

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001278-MR

BEVERLY A. LEONHARDT

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 04-CI-504039

GREGORY J. LEONHARDT

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

ACREE, JUDGE: Beverly A. Leonhardt appeals from findings of fact, conclusions of law and a judgment dissolving her marriage to Gregory J. Leonhardt. Beverly challenges the family court's rulings with respect to the values assigned to the marital and non-marital components of Gregory's 401(k) plan, the court's valuation of the parties' defined benefit plan (held through Gregory's employer), the court's calculation of Beverly's income for purposes of calculating child support, and the court's valuation of her personal property. Because we find no error in the family court's determinations, we affirm.

FACTUAL SUMMARY AND PROCEDURE

Beverly and Gregory were married, divorced in 1990, and then remarried on December 30, 1992. This is the last of three separate dissolution actions filed since that remarriage. The parties have two children, one of whom is still a minor, born on August 11, 1993.

The Jefferson Family Court conducted a hearing on February 9, 2006, addressing the various issues necessary to the dissolution of this marriage. Because of the prior marital relationship of the parties, as well as the significant activity in the parties' retirement accounts, the family court found it appropriate to engage an accountant to provide his opinion of the value and marital or non-marital character of the funds in those accounts. The court-appointed accountant presented that opinion which the family court then took into consideration in rendering its decision.

The family court originally entered judgment in this case on March 29, 2006, but both parties filed motions to alter the judgment. These motions prompted the family court to, among other things, reevaluate the opinion of the court-appointed accountant. On June 6, 2006, the court entered an order amending the original judgment. It is from the amended judgment that Beverly takes her appeal.

STANDARD OF REVIEW

Our review of Beverly's challenges to the amended judgment is governed by Kentucky Rule of Civil Procedure (CR) 52.01, which states in pertinent part:

Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

It has long been held that a judgment is not clearly erroneous if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky.1998). “[S]ubstantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972).

ASSIGNMENT OF VALUES TO GREGORY'S 401(k) PLAN

Beverly first argues that the family court applied erroneous values to the marital and non-marital components of Gregory's 401(k) plan. She contends that since the court ignored the expert opinion evidence presented at trial, its ruling with respect to these matters was clearly erroneous and an abuse of discretion.

On this issue, the family court initially held, based largely on the court-appointed expert's valuation opinion, that the marital portion of the 401(k) was \$141,230.09, that the non-marital portion was \$90,513.19, and that the outstanding loan from the 401(k) of \$5,291.00 was marital debt. However, the court's subsequent order amended this finding on the grounds that the court-appointed expert's opinion was premised upon incorrect underlying presumptions.

The family court concluded that the expert's opinion failed to value the 401(k) as of the date of the marriage, and that Gregory's \$15,000 loan should have been

reflected as a marital debt. Consequently, the court reassessed Gregory's non-marital portion of the 401(k) plan.

The family court was guided by Kentucky Revised Statute (KRS) 403.190(2)(e) which defines marital property as “all property acquired by either spouse subsequent to the marriage except [t]he increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during marriage.” The court determined that Gregory owned 647 shares of Anheuser-Busch stock as of the date of the marriage with no loan associated with it. The stocks subsequently split, and then split again, resulting in a total of 2,588 shares of stock. Consequently, the court calculated Gregory's non-marital share of the 401(k) plan as equal to the value of 2,588 shares of stock as of November 29, 2005, plus or minus the effect of market changes since that date. The value of these shares, plus additional shares purchased with non-marital dividends, equaled \$154,550.10. The court deemed this portion of the 401(k) as non-marital property and restored it to Gregory. The court then determined that the remainder of the 401(k) plan funds, \$77,193.27, was marital property.

Beverly argues that it was clearly erroneous and an abuse of discretion to disregard the expert's opinion regarding the valuation of property in the family court's amended judgment. She asserts that because the court received no other evidence apart from the expert's testimony regarding the valuation of the Appellant's 401(k) plan, any amendment of the original order that is inconsistent with that opinion is clearly erroneous.

