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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000149-MR
AND
NO. 2004-CA-000151-MR

DAVID L. WILLIAMS APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM CUMBERLAND CIRCUIT COURT
V. HONORABLE EDDIE C. LOVELACE, JUDGE
CIVIL ACTION NO. 01-CI-00097

ELAINE G. WILLIAMS APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

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BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; AND MILLER, SENIOR JUDGE.[1]

MINTON, JUDGE: In David and Elaine Williams's divorce, the circuit court found that David's solo law practice had no economic value capable of division as a marital asset aside from

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the tangible assets of the practice; declined to fix the value of each of their separate state pensions; failed to follow stipulations classifying as marital certain other retirement accounts; and denied maintenance to Elaine. We affirm on the valuation of the law practice because there was sufficient evidence to support the decision. But we must reverse and remand on the other issues, holding that the circuit court erred by declining to find the value of the pensions. Valuation of the pensions is an essential step in determining how to divide all of the marital partnership assets. We also reverse and remand for reconsideration of the division of other retirement accounts, which the parties stipulated to be marital assets. And since our reversal has a potential impact on the marital property apportioned to each spouse, we must also reverse and remand for reconsideration of the issue of maintenance for Elaine.

David and Elaine married in 1976 and divorced in 2003, bifurcating the property division issues. Several months after the divorce decree, they reached an agreement on various items of marital property, including the marital residence and its contents. The settlement included the building and contents of David's law office. The settlement further included a stipulation that any individual retirement accounts (IRAs), Keogh funds, and deferred compensation accounts would be

classified as marital property. But the parties did not reach an agreement as to the division of these marital assets.

So David and Elaine ultimately submitted to the circuit court the valuation and division of any goodwill in David's law practice; the division of the parties' individual pension funds, IRAs, Keogh funds, and deferred compensation accounts; and potential maintenance for Elaine. The court found that David's law practice had no goodwill capable of division. The court also found that neither of the parties' experts had properly valued the pensions so it declined to value the pensions, concluding simply that the pensions and the stipulated retirement accounts of each were "not subject to a marital division." Finally, the court denied maintenance for Elaine, concluding that she has "sufficient property to provide for her reasonable needs and in addition is able to support herself through appropriate employment."

David filed a motion to amend that portion of the court's findings concerning the parties' pensions and retirement accounts. His motion stated that "[t]he petitioner, by counsel, takes issue with the above Findings in that they state or suggest that no definite and certain values were placed upon all retirement accounts of the parties by the testimony and proof." David asked the court to amend its order by adopting the

testimony of his valuation expert. The court denied David's motion. This appeal and cross-appeal follow.

In his direct appeal, David makes two arguments: first, that the circuit court erred by failing to "equally divide the excess" of Elaine's pension; and, second, that the court erred by failing to classify Elaine's IRA as marital property. On cross-appeal, Elaine argues that the court erroneously found that she was ineligible for maintenance and that the court incorrectly valued David's law practice at zero dollars. Because the arguments in the direct and cross-appeal are interconnected, we will discuss them together.

As a preliminary matter, we note that all of the issues raised by the parties were properly preserved for appeal. Both parties contend that the opposing side failed to preserve particular issues for appellate review, but we find no fault with preservation on either side. So we will review fully all of the arguments made on both sides.

GOODWILL IN DAVID'S LAW PRACTICE

We begin our discussion with Elaine's argument regarding the under-valuation of David's law practice. Elaine contends that the trial court should have adopted the findings of her expert, Robert Wayne Stratton, a CPA specializing in business valuation, who testified that David's practice was

worth over $100,000.00 in addition to the value of its tangible assets. In support of this argument, Elaine asserts that the court failed to take into consideration the value of the "goodwill" associated with David's practice. We disagree.

David's expert, Timothy K. Snoddy, a CPA and business consultant, testified that the law practice likely had no value "because there is not significant net income being produced in excess of what would be reasonable compensation." Snoddy testified that he valued the practice under the income approach, the market approach, and the net asset approach. He concluded that under all three methods, David's practice was without value. When asked about the "goodwill" of David's practice, Snoddy testified, "if the attachment of David Williams'[s] name to this firm would add significant value or significant income above what would otherwise be reasonable, then it would have value. But certainly we're not seeing that." Therefore, Snoddy concluded that David's solo, general law practice located in a rural area of the state had no goodwill capable of division.

