from the residence and its mortgages was the \$38,670.45 in proceeds.

{¶ 25} Accordingly, the property at issue in this section of the decree is the proceeds from the sale of the residence, which may be described loosely as the home's "equity." After paying off the mortgage, and the settlement expenses, there remained \$38,670.45. Neither party disputes that these proceeds, or equity, are marital property. Thus, Sandra and Randy are each entitled to one-half of the proceeds unless equitable considerations demand otherwise.

{¶ 26} The court discusses the second mortgage precisely to explain why equitable considerations favor an unequal division. When dividing marital property, a

court is statutorily directed to “consider all relevant factors,” R.C. 3105.171(C)(1), “that the court expressly finds to be relevant and equitable.” R.C. 3105.171(F)(10). Here, the trial court determined that there were factors that made an unequal division of the proceeds equitable. The court neither awarded Sandra a \$13,922.08 credit nor did it offset Randy’s marital property award. Rather, the court is simply explaining the equitable factors it considered in deciding to award Sandra all the proceeds. Sandra, then, is not entitled to a credit. Incidentally, we observe that, because the court found Randy responsible, it actually awarded Sandra more in proceeds, an additional \$19,335.23, than was the balance of the second mortgage, \$17,283.39. The third assignment of error is sustained in part and overruled in part.

Fourth Assignment of Error

{¶ 27} “THE TRIAL COURT ERRED IN FAILING TO PROPERLY ALLOCATE APPELLANT’S ENTITLEMENT TO APPELLEE’S OP&F RETIREMENT BENEFITS.”

{¶ 28} The trial court awarded Sandra one-half of the retirement benefits Randy receives from the Ohio Police & Fire Pension Fund (OPFPF). Randy, however, is currently eligible to receive disability benefits from the OPFPF, having suffered an on-the-job injury in April 2007 that forced him to resign the same month from the Springfield Fire Department. Randy testified that the OPFPF had approved maximum partial disability benefits of \$2,674 per month, which he was to begin receiving soon. It is not clear from the evidence in the record whether, provided Randy remains “disabled,” the disability benefits will end this side of his grave. Sandra says that if she must wait until Randy actually receives retirement benefits, she may never get her marital share. As

Randy's disability benefits are roughly \$1,000 per month more than his retirement benefits will be, he has every incentive to continue receiving these benefits for as long as he can. Sandra contends that the trial court instead should have determined the date on which Randy became entitled to receive OPFPF retirement benefits and ordered payments of her marital share be made then, regardless of whether Randy has actually received them. We agree.

{¶ 29} The trial court correctly recognized that disability benefits are separate property, not subject to division. The court cites our decisions in *Bauser v. Bauser* (1997), 118 Ohio App.3d 31, and *Criswell v. Criswell* (Sept. 29, 2000), Montgomery App. Nos. 18101, 18111, for the proposition that, to be entitled to the marital portion of retirement benefits in this situation, the non-participant spouse has the burden to prove that the disability benefits are being received in lieu of retirement benefits or that the retirement benefits the participant spouse would otherwise be entitled to receive are being reduced by the receipt of disability benefits. The court found that Sandra had failed to meet this burden of proof.

{¶ 30} The trial court correctly states the law, but it needed to go one step further in its analysis.

{¶ 31} While retirement benefits earned during the marriage generally are divisible as marital property, disability benefits are not. R.C. 3105.171(A)(3)(a); *Hoyt v. Hoyt* (1990), 53 Ohio St.3d 177, 178 n.3. We have said that disability benefits "are not marital property unless they are accepted by the retiree in lieu of retirement pay." *Elsass v. Elsass* (Dec. 29, 1993), Montgomery App. Nos. 93-CA-00005, 93-CA-0016. When disability benefits are accepted in lieu of retirement pay, "they are marital property

to the extent that the disability benefit includes the retirement pay value.” *Messer v. Messer*, Darke App. No. 1570, 2002-Ohio-4196, at ¶8. On the date a spouse becomes eligible for retirement, the disability benefits being received, though not marital property per se, begin to represent retirement benefits to the extent that they equal the retirement benefits the spouse would receive but for his disability. *Motter v. Motter* (July 27, 2000), Wyandot App. No 16-99-14. Thus, Sandra meets her burden if she shows that Randy is entitled to receive retirement benefits from his pension.

{¶ 32} Having accumulated 24 years 11 months and 2 days of service, Randy is entitled to receive an OPFPF service-commuted retirement pension. The marital portion of his pension has a stipulated present-value of \$387,744.72, or \$1,636.48 per month. According to the OPFPF documents in the record, it appears that a member can begin receiving retirement benefits from a service-commuted pension at 48 years of age or when 25 years have elapsed from the day the member was initially hired, whichever comes last. When he resigned in April 2007, Randy (born in 1953) was over 50 years of age, and it was less than one month shy of 25 years since he began his service. Hence, it appears that Randy was eligible to begin receiving retirement benefits already in May 2007.

