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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-0002521-MR

BETTY JO CHAPMAN

APPELLANT

v. APPEAL FROM OHIO CIRCUIT COURT
HONORABLE RONNIE C. DORTCH, JUDGE
ACTION NO. 98-CI-00027

LOWEN D. CHAPMAN

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING
** ** * * * * *

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Betty J. Chapman and Lowen Dale Chapman were married in 1965 and separated on September 15, 1987. Lowen filed a petition for dissolution of the marriage on January 15, 1998 - more than ten years after their separation. The Ohio Circuit Court rendered a decree of dissolution on June 26, 1998. Thereafter, the trial court rendered an order confirming findings of fact, conclusions of law and a judgment submitted by

the domestic relations commissioner (DRC) on matters relating to division of marital property and debts, maintenance and attorney fees. Betty argues that the trial court erred in valuing Lowen's pension and other retirement savings as of the date of separation. We agree that these assets were marital, and they should have been valued as of the date of the entry of the decree. However, we find that the trial court did not abuse its discretion in denying Betty's request for maintenance, and that she failed to preserve any objection to the trial court's denial of her request for attorney fees. Hence, we affirm in part, reverse in part, and remand for further proceedings.

The disputed issues of division of marital property and debt, as well as Betty's request for an award of maintenance and attorney fees, were submitted to the DRC. Following a hearing, the DRC issued proposed findings of fact and conclusions of law on these matters. In pertinent part, the DRC found that Lowen had a pension plan through his employer. When the parties separated, the pension plan had a value of \$22,568.00, and by the time of the hearing it had grown to \$68,515.00. In addition, Lowen had opened an individual retirement account (IRA) shortly after the separation, which had grown to \$19,175.34 at the time of the hearing. Lowen also had a certificate of deposit (CD) in the amount of \$8,365.39. Like the IRA, Lowen had opened the CD after he and Betty separated.

The DRC noted that these assets would normally be considered marital property. However, the DRC found that the parties' lengthy separation presented an unusual situation for the division of these assets. The DRC found that "neither party contributed to the earning power of the other party after the date of separation, nor did either contribute as a spouse or homemaker for the benefit of the other." Consequently, the DRC recommended that the pension be divided based upon its value at the time of the separation. For the same reason, the DRC recommended that the IRA and the CD be awarded to Lowen in their entirety.

The DRC further found that Betty is able to meet her reasonable needs through appropriate employment. Accordingly, the DRC recommended that her request for maintenance be denied. The DRC's report did not address Betty's request for attorney fees.

Betty filed objections to these findings, as well as several other findings which are not at issue in this appeal. On October 26, 2001, the trial court overruled her objections and entered an order adopting the DRC's report. This appeal followed.

Betty first argues that the trial court erred by valuing the marital assets as of the date of separation rather than the date of the entry of the decree of dissolution. We

agree. KRS 403.190(3) provides that all property acquired during the course of the marriage is marital property, unless the property can be shown to have originated in one of the excepted ways outlined in KRS 403.190(2). A party claiming that property acquired during the marriage is other than marital property, bears the burden of proof.¹

In Stallings v. Stallings,² the Kentucky Supreme Court expressly rejected the reasoning set out in the DRC's report. As in the present case, the question presented in Stallings was whether marital assets should be valued as of the date the parties separated or as of the date of the dissolution decree. This Court had held that only the values at separation were includable in the marital estate because later increases in value were not the product of the "team or joint efforts" of the parties. The Supreme Court reversed, holding that the concept of "team or joint efforts" is irrelevant to the determination of whether property is marital. Rather, all property acquired during a period of separation will be presumed marital unless it fits into one of the exceptions set out in KRS 403.190(2).³

¹ See also Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 820 (2002).

² Ky., 606 S.W.2d 163 (1980).

³ Id. at 164. KRS 403.190(2) provides that all property acquired subsequent to the marriage is marital, except: (a) property

In this case, the DRC concluded that Lowen's acquisition of assets after the separation was entirely due to his own efforts. However, this reasoning overlooks the fact that, despite the separation, all of Lowen's income during this period was marital property. Therefore, any pension, IRA or savings which he accrued with that income during the separation was also marital property. Although the length of the parties' separation is unusual, all property acquired during the period of separation must be considered as marital unless it fits within one of the exceptions set out in KRS 403.190(2). Since none of the exceptions apply, the property must be considered marital and valued as of the date of the dissolution decree.

Nevertheless, Lowen argues that the trial court's division of these assets should be upheld. In Stallings, the Kentucky Supreme Court noted that the contribution of each spouse to the acquisition of marital property is a valid factor

acquired by gift, bequest, devise or descent, and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom; (b) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent; (c) property acquired by a spouse after a decree of legal separation; (d) property excluded by valid agreement of the parties; and (e) the increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during the marriage.

in dividing marital property.⁴ Furthermore, KRS 403.190 does not require an equal division of the marital estate, but merely requires the court to divide the property in "just proportions," and after consideration of all of the factors set out in subsection (1)(a)-(d).⁵ Given that the parties lived separate lives for more than ten years following their separation, Lowen contends that the trial court's division of the pension, IRA and the CD was within its discretion even if it mistakenly deemed some of the assets to be non-marital.

