

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-001460-MR

KEITH GAINES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE THOMAS L. CLARK, JUDGE  
ACTION NO. 01-CI-00030

RHONDA NORTHCUTT GAINES

APPELLEE

OPINION  
AFFIRMING IN PART,  
VACATING IN PART,  
AND  
REMANDING

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BEFORE: BUCKINGHAM, McANULTY, and PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Keith Gaines appeals from a judgment of the Fayette Circuit Court disposing of issues in a dissolution of marriage action between him and Rhonda Northcutt Gaines. The central issues involve the disposition of marital property and the award of child support. We affirm in part, vacate in part, and remand.

Keith and Rhonda were married on August 23, 1986. Their first child is named Megan, and she was born on

December 11, 1989. Megan has spina-bifida and is confined to a wheelchair. Keith and Rhonda also have a son, Travis, who was born on January 13, 1995. The parties separated on January 2, 2001, and a final decree of dissolution disposing of all issues was entered by the Fayette Circuit Court on May 23, 2002. Keith represented himself in the circuit court, and he represents himself before this court.

Keith was employed as a police officer for the Lexington-Fayette Urban County Government, Division of Police, and was employed in that capacity for approximately seven and one-half years prior to the entry of the decree. He was paid at the rate of \$16.00 per hour, which computed to \$41,280 annually or \$3,440 per month. Rhonda was a registered nurse employed at the Spine & Brain Neurosurgical Center in Lexington and was paid at the rate of \$20.00 per hour. She maintained this employment for approximately four and one-half years prior to the entry of the decree, and she worked 29 hours per week. Based on those hours, her income was \$2,797.50 per month. The court found that Rhonda worked reduced hours to make herself available to attend to Megan's special needs.

The court awarded joint custody of the children, ages twelve and seven at the time of the decree, to the parties. The decree noted that the parties were in agreement as to time-sharing with the children based on their respective work

schedules, and it ordered the parties to continue to agree on time-sharing. Keith asserts that the children spend 40%-50% of the time with him, but Rhonda asserts that the children stay with Keith approximately 35% of the time. The decree also provided that Keith shall continue to provide health and medical insurance coverage for the children through his employment and that the parties shall share equally any unreimbursed or extraordinary medical expenses of the children. Based on Keith's income of \$3,440 per month and Rhonda's income of \$2,797.50 per month, and considering the amount of \$300 per month for child care, the court awarded Rhonda child support from Keith in the amount of \$706.48 per month.

In addition to resolving issues concerning the children, the court also divided the marital property. The parties owned a marital residence in Lexington with a stipulated value of \$126,500. There were two mortgages on the residence that reflected a total indebtedness of \$76,382.16. Keith had a pension plan in connection with his employment, and it was valued at \$26,885.11. Keith also had a deferred compensation plan valued at \$2,571.13. Additionally, there were two automobiles, firearms, a Beanie Baby collection, and several credit card debts.

The court awarded Keith his pension plan, his deferred compensation plan, a Jeep, firearms, and the Beanie Baby

collection. The court awarded Rhonda the marital residence and an automobile. The court assigned the two mortgage debts on the residence to Rhonda and divided the credit card debts. The court also awarded each party "such other personal property as currently in their respective possessions." The net distribution of the marital estate to Rhonda was \$50,110.85, and the net distribution of the marital estate to Keith was \$30,696.24. In other words, Rhonda was awarded nearly \$20,000 more in marital property than Keith. Following the entry of the final decree, Keith appealed.

Keith raises several arguments in his appeal. First, he contends that the circuit court erred in the distribution of the marital property. The court was required to divide the marital property in just proportions after considering all relevant factors. KRS<sup>1</sup> 403.190(1). Also, the court was vested with wide discretion in the division of the marital property. Johnson v. Johnson, Ky. App., 564 S.W.2d 221, 222 (1978). Further, "[t]his court may not disturb the findings of the trial court in a case involving dissolution of marriage unless those findings are clearly erroneous." Id., citing Adams v. Adams, Ky., 412 S.W.2d 857 (1967).

Keith asserts that the circuit court erred in treating his pension plan as a distributive share of marital property.

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<sup>1</sup> Kentucky Revised Statutes.

He compares his police and firefighter's retirement plan to the school teachers' retirement plan. His argument is without merit.

This issue was addressed by this court in Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993). In that case, after taking notice of the fact that the legislature specifically did not include an exemption for the police and firefighter's retirement plan similar to the one contained in KRS 161.700 for the school teachers' retirement plan, this court concluded that the police and firefighter's pension was properly classified as marital property. Id. at 678.

Keith also contends that, if the court takes the position that his pension fund is to be considered marital property, then Rhonda's anticipated social security benefits should also be considered marital property. In support of his argument, Keith cites Gross v. Gross, Ky. App., 8 S.W.3d 56 (1999). In connection with this argument, Keith maintains that, by virtue of his participation in the police and firefighter's retirement plan, he will not have social security benefits.