In contrast, Stratton testified that David's practice had a value of $112,040.00. Stratton stated that he analyzed David's practice under the capitalization of excess earnings approach. He estimated that the practice's "capitalized excess economic earnings" had a value of $92,040.00, with an added $20,000.00 for the library and the furniture.

The circuit court found that Stratton's evaluation flawed because Stratton erroneously "ascribed David spending 50% of his time in the practice of law" and because, inaccurately, "he ascribed to David a median salary for practitioners of like nature at the sum of $109,205[.00]." Due to these flaws, the trial judge concluded that "the valuation of the law office by Stratton did not take into account certain essential components and thus cannot considered [sic] as authoritative by this Court." Therefore, the court adopted Snoddy's valuation of zero dollars.

It is well settled that "findings of fact shall not be set aside unless clearly erroneous . . . ."[2] The general principle in Kentucky is that "the trial court's judgment and valuations in an action for divorce will not be disturbed on appeal unless it was clearly contrary to the weight of evidence."[3]

There was sufficient evidence to support the trial court's assessment of David's law practice. Although both Snoddy and Stratton evaluated David's practice in accordance with accepted accounting standards, the court found that Stratton's evaluation was based on unsound assumptions. The judge's findings were permissible under the evidence. There was

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[2] Kentucky Rules of Civil Procedure (CR) 52.01.

[3] <u>Clark v. Clark</u>, 782 S.W.2d 56, 58 (Ky.App. 1990).

sufficient evidence to suggest that David did, in fact, devote less than half of his time to his solo law practice. David himself testified that most of his time was spent fulfilling his duties as a legislator and President of the Kentucky Senate and that the time he spent at his law office was usually consumed with answering personal calls and attending to legislative business. There was also sufficient evidence to support the trial court's finding that the average income among solo practitioners in south central Kentucky was far less than the amount relied upon by Stratton.

In addition, there was evidence to support Snoddy's opinions. Although Elaine argues that the court failed to take "goodwill" into account, Snoddy's testimony reveals that he was questioned about goodwill and that his evaluation, nonetheless, produced a value of zero dollars. We do not believe Snoddy's opinions, nor the court's adoption of them, were in error. Therefore, we must affirm with regard to the valuation of David's law practice.

THE PENSIONS

The trial court found that David's retirement accounts consisted of an IRA, a Keogh plan, a Cash Management Account,

and a Judicial Form Retirement System (JFRS) account,[4] while Elaine's accounts consisted of an IRA and her Kentucky Teachers Retirement System (KTRS) account.[5] We will first discuss the pensions.

David argues that the trial court erred by failing to divide equally the excess of Elaine's otherwise exempt KTRS account. Specifically, he asserts that under KRS[6] 403.190(4), to the extent that the value of Elaine's exempt pension exceeds the value of his pension, the value of Elaine's pension must be classified as marital property and subject to consideration as an economic circumstance and division.

David introduced an expert appraisal of his JFRS account performed by Michael Grabhorn, who holds a law degree and is a certified life underwriter and an actuary. Grabhorn testified that David's pension is a defined benefit plan[7] and that based upon a letter from JFRS, David had accrued a monthly benefit as of the date of the divorce of $1,155.36,

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[4] The Board of Trustees of the Judicial Form Retirement System (JFRS) administers the Legislators' Retirement Plan.

[5] Elaine is employed as the assistant superintendent of Cumberland County Schools.

[6] Kentucky Revised Statutes.

[7] A defined benefit plan sets forth or defines the monthly pension which will be provided to the plan participant at the participant's normal retirement age. This plan is the most complicated to value and the most difficult to obtain all of the required data for review. William M. Troyan, *Pension Evaluation and Equitable Distribution*, 10 Family L. Rep. 3001, 3016 (November 22, 1983).

which would be available for payment commencing at age 62. Based upon David’s age and mortality rating, Grabhorn estimated the present value of David’s pension to be $103,087.00.

Grabhorn also testified that Elaine’s KTRS pension is also a defined benefit plan. Based upon a letter from KTRS, Elaine’s accrued monthly pension benefit as of the date of the divorce was $3,223.72. According to KTRS, Elaine was eligible under the terms of the plan to retire and draw that benefit immediately. Based upon Elaine’s age and the same mortality tables and interest rates he used to calculate the value of David’s pension, Grabhorn estimated the present value of Elaine’s KTRS account to be $642,922.60.