We disagree with Beverly's reasoning. To say that judges are bound to follow an expert's opinion ignores the judge's duty to judge – that is, to weigh all of the evidence presented at trial and assign each quotient of evidence an appropriate value in the process of reaching a decision. If we followed Beverly's reasoning, a judge could not fashion a result from two conflicting expert opinions, but would have to accept one without change to the exclusion of the other. This is clearly not so. Here, the judge discovered errors in the expert's valuation of the 401(k) plan. In light of this discovery, the family court corrected the mistakes and then ruled based on all the evidence before him, including the expert's report, the 401(k) plan documents, testimony of the parties, and the financial history of the account. Nothing he has done can be said to be clearly erroneous.

Beverly also argues that once the court determined the marital portion of the 401(k) plan to be \$77,193.27, he was required to divide that sum equally between herself and Gregory. This, too, is incorrect.

In a proceeding for dissolution of the marriage . . . , the court shall assign each spouse's property to him. It also shall 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.

KRS 403.190(1)(emphasis supplied). Thus, a court's charge in dividing marital property is not to divide it equally, but to divide it “in just proportions” considering the factors listed in the statute. We believe the circuit court did just that.

Although Beverly did not receive an equal share of the marital portion of Gregory's 401(k), and particularly considering that Gregory received no portion of her 401(k), we cannot say she did not receive a just proportion of his. KRS 403.190(1). We therefore hold that the court did not abuse its discretion and was not clearly erroneous in its allocation of Gregory's 401(k) assets.

VALUATION OF THE DEFINED BENEFIT PLAN

The second issue Beverly raises is the family court's division of the defined benefit plan, a separate retirement plan maintained through Gregory's employer, in which both parties have an accrued interest. The court valued Gregory's interest in the plan at \$22,779.24, of which \$17,544.83 was deemed marital property. The court valued Beverly's interest at \$5,483.00, of which \$552.45 was deemed marital. Beverly argues that because the court failed to consider the life expectancies of the parties in its valuation and should have calculated the discounted present value of the plan, the court's decision on this issue was an abuse of discretion and clearly erroneous.

We agree generally with Beverly's contention that the discounted present value of the defined benefit plans would have been a more accurate estimation of the potential yield from the plan. However, for the following reasons, we do not reverse the lower court's decision on the matter.

Initially, we reiterate the longstanding principle that the family court is charged with the duty of determining what constitutes a fair and just division of the parties' marital and nonmarital property. To fulfill this charge, we grant the family court wide discretion and only interfere with its decision where there is a clear abuse of discretion or failure to observe a legislative mandate. *Brandenburg v. Brandenburg*, 617 S.W.2d 871, 875 (Ky.App. 1981). This discretion applies as well to the method by which the family court undertakes the uncertain task of valuing pensions when deciding a fair and just division of the parties' marital and nonmarital assets. *See Poe v. Poe*, 711 S.W.2d 849, 852 (Ky.App. 1986)(no abuse of discretion simply because a different method of calculating an award is “quite obviously the better practice”). Here, the court's ruling was based on the annual accrued benefit to which each party was entitled. While actuarial estimates may have been more representative of the potential long-term value of the defined benefit plan, the method applied by the family court did not result in an inaccurate calculation.

The truly fatal flaw of Beverly's argument is that she did not present it, or the evidence supporting it, to the family judge. Furthermore, this argument (in fact, each of her arguments) fails to comply with CR 76.12(4)(c)(v) which requires “a statement

with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner[,]” and could have caused her brief to be stricken. CR 76.12(8)(a). Because this argument was not presented to the family court, we will not further consider it here.

CALCULATION OF BEVERLY'S INCOME

Beverly next argues error in the family court's determination of her gross income for the purpose of calculating child support. The provisions of the statute relevant to Beverly's argument are Section (2)(b) and (2)(c).

(b) "Gross income" includes income from any source . . . and includes but is not limited to income from . . . commissions . . .

