

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001535-MR

JOHN LEWIS WATSON

APPELLANT

v. APPEAL FROM MCCRACKEN FAMILY COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 96-CI-00085

KIMBERLY ANNE WATSON

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND HENRY, JUDGES.

COMBS, CHIEF JUDGE: John Lewis Watson appeals from an order of the McCracken Family Court that divided his retirement benefits after a period of more than eight years subsequent to the entry of the decree of dissolution of his marriage to Kimberly Anne Watson. We conclude that the family court had jurisdiction to enforce the provisions of the parties' separation agreement as incorporated into the decree. Therefore, we affirm.

John and Kimberly were married on April 25, 1981. They separated in November 1995, and their marriage was dissolved by a decree entered on May 29, 1996. John worked for

the Tennessee Valley Authority ("TVA") as a heavy equipment operator from December 1979 through September 28, 1984, and again from February 7, 1990, through February 1, 2002.

Throughout his employment, John participated in TVA's various retirement benefits plans.

The court's 1996 decree of dissolution incorporated the parties' property settlement agreement, which provided that each party would waive all interest in the pension plan of the other unless "there is in excess of three thousand five hundred and no/100 dollars (\$3,500.00) difference in the amount." The parties agreed to share information related to the value of each of their pension plans within thirty (30) days.

In September 1999, Kimberly filed a motion requesting the court to order John to show cause why he should not be held in contempt for his failure to disclose information relevant to his pension plan in compliance with the parties' separation agreement and the decree of dissolution. While the resolution of the motion is unclear, an order was entered by the family court after our staff conducted a prehearing conference in the course of this appeal. That order indicates that Kimberly's motion was denied from the bench on April 18, 2000. Kimberly was still trying to secure information relating to John's pension benefits in June 2000.

In February 2002, John retired from the TVA. Six months later, in August 2002, Kimberly retained new counsel and filed a motion requesting the court to divide John's retirement benefits pursuant to the terms of the 1996 property settlement agreement. Kimberly alleged that John's various retirement accounts had a cash value of nearly \$42,000.00 at the time of divorce while Kimberly's retirement account was valued at less than \$12,000.00 in 1996. Pursuant to the terms of their settlement agreement, Kimberly argued that John should pay to her the sum of \$14,964.38 -- plus the income and interest that had been earned on the value of this portion of John's retirement accounts. In addition, Kimberly requested that John pay her one-half of the marital portion of the monthly pension benefit that he was now receiving.

In reply, John argued that his TVA retirement benefit was not subject to division under federal law and that even if it were, it had been "cashed out" when he left work because of a disability. He also contended that the disparity in the value of the parties' pension accounts was more than offset by the fact that he had not received a fair share of the equity in the marital residence under the terms of the 1996 settlement agreement. Finally, John argued that if the amount of his retirement accounts was to be evaluated, the distribution of the couple's marital property should be re-assessed in its entirety.

On July 8, 2004, the family court ordered John to pay to Kimberly the sum of \$13,214.38 in order to equalize the value of their respective retirement accounts. However, the court denied Kimberly's request for a division of the income and interest generated on John's retirement accounts after 1996. The family court next determined that 67% of John's monthly pension benefit was marital property subject to division. The court awarded Kimberly one-half of this portion of John's benefits. John was ordered to pay Kimberly 33.5% of his monthly pension benefit within ten (10) days of its receipt each month and 33.5% of the total that he had received since his retirement in February 2002. This appeal followed.

John argues that the family court erred by permitting Kimberly to re-open the judgment after many years had elapsed.¹ We do not agree with John's characterization of the proceedings as a "re-opening." Kimberly has not invoked the provisions of CR 60.02 relevant to securing relief from a judgment. Instead, she has attempted the enforcement of a judgment. The terms of a separation agreement incorporated into a divorce decree are enforceable by all the remedies available for the enforcement of

¹ We note that issues related to a division of the parties' retirement benefits have been intertwined with a number of other issues reviewed by this court and the family court on several occasions. The Watsons' disputes have ranged from a motion for an order requiring John to return a camera to an appeal to this court of the family court's resolution of a change of custody dispute.

a judgment. KRS² 403.180(5). Moreover, the family court has continuing jurisdiction to enforce the terms of a judgment or decree. Penrod v. Penrod, 489 S.W.2d 524 (Ky. 1972). Kimberly merely sought to enforce the terms of the separation agreement - not to re-open or to modify it. Consequently, the family court did not err in exercising jurisdiction over the judgment.

John next contends that the family court erred by exercising jurisdiction over a federal pension. We are not persuaded that John's TVA pension is exempt from equitable distribution in a state court. More significantly, however, we note that parties to a divorce action in Kentucky are at liberty to bargain away their property rights. The family court did not err by approving the parties' settlement agreement that provided for a conditional division of their retirement benefits to be incorporated into the divorce decree.

John also argues that the family court erred by failing to take into account the provisions of KRS 403.190(1)(b) requiring the court to consider the value of the entirety of the parties' marital property before dividing his retirement benefits. Again, we find no error.

The equitable division of the parties' retirement benefits was explicitly and clearly addressed in their settlement agreement and was properly incorporated into the

² Kentucky Revised Statutes.

court's decree of dissolution. In this case, the court was required merely to enforce the terms of their agreement as originally drafted and not to undertake a *de novo* division of their property and debt. Proof offered concerning other values was immaterial, and the family court did not err by refusing to consider the testimony of John's forensic real estate appraiser.

The court did not err by ordering John to pay to Kimberly the sum of \$13,214.38 in order to equalize the value of their separate retirement accounts. It arrived at that amount by carefully adhering to the terms of their property settlement agreement:

The amount John owes Kim shall be calculated as follows: \$41,898.71 (the value of John's retirement accounts on the date of divorce) minus \$11,969.95 (the value of Kim's retirement account on the date of divorce) minus \$3,500.00 (pursuant to the Separation Agreement). This totals \$26,428.76, which shall be divided equally. Therefore, John should pay the sum of \$13,214.38 to Kim within thirty (30) days of the entry of this order. Order of the McCracken Family Court, entered July 8, 2004, p. 5.

While the court might have calculated a similar sum using a different method, this calculation was not clearly erroneous.

John contends that the family court erred by failing to take into account the adverse tax consequences that he faced when he "cashed out" two of his retirement accounts. However, if John's retirement accounts had been properly divided

according to the terms of the agreement, he would not have suffered a tax penalty. Consequently, we cannot hold that the court erred by concluding that John alone should bear the burden of the tax consequences.

Finally, John contends that the court erred by dividing the TVA benefits that he is now receiving since a portion of those benefits is directly attributable to his disability. He argues that the disability benefits at issue are not marital property subject to division by the court. He relies on the court's holding in Davis v. Davis, 777 S.W.2d 230 (Ky. 1989). However, we do not believe that Davis is directly relevant to the issue before us.

In Davis, the contested property was the value of military retirement pay that the former husband had waived in order to receive veterans disability benefits. The division of the disputed property was specifically governed by provisions of the federal Uniformed Services Former Spouses' Protection Act that effectively prevented state courts from dividing the value of the disability benefits. However, Davis involved the state court's authority *per se* to divide the benefits -- **not** the parties' agreement as to division of those benefits.

In the case before us, the McCracken Family Court order simply enforced the parties' separation agreement as it was incorporated into the divorce decree. The court did not err

by concluding that Kimberly is entitled by the clear terms of the agreement to receive a share of John's current TVA retirement benefit.

The order of the McCracken Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark L. Ashburn
Paducah, Kentucky

BRIEF FOR APPELLEE:

Vicki R. Holloway
Paducah, Kentucky