Despite Grabhorn’s use of what appears to us to be one of the generally accepted methodologies for valuing defined benefit plans, the circuit court rejected his appraisal. The court’s original order did not point out any particular flaw in the appraisal, but it revealed its position following David’s motion to amend. The court stated:

> This court however does find that the value Mr. Grabhorn ascribed to Ms. Williams’[s] Teacher Retirement Account was based upon a retirement date of September 2003. The Court specifically finds that Ms. Williams did not retire in September and did in fact testify that she had no plans to retire before she reached her normal retirement age of 62. This Court finds that Mr. Grabhorn’s evaluation imputed 12 years of retirement pay to the ascribed value of

> Ms. Williams'[s] retirement account when [sic] as this Court has noted is not applicable due to the fact that she did not retire in September of 2003.

From the record, we agree that Elaine did not actually retire from her job with the school system in September 2003. But the court's criticism of Grabhorn's calculations as including post-divorce income in Elaine's monthly pension benefit shows that the court misunderstood Grabhorn's testimony.

Elaine used Stratton to appraise the value of the pensions. Using the benefits estimating tool found on a website for the Kentucky Retirement System, Stratton estimated the monthly retirement benefits for Elaine and David. According to Stratton, he

> [I]nput basically the demographic information like age and expected retirement date and years served, months service, and salary information and that type of thing and [the benefits calculator] calculates what your estimated benefit would be at the date . . . whatever date you choose of that retirement. And we had spoken earlier that Ms. Williams probably was going to retire around 62 so in order to keep it consistent, I ran a calculation of retirement benefit using that Kentucky Retirement System methodology with an estimated retirement date of 62 . . . in Senator Williams'[s] case . . . .

Assuming each worked to age 62 and retired, Stratton estimated that Elaine's monthly pension benefit would be $2,447.24 and David's would be $1,143.20.

The circuit court aptly rejected Stratton's appraisal.[8] Specifically, the court found that Stratton incorrectly based his calculations "upon David and Elaine retiring around 62 years of age" and that he "compounded his error in calculating the retirement benefits by stating categorically that he calculated those future benefits under the assumption both of the parties retire at age 62."

David argues that the trial court erred by failing to divide the excess amount in Elaine's KTRS account. In support of this argument, he relies on KRS 161.700 and KRS 403.190(4). KRS 161.700 states that teacher retirement plans are exempt from classification as marital property in divorce actions under KRS 403.190(1); meaning that under normal circumstances, Elaine's retirement account would be completely exempt from division between the parties or consideration as an economic circumstance. But KRS 403.190(4) reads:

> If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be. However, **the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse.**

[8] *See* Clark v. Clark, *supra.*

David points to the final sentence of this statute as the basis for his argument that he is entitled to a marital share of Elaine's KTRS account.

We agree with David that KRS 403.190(4) places on the trial court the complex task of valuing these pensions in order to establish the level of the nonmarital exemption with the excess to be treated as marital property. In response to David's motion for a specific finding on this issue, the trial court emphasized that "neither expert, Mr. Grabhorn or Mr. Stratton, has disclosed with certainty the present market value of the parties' accrued benefit plans." But the court offered no substitute valuation method of its own, concluding simply that the pensions were "not subject to a marital division."

> Through the years, we have consistently recognized that the trial court is charged with the duty of resolving all issues in a domestic relations case, including the duty of adjudging a fair and just division of the parties' marital and nonmarital property. To assist trial courts in performing their duty, we have vested them with wide discretion, and once that discretion has been exercised, we have traditionally been reluctant to interfere unless there has been a clear abuse of discretion or a failure to observe a clear legislative mandate set forth in a statute.[9]

[9] Brandenburg v. Brandenburg, 617 S.W.2d 871, 875 (Ky.App. 1981) (Gudgel, J., concurring).

Consistent with this principle, we recognize that the trial court has considerable discretion in selecting a method by which to undertake the uncertain task of valuing pensions when making a fair and just division of the parties' marital and nonmarital property.[10] And we should refrain from endorsing any one formula that would impinge on the trial court's ability to fashion an equitable remedy in each case.[11] But we hold that the trial court abused its discretion when it rejected all of the valuation evidence offered by the parties without itself suggesting an acceptable valuation method or requiring the parties to submit evidence to assist the court.[12] In the case at hand, the trial court has effectively removed the pensions——and all of the retirement accounts for that matter——from the scales in determining an equitable division of all of the property before the court.

