

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001746-MR

FRANK HELLER

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA F. SHERLOCK, JUDGE
ACTION NO. 05-CI-503569

SUE HELLER

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Frank Heller appeals from a judgment of the Jefferson Family Court ordering him to pay Sue Heller one-third of his pension in accordance with a supplemental decree of dissolution entered on April 25, 1983. For the reasons stated below, we affirm.

The facts are as follows. Frank and Sue Heller were divorced on April 20,

1982, by entry of a decree of dissolution of marriage entered by the Jefferson Family

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

Court. An order on March 16, 1983, allocated to Sue one-third of Frank's pension from his employment with the City of Louisville, which was incorporated into the supplemental decree of dissolution entered on April 25, 1983. Frank began drawing benefits from this pension in 1986, ten years earlier than contemplated by the parties. Sue did not know that Frank was drawing such benefits, and on October 3, 2005, Sue filed a motion with the trial court to enforce the prior judgment awarding her one-third of the pension. The motion specifically requested that Frank immediately begin making payments to Sue and for a judgment of the arrearage accumulated from the time Frank began receiving payments in 1986 to the present.

On October 10, 2005, the trial court granted Sue's motion and ordered Frank to immediately begin paying Sue \$124.83 per month. A hearing was held on January 9, 2006, to determine the arrearage issue. The trial court awarded Sue a lump sum judgment in the amount of \$36,999.68, which represented her one-third interest in the pension payments that Frank received from October 1990 through October 2005, including 12% interest compounded annually. The trial court held that Sue was not entitled to any payments before October 1990, because KRS 413.090 barred her from recovery of payments made longer than fifteen years ago. The trial court reasoned that the holding in *Bollengier v. Charlet*, 141 S.W.3d 14 (Ky. App. 2004), allows Sue to enforce the 1983 order because it is an installment judgment, and the statute of limitations begins to run on each installment when it is due and unpaid. Frank now appeals from that order.

First, issues that should have been raised on direct appeal are not appropriate for later review by this Court. Frank did not appeal the trial court's division of Frank's City of Louisville pension. The January 31, 2006, order noted that “[a]lthough multiple issues were raised on appeal, [Sue's] right to one-third of [Frank's] pension was not among them. Such right has remained unchanged since it was ordered in 1983.” Therefore, the issues raised by Frank about the tax concerns of the division of the pension should have been raised on direct appeal, and we will not consider them.

Frank's second issue on appeal is the alleged ambiguity of the lump sum award of the trial court's January 31, 2006, order. For example, he points out that the trial court should have awarded one-third of his monthly pension payments to Sue rather than thirty percent. However, this error operates in Frank's favor and could have been raised by Sue because a recalculation would require Frank to pay more. However, Sue did not file a notice of appeal to preserve the issue. Frank also argues that the lump sum award to Sue was ambiguous because it provided for payments to Sue of either a flat dollar amount of \$124.83 per month or one-third of Frank's retirement payments. Finding no abuse of discretion in the trial court's award, we move onto to the other issues raised on appeal.

Next, Frank argues that the doctrine of laches should be applied to bar Sue's claim to her one-third interest in his pension. KRS 413.090 provides a statute of limitations of fifteen years for a party to execute a judgment. However, as the trial court stated:

While it is usually true that action must be made upon a judgment within fifteen years, Kentucky case law provides an exception for judgments that are payable in installments. In such instances, each installment is deemed a lump sum and the statute of limitations begins to run, as to each installment, when it is due and unpaid. *Bollengier v. Charlet*, 141 S.W.3d 14 (Ky. App. 2004).

The trial court also stated:

[Sue] made her first action on the Circuit Court's judgment when she filed a motion with this Court on October 4, 2005. Since the statute of limitations is staggered with each payment, [Sue] has the right to enforce the judgment as to pension payments received by [Frank] on or about October 4, 1990. Those payments made to [Frank] prior to October 4, 1990 are outside the statute of limitation.

We agree with the trial court's application of the holding in *Bollengier* to the facts of this case.

Further, this Court in *Heisley v. Heisley*, 676 S.W.2d 477 (Ky. App. 1984) held that “equitable relief through laches and estoppel would not be available” in actions where the “law has addressed the running of time.” *See Karami v. Roberts*, 706 S.W.2d 843, 846 (Ky. App. 1986). Therefore, Sue is entitled to her one-third interest in Frank's pension from October 1990 to the present.

Finally, Frank argues on appeal that the statutory interest rate of twelve percent was inequitable as applied to him because of certain factors that existed at the time of the judgment. KRS 360.040 outlines the procedure for calculating interest on a judgment. Frank had the benefit of the pension payments for fifteen years. KRS 360.040 is meant to guide trial courts in determinations exactly like the one at issue. Therefore,

the trial court was within its discretion in awarding an interest judgment of twelve percent.

The judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

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