

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001622-MR
AND
NO. 2004-CA-001657-MR

SONDRA CAROLE JOHNSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM LETCHER CIRCUIT COURT
v. HONORABLE SAMUEL T. WRIGHT III, JUDGE
ACTION NO. 96-CI-00391

GEORGE FRANK JOHNSON

APPELLEE

OPINION
AFFIRMING ON APPEAL
AND
AFFIRMING ON CROSS-APPEAL

** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND MCANULTY, JUDGES.

COMBS, CHIEF JUDGE: Sondra Johnson appeals and George Johnson cross-appeals from an order of the Letcher Circuit Court of May 24, 2004, which denied their exceptions to the recommendations of the Domestic Relations Commissioner (DRC). The appeal and cross-appeal were abated by this Court on September 16, 2005, and were remanded to the trial court for the entry of a final

judgment resolving the property issues addressed by the DRC. The trial court entered a final order on December 19, 2005, and the appeal and cross-appeal have been restored to our docket for a decision on the merits. We affirm.

In our opinion of September 2005, we outlined the factual background and the prolonged procedural history relevant to the appeals. Therefore, rather than recapitulating that recitation, we shall summarize the facts. A decree dissolving the parties' marriage was entered on July 1, 1997. In a later order dividing the marital estate entered on February 4, 1998, the trial court failed to award Sondra any portion of the \$40,494 workers' compensation award received by George during the pendency of the dissolution. Sondra appealed, claiming entitlement to a portion of the \$29,988 in benefits which represented back pay accrued during the marriage.

This Court agreed with Sondra and vacated the judgment.¹ The matter was remanded to the trial court with directions to divide the marital portion of the award in just proportions pursuant to the criteria in KRS² 403.190(1). After this Court's opinion became final in November 1999, Sondra immediately moved for a judgment. George responded by asking the court to hold Sondra in contempt. For the first time,

¹ See, Johnson v. Johnson, no. 1998-CA-000420-MR, rendered March 19, 1999, designated as "not to be published."

² Kentucky Revised Statutes.

George claimed that Sondra had damaged property awarded to him and had failed to return other items of property that he claimed were in her possession. To compensate for the damage, he requested that he be given an offset or credit against Sandra's share of the workers' compensation benefits.

After numerous delays, the DRC filed his recommendations addressing the parties' claims. In his report of March 21, 2003, the DRC determined that Sondra should receive 45% of the compensation benefits which accrued for the 147 weeks during which the award coincided with the parties' marriage. However, the DRC mistakenly calculated that amount to be \$6,747.30 -- a sum reached by multiplying the number of weeks (147) by \$102 rather than the actual weekly benefit of \$204.

In addressing George's claim, the DRC found that there was insufficient evidence to hold Sondra responsible for any damage to the trailer awarded to George or for the loss of his tools. Accordingly, he recommended that George be denied any setoff against Sondra's share of the workers' compensation income benefits.

Both parties filed exceptions. The trial court denied the exceptions, but it did not confirm or adopt the recommendations of the DRC or otherwise enter a final judgment subject to execution. The appeal and cross-appeal followed.

In her appeal, Sondra argued that the DRC erred by using the wrong amount in calculating her share of the workers' compensation award. She also argued that she was entitled to prejudgment interest. In his cross-appeal, George argued that the trial court used the wrong standard in considering his motion to hold Sondra in contempt.

In our initial review of the record, we determined that a final order had not been entered and that we could not, therefore, consider the merits of the issues raised in the appeal and cross-appeal. We abated the case and remanded the matter to the trial court with directions that it enter a final order.

In its order of December 19, 2005, the trial court adopted the DRC's recommendations with two modifications. It changed the amount of the award to Sondra to \$13,494.60. It based this figure on the calculation of the correct weekly income benefit of \$204 (rather than \$102) and the DRC's recommended 45%/55% division of the asset. The trial court also awarded Sondra prejudgment interest on the award at the rate of twelve percent (12%) per annum beginning February 4, 1988, until satisfied.

Thus, the errors originally claimed by Sondra in her brief now have been eliminated in light of the award contained

in the final judgment. The error in calculation was corrected, and she has been awarded interest.

George argues that an award of 45% of the total weekly benefit was not warranted because Sondra's contribution was "negligible." (Appellee's brief at p. 7.) He further contends that the parties' economic circumstances should have weighed more heavily in his favor. (Id.) He points to the fact that he is disabled and that Sondra has a college degree.