This case must be reversed on this issue and remanded to the circuit court to assign an appropriate valuation to the pensions and to reconsider its determination regarding the excess, if any, in David or Elaine's pension. The excess is to

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[10] *See* Poe v. Poe, 711 S.W.2d 849 (Ky.App. 1986).

[11] Different methods for valuing defined benefit plans have been developed by accountants and actuaries and accepted by courts. *See* 24 AM JUR 2D *Divorce and Separation* § 586 (1998).

[12] *See* Robinson v. Robinson, 569 S.W.2d 178, 180 (Ky.App. 1978), *overruled on other grounds by* Brandenburg v. Brandenburg, *supra.*

be deemed marital property under KRS 403.190(4). But because "[t]here is not a presumption or requirement that marital property be equally divided in a dissolution of marriage action,"[13] it is within the broad discretion of the trial court to determine from the evidence how any excess should be equitably divided.

THE OTHER RETIREMENT ACCOUNTS

David further argues that the trial court should have found Elaine's IRA to be marital property because the parties had stipulated that their IRAs, Keogh funds, and deferred compensation accounts would be considered marital property.

We agree with David's argument; but David fails to mention that under their stipulation, his own IRA and Keogh account should also be considered marital property. The parties stipulated in their property settlement agreement that these accounts would be considered marital. No distinction was made in the stipulation between the classification of Elaine's accounts and David's accounts. Because of the parties' agreement, the trial court abused its discretion by concluding that these accounts, like the pensions, were "not subject to a marital division." Therefore, on remand, the trial court must recognize David and Elaine's stipulation and consider their

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[13] Russell v. Russell, 878 S.W.2d 24, 25 (Ky.App. 1994).

IRAs, Keogh funds, and any deferred compensation accounts as marital property subject to division.

MAINTENANCE FOR ELAINE

Finally, Elaine argues that the trial court erred in failing to award her maintenance. She claims that the court failed to take into consideration the fact that she is "entitled to maintain the standard of living to which she had become accustomed during the twenty-five year marriage to David." Specifically, Elaine argues that while married to David, she "enjoyed a lavish lifestyle of free spending, fine dining and frequent travel" but that now she "lives paycheck to paycheck with no extra money to spare."

The trial court determined that Elaine had sufficient property and made enough money to support herself; therefore, the court concluded that "Elaine has not met the burden of proof necessary for an award of maintenance." However, in footnote 33 of the court's order, the trial court signaled, "[i]f this Court were to accede to the request made by counsel for David, namely, to award him the excess of Elaine's retirement benefits over and above the exemption allowed to David for his retirement benefits, then in all probability Elaine would be entitled to an award of maintenance."

KRS 403.200 says that maintenance may be awarded if the court finds the spouse seeking maintenance "[l]acks sufficient property . . . to provide for his reasonable needs" and "[i]s unable to support himself through appropriate employment . . . ." Factors to be taken into account when making this determination include "[t]he financial resources of the party seeking maintenance, including the marital property apportioned to him," and "[t]he standard of living established during the marriage." Our review of a trial court's decision regarding an award of maintenance "is limited to a consideration of whether the trial court considered the statutory factors and whether it abused its discretion in denying maintenance."[14]

We agree with the court's initial assessment. It appears from the record that the trial court properly evaluated the statutory factors and found that Elaine had sufficient resources to preclude an award of maintenance. But because we are remanding on the issue of the parties' pensions and their retirement accounts, we must also reverse and remand on the issue of maintenance. As suggested in footnote 33, if the court does, in fact, "accede" to David's request for a division of any alleged excess in Elaine's retirement account, the issue of maintenance must be reevaluated in accordance with the factors listed in KRS 403.200. Specifically, because a change in the

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[14] Mosley v. Mosley, 682 S.W.2d 462, 463 (Ky.App, 1985).

division of the parties' retirement funds could shift the amount of marital property apportioned to each spouse, Elaine's maintenance request must be reconsidered to determine if an adjustment to the parties' economic circumstances justifies an award of maintenance.

DISPOSITION

For these reasons, the order of the circuit court is reversed and remanded for additional proceedings to assign the appropriate valuation to the pensions, reconsider the marital property so as to effectuate an equitable distribution of all of the marital assets, and to reconsider maintenance as necessary. The decision is otherwise affirmed as to the valuation of David's law practice.

ALL CONCUR.

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