

ARKANSAS COURT OF APPEALS

DIVISION IV
No. CA12-105

DEBRA SUE ATCHISON

APPELLANT

V.

THOMAS ARTHUR ATCHISON

APPELLEE

Opinion Delivered October 10, 2012

APPEAL FROM THE FAULKNER
COUNTY CIRCUIT COURT
[23DR-08-846]

HONORABLE DAVID M. CLARK,
JUDGE

AFFIRMED

DAVID M. GLOVER, Judge

Debra Atchison and Thomas Atchison were divorced by decree entered on June 22, 2009. In the decree, the trial court retained “jurisdiction of the parties and the subject matter of this action for such further Orders as may be necessary.” The decree set forth a formula for determining Debra’s percentage interest in Thomas’s retirement account, and Debra submitted a Qualified Domestic Relations Order to Fidelity Investments for division of the account. However, Fidelity would not accept the qualified order; instead, it demanded instructions concerning the exact amount that was to be transferred from Thomas’s account to an account for Debra. When Debra and Thomas were not able to agree on what that exact amount should be, Debra, on September 27, 2010, filed a motion to determine the value of the retirement account and to freeze the account pending division. On March 30, 2011, a hearing was held on the motion, resulting in an April 18, 2011 order. When the parties still could not agree on how the order of division should be

interpreted, another hearing was held on September 20, 2011. The instant appeal arises from the October 17, 2011 order from that hearing, which divides the retirement account. We affirm.

We review division-of-marital-property cases de novo; however, we will affirm the trial court's findings of fact unless they are clearly erroneous or against the preponderance of the evidence. *McClure v. Schollmier-McClure*, 2011 Ark. App. 681. The division of property itself is also reviewed, and the same standard applies. *Horton v. Horton*, 2011 Ark. App. 361, 384 S.W.3d 61. A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* Under Arkansas Code Annotated section 9-12-315 (Repl. 2009), all marital property shall be divided equally between the parties unless the circuit court finds that such a distribution would be inequitable. Section 9-12-315(b)(1) excludes property that was acquired prior to the marriage from the definition of marital property. In the event that the circuit court reaches the conclusion that an unequal distribution is warranted, it is allowed, after considering specific factors, to make any division of the property that it deems equitable. *Horton, supra*. Section 9-12-315, however, does not compel mathematical precision in the distribution of property; it simply requires that marital property be distributed equitably. *Id.*

Debra contends in this appeal that the trial court erred in its division of the marital portion of Thomas's retirement account. In particular, she argues that the "central issue in this case is the formula used by the trial court to divide [Thomas's] retirement account"; that "the retirement account contained both pre-marital contributions and marital

contributions including growth on both pre-marital and marital contributions”; that the methods employed by her witness, Dr. Bratton, were consistent and reflected the proper formula; and that “the trial court should have used either total values (i.e., contributions plus growth) or simply used contributions only. All calculations should have been based upon account values which includes contributions and growth or contributions only.” In her appeal, she also challenges the manner in which the trial court handled the two amounts that Thomas had withdrawn from the account after the entry of the decree, arguing that the trial court’s method did not give any consideration to the growth of those funds from the period of their withdrawal through June 2011.

The trial court utilized the following formula in the October 17 order:

2. The Court has determined [Debra’s] interest in [Thomas’s] retirement account to be \$271,266.48 based upon the following formula and division:

$$\begin{aligned} & \$373,332.09 \text{ (marital contributions) [divided by]} \\ & \$255,846.34 \text{ (premarital value) + } \$373,332.09 \text{ (marital contributions) =} \\ & 59.3364\% \text{ (marital share) [divided by] } 2 = \\ & 29.6684\% \text{ ([Debra’s] share).} \end{aligned}$$

- a. The balance in the account as of June 30, 2011 was \$311,192.22 which [Debra] shall receive 29.6684% or \$92,327.26 as her one-half share.
- b. [Thomas] made two withdrawals from the account since the entry of the Decree. The first withdrawal was in the amount of \$373,134.32 of which Debra shall receive 29.6684% or \$110,702.31.
- c. The second withdrawal was in the amount of \$230,000.00 of which [Debra] shall receive 29.6684% or \$68,236.91.

Appellant candidly cited numerous appellate decisions in which different formulas of division were utilized and approved in dealing with the appropriate distribution of a

pension in a divorce case, including an early case where our supreme court affirmed the trial court's inclusion of the enhanced portion of the retirement pay. *See Askins v. Askins*, 288 Ark. 333, 704 S.W.2d 632 (1986). In that case, however, the court was also careful to note that it would have affirmed even if the chancellor had decided *not* to divide equally the proportion of retirement benefits based on the twelve years of marriage, explaining that the statute gave the chancellor broad discretion and that it was not the intent of the statute or the supreme court's opinion to tie the chancellor to any specific formula for dividing prospective retirement benefits.

Here, the trial court explained its formula in part by stating:

The \$255,846.35 that was premarital, yes, that takes into account the interest that the money that he contributed earned, prior to the marriage. But it's all his. I mean, if I'm doing anything with these calculations, I'm short changing him, because the return of—he is not realizing the full return of investment on that premarital account—amount.

By using the formula that it chose, the trial court took into account that the size of the premarital contribution allowed the account to grow more than it would have otherwise been able to do. We are simply not left with a definite and firm conviction that the trial court made a mistake in dividing the retirement account and the sums that were withdrawn from that account in the manner that it did.

Affirmed.

VAUGHT, C.J., and MARTIN, J., agree.

Hilburn, Calhoon, Harper, Pruniski & Calhoun, LTD, by: *Sam Hilburn and Traci LaCerra*.

Pamela S. Osment, for appellee.