

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002697-MR

WILLIAM BRAY

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 95-CI-00769

VICKI CALLAHAN (FORMERLY BRAY)

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This appeal involves the selection of a benefit payment option of a pension plan where a division of the pension itself is not contested. The circuit court entered a QDRO requiring William Bray to elect a benefit payment option giving his ex-wife, Vicki Callahan (formerly Bray), survivor benefits. We believe William is entitled to relief from that order pursuant to CR 60.02(f). Therefore, we reverse and remand for further proceedings.

William Bray began working for Ford Motor Company in April, 1975. On December 14, 1979, William married Vicki Callahan. A decree of dissolution was entered June 23, 1998. The decree reserved on the issue of the division of the pension from Ford. The Domestic Relations Commissioner's report of April 28, 1998, stated in part:

4. The parties agree that a qualified domestic relations order should be issued for the division of Respondent's pension, but disagree as to the date when the Petitioner's share should be computed to. The Commissioner finds that an equitable division would be to cut off Petitioner's interest as of the date of separation, June 1, 1997. (emphasis added).

On August 3, 1998, the court entered an order which adopted the Commissioner's April 28, 1998, report as to the pension. This order was made final and appealable. In October, 2002, William retired from Ford. On January 24, 2003, Vicki moved the trial court to enter an attached qualified domestic relations order "on the grounds that the Order entered by the Court August 3, 1998, directs that this Qualified Domestic Relations Order be entered."

By order entered February 3, 2003, the trial court entered the tendered order which divided the Ford pension assigning Vicki fifty percent of the "Marital Portion" of the pension. William has no dispute with that division. The contested part of the order is in paragraph 10, which provides

"Upon Participant's retirement, Participant shall be required to elect his benefit in the form of a 65 percent joint and survivor annuity."

Under the Ford pension plan, William's monthly benefit totaled \$2,730.00. After the court entered the February 3, 2003, order adopting the "65 percent joint and survivor annuity", his total monthly benefit was reduced by \$871.56, to \$1,858.44 per month. At the same time, upon William's death, Vicki will continue to receive \$603.03 a month for life.

On October 8, 2003, William moved the trial court, pursuant to CR 60.02, to set aside and/or amend the QDRO entered on February 3, 2003. In the motion, William stated that he was unrepresented at the time of entry of the February 3, 2003, order, which divided his pension and included the survivorship election, drafted by Vicki's attorney. William did not dispute a fifty-fifty division of the marital portion of the pension, but argued that the inclusion of the survivorship election was not considered in the prior orders of the court nor the agreement of the parties.

On October 30, 2003, the trial court entered an order setting aside the QDRO entered on February 3, 2003. Subsequently, Vicki moved the court to vacate the October 30, 2003, order, on grounds that the court was without jurisdiction to vacate or modify an order after the tenth day following its

entry, and that William alleged no grounds which satisfy CR 60.02. On November 17, 2003, the trial court entered an order setting aside its order of October 30, 2003, and reinstating the QDRO entered on February 3, 2003. This appeal followed.

On appeal, William does not dispute the division of the pension, but contends the trial court erred in allowing Vicki to select the payment option. Vicki contends that William failed to timely object to the provision of the QDRO providing her with survivor's benefits, or, in the alternative, that the trial court had the discretion to provide her with the option of survivor's benefits.

The final order of the trial court entered August 3, 1998, adopted the Commissioner's report of April 28, 1998, which states, "The parties agree that a qualified domestic relations Order should be issued for the division of [the] pension . . ." (emphasis added). And "an equitable division would be to cut off [Vicki's] interest as of the date of separation . . ." (emphasis added).

We conclude that William was entitled to relief under 60.02(f), which allows relief from a final order or judgment due to "any other reason of an extraordinary nature justifying relief."¹ While it is true that William had his chance to

¹ A catch-all provision encompassing those grounds which justify relief that are not otherwise set forth in the rule. Alliant Hospitals, Inc. v. Benhan,

contest the provisions of the QDRO tendered to the court by Vicki's attorney, he failed to do so. His failure to contest the order was undoubtedly due to his ignorance of its terms and the fact that he was not represented by counsel. While William should not be rewarded for his failure to contest the order in a timely manner, neither should Vicki receive the benefit of an order that was not in accordance with the parties' intent or the court's previous orders.

The parties agree that the marital portion of William's pension should be divided equally. Furthermore, the court ruled that Vicki's interest would be "cut off" as of the date of separation. The parties did not contemplate that Vicki would receive any survivor's benefits from William's pension. Under the peculiar facts of this case, we conclude that William should be granted relief. Vicki should only be awarded an equal portion of her marital interest in William's pension.

The prior orders of the Bullitt Circuit Court are reversed, and this case is hereby remanded for the entry of an order consistent with this opinion.

ALL CONCUR.

105 S.W.3d 473 (Ky.App. 2003); Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999).

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