

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000587-MR

ELSIE SPEED

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE THOMAS L. CLARK, JUDGE
CIVIL ACTION NO. 00-CI-02307

WALTER SPEED

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: MINTON AND TACKETT, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Elsie Speed appeals from a Fayette Circuit Court order that divided various assets of the marital estate as part of the dissolution of Elsie's marriage to Walter Speed. The issue on appeal is whether the circuit court abused its discretion in awarding Walter the bulk of the assets in a

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

401(k) plan, some common stock in Lexmark and a money market account. Although Walter acquired these assets after the couple had separated in 1987, Elsie argues that she should have received an equal share. We disagree and thus affirm.

Walter and Elsie were married in 1971. At that time, Walter was in his final year at the University of Tennessee. Elsie had already graduated with a degree in education and was working as a school teacher. The couple's first child, Erika, was born in 1979. In 1982 the family moved to Lexington, Kentucky, where Walter was employed as an engineer by IBM. In 1985, their second child, Walter III, was born.

Walter and Elsie separated in 1987. A dissolution action was filed in the following year, but it was subsequently dismissed for failure to prosecute. Walter and Elsie continued to live apart for the next thirteen years. Elsie was the primary residential custodian of the children until 1994, when Erika went to live with her father. Then, in 1997, when Erika started college, Walter III also went to live with his father. The record indicates that Walter continued to pay child support in the amount of \$1,000.00 per month for a total of 77 months, from 1994 until 2000, even though Erika and then Walter had moved in with him. Elsie retired in 1998. Her primary source of income is a disability pension of \$2,100.00 per month. Walter currently earns about \$100,000.00 per year.

Elsie filed for divorce in December 2000. She and Walter participated in mediation and arrived at an "Agreement as to Property Rights, Maintenance, Custody and Support." A final decree of dissolution that incorporated that agreement was entered on December 13, 2000.

The only matter left unresolved was the disposition of two substantial accounts and some stock that Walter had accumulated after the separation in 1987. These assets were acquired in the following manner:

The first account was started in 1992, when Lexmark acquired the division of IBM where Walter was employed. Lexmark instituted a 401(k) plan for its employees in which Walter participated, with the result that at the time of the dissolution of the marriage in 2000, his account contained \$165,576.00. The second account, in the H&R Block Money Market Fund, was opened by Walter in 1997. It contained \$122,000.00 at the time of the dissolution. Finally, in 1999, Walter was awarded 2,505 shares in Lexmark stock that were valued at \$165,576.00 at the time of dissolution. The division of these three substantial assets was left to the court.

Accordingly, on February 23, 2004, Fayette Circuit Court issued an order that awarded 17 percent of the Lexmark 401(k) account to Elsie, and all the remaining assets in the two accounts and the stock to Walter. This appeal followed.

We note as a preliminary matter (and the parties agree) that the circuit court correctly determined that, under Stallings v. Stallings,² these three assets were marital property even though they were acquired after the parties had separated.

Kentucky Revised Statutes (KRS) 403.190(1) directs the court to

divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

(b) Value of the property set apart to each spouse;

(c) Duration of the marriage; and

(d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

This process of dividing the marital property is left to the "sound discretion of the trial court;"³ and our review is

² 606 S.W.2d 163, 164 (Ky. App. 1980) (property acquired after separation may be excluded from the marital estate under KRS 403.190(2)(c), but the separation must be a legal separation granted by a decree).

³ Cochran v. Cochran, 746 S.W.2d 568, 570 (Ky. App. 1988).

therefore limited to determining whether the court abused its discretion.

In its order, the court found that although the three assets were marital property, Elsie had not contributed to their acquisition except insofar as she had provided the primary residence for both children from 1987 to 1994 and for the parties' son until 1997. The court determined that this contribution was made for approximately 17 percent of the total duration of the marriage, and therefore awarded her 17 percent of the 401(k) account. The court did not award Elsie any part of the H&R Block account or the Lexmark stock on the grounds that there was no evidence that she had made any marital contributions to either of them, and they were both acquired in the years after the children had ceased to reside with her.

Elsie argues that the trial court's decision to award the bulk of these assets to Walter was an abuse of discretion. She contends that the court failed to divide the marital property in "just proportions" under the factors listed in KRS 403.190. Specifically, she argues that the court failed to consider that her current economic circumstances are not as comfortable as Walter's.

The circuit court did consider the current financial state of the parties. It acknowledged that the final distribution of assets might appear disproportionate, but

stressed that the parties themselves had divided all the other marital assets in their prior agreement. The court found that its division of the remaining three assets did not render the total division of property unconscionable. We agree. "There is not a presumption or requirement that marital property be equally divided in a dissolution of marriage action."⁴

Elsie also argues that the court's division of the assets was unjust because it failed to give adequate weight to her contributions as a homemaker and mother. She points out that she cared for Erika and Walter III during their formative years, and that she worked as a teacher, looked after the home and cared for the children while Walter earned his engineering degree, thereby contributing to the "marital foundation."

The marital foundation theory was developed specifically to address the division and valuation of pensions at dissolution. In that context, it was expressly rejected by this court in Armstrong v. Armstrong.⁵ "The "marital foundation" theory posits that "[t]he employee spouse's ability to enhance the future benefit after the marriage frequently builds on foundation work and efforts undertaken during the marriage."⁶ The circuit court adequately assessed Elsie's marital

⁴ Russell v. Russell, 878 S.W.2d 24, 25 (Ky. App. 1994) (citations omitted).

⁵ 34 S.W.3d 83, 87 (Ky. App. 2000) (Court instead applied the "bright line" rule which used husband's salary at the time of the divorce decree, not salary upon which his benefits will ultimately be based, to determine wife's share of his pension).

⁶ Id. at 86.

contribution to the 401(k) account at 17 percent, since the account was acquired during a period commencing five years after the couple's separation. We also agree that there is no evidence that Elsie made any contribution to the H&R Block account or the Lexmark stock, both of which were acquired long after the separation and after both children had ceased residing with her. The record also indicates that Walter continued to pay substantial child support to Elsie after Erika and then Walter III had ceased living with her.

As to Elsie's contention that she contributed foundational support for Walter to obtain his engineering degree, the record shows that the couple married when Walter was in his final year of college and that he had paid his tuition for the year; therefore, Elsie's assistance in obtaining the degree was of relatively limited scope and duration. Moreover, under the terms of the parties' agreement, Elsie will receive one-fourth of Walter's pension from Lexmark, and Walter will pay over \$20,000.00 of her debts.

The court properly considered the relevant factors under KRS 403.190, and we find no abuse of discretion in its division of the marital assets at issue. We therefore affirm the Fayette Circuit Court order from which this appeal is prosecuted.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward E. Dove
Lexington, Kentucky

BRIEF FOR APPELLEE:

Reginald L. Thomas
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