His arguments fail for two reasons. First, the Gross case is distinguishable from this case in that in Gross the court concluded only that non-prospective social security benefits may be considered in the division of marital property. Id. at 58. Second, it appears evident that Keith participates

in the social security program. Under the policy statement established in KRS 61.410, public employees participate in social security. This includes public employees who participate in a retirement system, except for those covered by KRS 161.220-710 (the teachers' retirement plan). We neither find, nor has Keith cited to, any statute that exempts police officers covered by the police and firefighter's retirement plan from participating in social security. Furthermore, a review of the evidence concerning the deductions taken from Keith's pay demonstrates that he continues to pay FICA out of his salary. Therefore, Keith's argument that Rhonda's prospective social security benefits should be considered marital property fails.

Keith also maintains that his pension should not be considered marital property because his interest is not vested. In fact, Keith has a vested interest in his contributions. See KRS 67A.610. Thus, he would, at a minimum, be entitled to receive a refund of the contributions made into the fund in the event he did not remain employed until his pension rights fully matured. See KRS 67A.500(1).

Next, Keith argues that the circuit court erred when it found that the division of property resulted in only a \$6,000 difference between the property awarded to him and the property awarded to Rhonda. We agree with Keith. In fact, even Rhonda's brief reveals that the difference in the amount awarded is

nearly \$20,000. We conclude that the trial court clearly erred in this regard. Had the trial court understood that its division of the marital property resulted in a difference of \$20,000 rather than \$6,000, it might have divided the property in a different manner. We vacate the division of marital property and remand the matter for reconsideration by the court after giving proper consideration to the difference in the amounts awarded.

Keith also argues that the trial court erred in failing to value the household furnishings awarded to Rhonda by agreement in the division of marital property. Further, he maintains that the trial court failed to consider a loan indebtedness against an insurance policy. Rhonda did not address either of these issues in her brief. However, at trial she relied on the fact that neither were included in a joint trial disclosure form.

Apparently, Rhonda ended up with all household furnishings, either by agreement or otherwise. Presumably, these items have some value, although no value was assigned by the court in the division of the marital property. While it is true that the household furnishings are not listed in the joint trial disclosure form, Keith did raise the issue at trial. We conclude that the household furnishings should be assigned a value to be considered in the disposition of marital property on

remand. Further, if there is a marital debt against an insurance policy, the court should determine whether the debt is marital property and assign it to the proper party.

Keith's final arguments relate to the child support award of \$706.48 per month to Rhonda. Keith's first argument in this regard is that the trial court erred by not deviating from the child support guidelines because the children spend 40%-50% of the time with him. Rhonda claims that the children spend only an average of about 35% of the time with Keith.

Guidelines for setting child support are contained in KRS 403.212. The trial court may deviate from the guidelines upon making a finding that their application would be unjust or inappropriate. Downing v. Downing, Ky. App., 45 S.W.3d 449, 454 (2001). See also KRS 403.211(2). The Downing case also states that trial courts are given broad discretion in considering a parent's assets and in setting the appropriate amount of child support. Id. Finally, the court in Downing noted that "[a]s long as the trial court's discretion comports with the guidelines, or any deviation is adequately justified in writing, this Court will not disturb the trial court's ruling in this regard." Id.

While the court in the case *sub judice* had the discretion to consider the time-sharing evidence as possible grounds for deviating from the guidelines, it was also free to

reach the conclusion that this circumstance alone, when weighed with other facts in the case, simply did not warrant a deviation from the guidelines. Thus, we conclude that the trial court did not abuse its discretion in declining to deviate from the guidelines.

Finally, Keith argues that the trial court improperly calculated child support because it did not determine that Rhonda was voluntarily underemployed. He asserts that the court based his child support obligation on Rhonda working only 29 hours a week. He contends that her income should have been computed based on her earning potential and not the 29 hours per week she was working. On the other hand, Rhonda maintained that the circumstances imposed by Meagan's condition, including coordinating with home health care providers and seeing that she was taken to her many medical appointments, precluded her from seeking further employment. By computing child support based on Rhonda's income from the 29 hours per week, the court obviously rejected Keith's argument that Rhonda was voluntarily underemployed.

KRS 403.212(2)(d) provides that child support shall be calculated on a determination of potential income where a parent is voluntarily unemployed or underemployed. The statute also provides for exceptions. Id. Given the conflicting evidence concerning whether Rhonda was voluntarily underemployed, we

conclude the trial court did not abuse its discretion in concluding that she was not.

The judgment of the Fayette Circuit Court is affirmed in part, vacated in part, and remanded for further proceedings.

PAISLEY, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

McANULTY, JUDGE, DISSENTING IN PART AND CONCURRING IN PART: The disparity in marital property in favor of Appellee by either \$20,000 or \$6,000 in my opinion comports with the trial court's discretion to divide in "just proportions." KRS 403.190(1); Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994); McGowan v. McGowan, Ky. App., 663 S.W.2d 219, 223 (1983).

Rhonda received the equity in the marital home and two mortgages. She also received a vehicle and household furniture. Keith was awarded his pension, deferred compensation, a car, his guns and the Beanie Baby collection. Now upon remand he could receive approximately \$10,000 from the over encumbered marital residence. Perhaps upon valuing the personal property the trial court might award all of the useable furniture from the basement or attic and assign some inflated value in order accomplish a fairer division.

From this portion of the majority's opinion, I respectfully dissent.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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