(c) For income from self-employment [or] proprietorship of a business . . . “gross income” means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. . . .

KRS 403.212(2)(b), (2)(c).

The evidence Beverly presented of her gross income for purposes of calculating child support under KRS 403.212 is not contradicted. She testified to two primary sources of income. First, she works for a mortgage brokerage firm where she is paid by commission only. Second, she purchases health and beauty products for resale to her own customers. We will examine her income from each of these sources separately.

Beverly testified that her total commissions from brokering mortgages were reflected on her “Earnings Statement” from CTX Mortgage Company, LLC (“CTX”),

prepared by Automatic Data Processing, Inc. (“ADP”), an independent payroll and human resource services company. The ADP Earnings Statement reflects Beverly's gross income for 2005 as \$48,693.72.

Beverly also testified that, though she is an employee of CTX, she incurs unreimbursed business expenses in the form of “my advertising, any lunches, meetings, breakfast meetings that I do for realtors. I pay for all that out of my pocket.” Closer examination of her ADP Earnings Statement shows a deduction from her gross pay of a “Media Center” fee in the amount for 2005 of \$3,331.24. She testified that this deduction by her employer from her gross pay was for her advertising, access to a specialized database, realtor gifts, and lunches.

Her 2005 federal income tax return conflicts with this information. Her tax return shows gross income of \$41,791 from her employment at CTX – less income by \$6,900 than is shown on her ADP Earnings Statement. Her Form 2106 (Employee Business Expenses) appended to her tax return shows unreimbursed out-of-pocket expenses related to her employment at CTX of \$10,581 – which is \$7,250 more than shown on her earning statement.

Beverly appears to be arguing that, because she did not receive W-2 type wages but only commission compensation, she was an independent contractor and therefore self-employed for purposes of KRS 403.212(2)(c). If we should so hold, then it would be appropriate to calculate her gross income as defined in that subsection: “gross income' means gross receipts minus ordinary and necessary expenses required for self-

employment or business operation.” KRS 403.212(2)(c). Then, we would have to determine which of the amounts from the conflicting evidence were appropriate in the calculation. Her “gross income” under KRS 403.212(2)(c) from her ADP Earnings Statement would be \$45,363 (\$48,694 - \$3,331), but from her tax return it would be \$31,210 (\$41,791 - \$10,581).

The problem with Beverly's argument is not in these figures. The problem is that Beverly failed to clear the threshold issue of whether she is truly “self-employed” or simply an employee who incurred unreimbursed business expenses. The videotape of the hearing does not indicate that Beverly clearly attempted to convince the family court that her relationship with CTX fell into the former category rather than the latter. And the statute allows no reduction in a parent's gross income for the latter category. Furthermore, Beverly did not request amendment of the family court's ruling as part of her motion to alter or amend the court's findings pursuant to CR 59.05.

Beverly bore the burden of proof on the issue of whether she was self-employed. *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004), *citing* CR 43.01(1) (“The party holding the affirmative of an issue must produce the evidence to prove it.”). Failing to present evidence sufficient to convince the family court that she was self-employed for purposes of KRS 403.212(2) means that the family court did not err in applying KRS 403.212(2)(b) rather than KRS 403.212(2)(c) to her employment income from CTX.

The fact that Beverly also engages in a separate activity ostensibly intended to generate revenue confuses the issue, but only slightly. Beverly's 2005 and 2004 tax

returns show she distributed Mary Kay and Arbonne health and beauty products. The evidence shows that with regard to this activity, she was “self-employed.” Unlike her own tax treatment of her employment at CTX, Beverly prepared Schedules C (Profit or Loss From Business) indicating her proprietorship of a business.

For 2005, Beverly prepared two Schedules C. The first, apparently reflecting sales of Mary Kay cosmetics, shows she began the year with \$5,778 in inventory, incurred no expenses and earned no income. From the evidence, she still has that inventory to sell.