In recommending that Sondra be awarded 45% of the income benefits accrued during the marriage, the DRC noted that the parties either were married or had cohabited for more than twenty (20) years; that the most valuable asset awarded to George was a double-wide mobile home and that the most valuable item awarded to Sondra was a 1995 pick-up truck; that Sondra's contribution to the asset was that of a homemaker; and that Sondra is employed as a school teacher while George has income from workers' compensation and Social Security benefits. These findings are well supported by the record.

Our review is limited to determining whether the trial court's nearly equal division of the asset constitutes an abuse of discretion in light of the criteria outlined in KRS 403.190(1). Herron v. Herron, 573 S.W.2d 342, 344 (Ky. 1978). As found by the DRC, the evidence reveals that the parties had accumulated very little property to divide at the conclusion of

their twenty-year relationship. The \$29,988 in cash (again, benefits representing back pay accrued during their marriage) was the most significant asset to be divided. While Sondra is better educated and is still able to work, the record also reveals that her financial prospects are not much better than George's circumstances. Thus, we are unable to conclude that the trial court abused its discretion in awarding Sondra 45% of the cash asset.

We also find no abuse of the court's discretion in awarding Sondra prejudgment interest. In Fields v. Fields, 58 S.W.3d 464 (Ky. 2001), the court held that an award of prejudgment interest was well within the authority of the trial court.

"It is self-evident that equity and justice demand that one who uses the money or property of another for his own benefit, particularly in a business enterprise, should at least pay interest for its use in the absence of some agreement to the contrary." . . . [P]rejudgment interest on a spouse's share of marital property will not always be warranted. The trial court must examine the unique facts of every case in making that determination. (Citation omitted.)

Id., at 466-467.

As noted in our opinion of September 2005, Sondra has been deprived of the use of her share of the cash asset since 1998. The record reveals that the extreme delay in complying

with the mandate of this Court was caused by George's repeated requests for continuances and his pursuit of meritless, collateral claims against Sondra.

As to the percentage of interest awarded, Fields, supra, directs that the trial court does not have "unfettered discretion" in the amount of interest that it can award. Id. Rather, it must limit its award to the legal rate provided in KRS 360.010.

The trial court may award prejudgment interest at any rate up to 8%, or it may choose to award no prejudgment interest at all, **but it may not exceed the legal rate of 8%.** (Emphasis added).

Id. Thus, the trial court's division of the cash asset and its award of interest to Sondra are affirmed. Although the court had originally ordered interest to be awarded at the rate of 12%, it has since corrected that amount to reflect the legal rate of interest of 8% by order entered on February 6, 2006. Thus, we find no error on this issue.

In his cross-appeal, George argues that the trial court used the wrong standard in analyzing his claims that Sondra caused considerable damage to the double-wide trailer and that she failed to return items of personalty to him. Citing cases involving bailment, he contends that the DRC should have applied the rule of *res ipsa loquitur* to place the burden on

Sondra to prove that the damage or loss "resulted other than from her negligence." (Appellee's brief at p. 10.)

We are not persuaded by George's arguments. First, we note that the *res ipsa loquitur*/bailment theory was not raised before the DRC. The cases cited by George did not arise in the context of dissolution or division of marital property. We believe that the DRC did not err in placing the burden on George to prove his claims of wrongdoing on Sondra's part. Resolution of the claims involved assessing the credibility of the witnesses, a matter solely within the purview of the DRC as the fact finder. CR³ 52.01.

In analyzing George's claim, the DRC summarized the testimony of several witnesses, including a police officer (who had accompanied Sondra to the trailer to retrieve her furniture) and a refrigerator repairman (who stated that he did not see the damage claimed by George to have been made by Sondra). The DRC also observed that although George had been aware of the alleged damages in 1997, he raised no complaint against Sondra concerning them until this Court's decision was rendered requiring him to share a portion of his workers' compensation award. The evidence -- and the reasonable inferences to be drawn from it -- support all of the DRC's findings. Thus, the judgment of the trial court adopting the DRC's recommendations

³ Kentucky Rules of Civil Procedure.

with respect to George's claim will not be disturbed. Reichle
v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986).

The judgment of the Letcher Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Gene Smallwood, JR
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