{¶ 33} The situation here is similar to that in *Mueller v. Mueller*, Montgomery App. No. 20847, 2005-Ohio-5915. There, the final divorce decree stated that a former wife was entitled to receive her marital share of her former husband’s Public Employee Retirement System (PERS) retirement benefits when the latter received them. Sometime after the divorce, the former wife argued to a magistrate that her former husband had retired but refused to provide her with her share of the retirement benefits.

The magistrate disagreed, finding that he had not yet retired and was receiving disability payments, and held that she was not yet entitled to her share of the retirement benefits. The former wife appealed to the trial court, and the trial court agreed with the magistrate, saying that the disability benefits were still in the nature of wage replacement. The court, though, remanded back to the magistrate with instructions to determine the date on which the former husband would become eligible for retirement benefits. He then appealed to this court. Affirming, we held that the trial court “correctly remanded the matter back to the Magistrate for a determination of the time at which Appellee will fulfill the age requirements for PERS pension benefits and accordingly subject his benefits to division and payment to Appellant.” *Id.* at ¶15.

{¶ 34} On remand the trial court should determine the date on which Randy was eligible for retirement benefits and then fashion an appropriate order directing him to begin making payments to Sandra of her marital share. The fourth assignment of error is sustained.

II

{¶ 35} We now turn to Randy’s two assignments of error.

First Assignment of Error

{¶ 36} “THE TRIAL COURT ERRED IN CHARACTERIZING THE PARTIES’ SECOND MORTGAGE AS APPELLEE’S SOLE OBLIGATION.”

{¶ 37} Randy’s arguments here are premised on the idea that the second mortgage was allocated by the trial court as marital property. This, he contends, the

court could not do unless it finds that the mortgage was his separate property or it finds that he committed financial misconduct, neither of which it did. In our review of Sandra's third assignment of error, however, we pointed out that the mortgage is not marital property because it does not currently exist. We observed that the trial court discussed the second mortgage as a factor that it believed weighed in favor of awarding Sandra all the proceeds from the sale of the residence. The trial court did not do what Randy here alleges. The first assignment of error is overruled.

Second Assignment of Error

{¶ 38} "THE TRIAL COURT ERRED IN FAILING TO CONSIDER PLAINTIFF/APPELLANT'S SOCIAL SECURITY BENEFITS AS AN OFFSET IN THE PROPERTY DIVISION."

{¶ 39} Randy contends that the trial court's failure to consider an offset based on Sandra's Social Security retirement benefits is an abuse of discretion. The idea of an offset was raised in the parties' testimony and in the joint expert-valuation reports submitted to the trial court, in which the parties stipulated that the present value of the marital portion of Sandra's Social Security retirement benefit is \$161,810.21, while Randy's is only \$10,105.85. Yet the court never mentions these benefits in the divorce decree.

{¶ 40} To help ensure an equitable division, we have said, "the domestic relations court should consider the parties' Social Security benefits in relation to other retirement accounts that are divided." *Hardy v. Hardy*, Montgomery App. No. 20865, 2005-Ohio-5528, at ¶13. The failure to consider Social Security retirement benefits as an offset to

public retirement benefits is an abuse of the trial court’s discretion. *Walker v. Walker*, Greene App. No. 06-CA-23, 2007-Ohio-331, at ¶7. Thus, the trial court ought to have considered an offset and should do so on remand.⁵ See *Harshbarger v. Harshbarger*, 158 Ohio App.3d 121, 2004-Ohio-3919 (describing offset considerations). The second assignment of error is sustained.

III

{¶ 41} Sandra’s first, second, and fourth assignments of error are sustained, and her third assignment of error is sustained in part and overruled in part. Randy’s first assignment of error is overruled, but his second assignment of error is sustained. The trial court’s judgment is Affirmed in part, Reversed in part, and Remanded for further proceedings.

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FAIN and FROELICH, JJ., concur.

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⁵We note that on April 7, 2009, amendments to R.C. 3105.171 went into effect making it clear that social security benefits are not marital property divisible by courts but may be considered in dividing a public pension. The last sentence of paragraph (B) was modified to read, “For purposes of this section, the court has jurisdiction over all property, **excluding the social security benefits of a spouse other than as set forth in division (F)(9) of this section**, in which one or both spouses have an interest.” (Emphasis added). The other relevant amendment, referred to in paragraph (B), is a new factor for courts to consider in dividing property: “Any retirement benefits of the spouses, excluding the social security benefits of a spouse except as may be relevant for purposes of dividing a public pension.” R.C. 3105.171(F)(9). These amendments do not apply retroactively, so they do not apply here to the trial court’s 2008 judgment.

Hon. Thomas J. Capper