However, matters involving the exercise of discretion presuppose that a court could reach a range of conclusions based upon the evidence and a proper application of legal principles.⁶ As long as the trial court's conclusion is within that range, generally an appellate court must defer to the trial court's determination. But it is not sufficient that the court's ultimate result is within a range which a proper exercise of discretion would have allowed if the court did not apply the correct legal standard in reaching that conclusion. The result is arbitrary even if the raw numbers could be justified in some manner.

⁴ Id.

⁵ Garrett v. Garrett, Ky. App., 766 S.W.2d 634, 636 (1989).

⁶ City of Louisville v. Allen, Ky., 385 S.W.2d 179, 182 (1964).

In this case, the trial court erroneously concluded that the assets acquired by Lowen after the separation were non-marital. Consequently, this matter must be remanded to the trial court for a re-allocation of the marital property. In dividing the marital property, the trial court may consider the contribution of either spouse (or lack thereof) to the acquisition of marital property.

It should be noted, however, that the "contribution of a spouse as a homemaker" does not necessarily cease when the other spouse leaves, especially when minor children remain with the homemaker-spouse. Although she may no longer be providing services directly to her spouse, she may be assisting him by caring for his children, thus continuing to enhance to some degree his ability to earn a living.⁷

Betty next argues that the trial court erred in denying her request for maintenance. Betty first argues that Lowen has sufficient income to meet his own needs while paying maintenance to her. But before a court may consider this factor in determining the amount and duration of maintenance, the trial court must first find that the spouse seeking maintenance: (1) lacks sufficient property, including marital property apportioned to her, to provide for her reasonable needs; and (2)

⁷ Stallings, 606 S.W.2d at 164.

is unable to support herself through appropriate employment.⁸ Furthermore, in order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.⁹

As a general rule, a trial court should not make a final decision on whether to award maintenance until after all of the marital and non-marital property has been allocated.¹⁰ Because we are reversing the trial court's division of Lowen's pension plan and retirement savings, normally we would direct the trial court to reconsider its decision on maintenance in light of any adjustment to the property division. In this case, however, we find no need for the trial court to revisit this issue. Upon remand, Betty may be awarded more marital property than she previously received. She certainly cannot be awarded any less. Because the trial court already determined that Betty has sufficient property and income to meet her reasonable needs, any adjustment in the allocation of marital property would not change this result. Moreover, we find that the trial court's

⁸ KRS 403.200(1).

⁹ Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992).

¹⁰ See Owens v. Owens, Ky. App., 672 S.W.2d 67, 69 (1984).

findings regarding Betty's entitlement to maintenance were supported by substantial evidence and should not be disturbed.

Betty complains that the DRC failed to make findings concerning her income or expenses. The DRC was unable to determine Betty's exact income or monthly expenses because she failed to introduce sufficient documentation regarding her income, and she admitted to inflating the amounts on her list of expenses. However, the DRC noted that Betty lives on her non-marital farm, which consists of two (2) houses, barns and lakes. The farm has a tobacco base from which Betty receives income, although the DRC could not determine the exact amount. Betty also raises flowers and other plants in the greenhouse which she sells to retail florists. She sells Stanley products and does demonstrations for other products. Betty also has income from cleaning houses. And in addition to these sources of income, Betty's adult son lives with her in the house and contributes toward the monthly expenses. The DRC estimated Betty's expenses to be around \$600.00 a month, and concluded that Betty's income from all sources was sufficient to meet her reasonable needs.

Although Betty asserts that her health problems limit her ability to earn income, she presented no medical records or evidence to establish that she suffered from any limitation on her ability to work. Furthermore, the DRC found that Betty has been able to perform physically demanding farm work, including

the feeding of twelve to fourteen head of cattle plus calves and a bull. In addition to her work in the greenhouse and cleaning houses, Betty also has past experience in sales and in banking. Based on this evidence, the DRC found that Betty is able to support herself through appropriate employment if she chooses to do so. This finding was supported by substantial evidence of record, and consequently, the trial court did not abuse its discretion by denying Betty's request for maintenance.

Lastly, Betty argues that the DRC and the trial court failed to address her request for an award of attorney fees. However, CR 52.04 requires a motion for additional findings of fact when the trial court has failed to make findings on essential issues. Failure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal.¹¹ In her objections to the DRC's report, Betty asserted that the DRC erred in failing to award her attorney fees. But she did not bring the DRC's failure to make findings on this issue to the trial court's attention, nor did she ask the trial court to make any findings. Consequently, we conclude that she has waived any objection to the sufficiency of the trial court's findings on this issue.

¹¹ Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997) (*citing* Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982)).

Accordingly, the judgment of the Ohio Circuit Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph R. Flaherty
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BRIEF FOR APPELLEE:

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