The second 2005 Schedule C, for sales of Arbonne products, shows she started that business in 2005 with no inventory. She acquired \$7,168 in inventory, depleted the value of that inventory by \$3,951, but had gross receipts of only \$1,955. In other words, approximately \$2,000 of the value of that inventory was not converted to income. She managed her business similarly in 2004 when she converted \$2,750 worth of inventory into only \$1,743 of income.

Beverly argues that the inventory losses in 2005, combined with the other expenses related to her proprietorship of a health and beauty business, combine for a total business loss of \$10,709 that should be deducted from her gross income. We disagree.

The statute makes it clear that

Income and expenses from self-employment or operation of a business *shall be carefully reviewed* to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount

will differ from a determination of business income for tax purposes.

KRS 403.212(2)(c)(emphasis supplied). We believe, despite the brevity with which the issue is addressed in the Findings of Fact, that the family court did carefully review Beverly's income from her proprietorship of these businesses.

When the legislature said that a self-employed parent's evidence should be “carefully reviewed,” it did not impose a greater fact-finding burden on the court than exists for any issue, nor did it in any degree relieve the self-employed parent of the burden of proving the inability to accumulate funds to satisfy that parent's duty to provide for his or her child.

The heart of this statute appears a few words later and is expressed in the legislatures' admonition to the family court to “determine an *appropriate level of gross income available* to the parent to satisfy a child support obligation.” KRS 403.212(2)(c)(emphasis supplied). That is why the legislature cautioned against relying on tax returns which were designed for a purpose distinct from that of KRS 403.212.

Beverly's business losses for 2004 and 2005 are largely what are referred to as “paper losses,” primarily incurred because she has carried her inventory forward. She made a choice on her tax return. “[I]t is in reality the same choice that every taxpayer who has a paper loss must face. It can realize its loss now and garner its tax benefit, or it can defer realization, and its deduction, hoping for better luck later.” *Thor Power Tool Co. v. C. I. R.*, 439 U.S. 522, 545, 99 S.Ct. 773, 787 (1979). Except to the extent that she

has engaged in a questionable business practice of selling her inventory below cost as it appears, she has not presented evidence of any actual loss. To state it another way, she has presented no evidence that the \$1,955 in gross receipts she actually did receive from her business in 2005 is unavailable to satisfy her child support obligation. The family court has simply chosen not to include the revenue from her proprietorship of a health and beauty business in her gross income.

Therefore, we see no error in the family court's determination that Beverly's gross income for purposes of determining child support pursuant to KRS 403.212 is equal to that shown on her ADP Earnings Statement from CTX – \$48,697.72.

VALUATION OF PERSONAL OTHER PROPERTY

Beverly's final contention is that the family court failed to clearly and concisely state its reasoning for valuing the personal property as it did. As an example of this lack of clarity, she specifically cites the court's valuation of a 1998 Lexus and a 2000 Ford Taurus in her possession when the appraisal was made, but not at the time of trial. But we view the family court's findings otherwise.

The parties owned a 2001 Ford Taurus during the marriage which was unencumbered and had a fair market value of \$4,485. Ms. Leonhardt sold the vehicle to pay off a loan she acquired after the parties' separation. Mr. Leonhardt had no knowledge of the loan and there was no evidence that the money was used for marital purposes. The marital interest is awarded to Ms. Leonhardt.

Additionally, Ms. Leonhardt purchased a Lexus from her sister which she sold in January 2005 to pay off the note on that vehicle. There was no evidence that Ms. Leonhardt made

any profit from the sale of the Lexus. Therefore, Mr. Leonhardt has no entitlement to those sale proceeds.

We believe this language clearly articulates the family court's findings underlying justification for the award. Certainly any clarity lacking in the Findings of Fact is insufficient to justify our reversal given the clearly erroneous standard. We find no error in the family court's valuation of Beverly's personal property, including the 1998 Lexus and the 2000 Taurus.

CONCLUSION

For the foregoing reasons, we affirm the family court in all respects.

ALL CONCUR.

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