

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEODORE S. BOTHWELL, ¹	§	
	§	No. 416, 2004
Petitioner Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
CHARLENE A. BOTHWELL,	§	CN-03-08069
	§	Petition No. 03-16827
Respondent Below,	§	
Appellee.	§	

Submitted: June 15, 2005

Decided: June 23, 2005

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices.

ORDER

This 23rd day of June 2005, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. The petitioner-below appellant, Theodore Bothwell, appeals from an order of the Family Court dividing marital assets between Mr. Bothwell and his former wife, Charlene Bothwell. Mr. Bothwell argues that the Family Court made various errors in calculating and apportioning the parties' marital assets. Because the Family Court did not abuse its discretion in dividing the parties' property, and because the Family Court's factual findings were not clearly wrong, we affirm.

¹ The Court, *sua sponte*, has assigned pseudonyms to the parties under SUPR. CT. R. 7(d).

2. Theodore and Charlene Bothwell were divorced on October 23, 2003. The parties' two children live primarily with their mother. Mr. Bothwell is employed by a large corporation and also earns income from a second job. Mrs. Bothwell is employed by a local hospital. After the parties' divorce, the Family Court retained ancillary jurisdiction over property division and alimony. After a hearing, the Family Court issued an order awarding 60% of the marital assets to Mrs. Bothwell, with the other 40% going to Mr. Bothwell. Mr. Bothwell appeals from that order.

3. Mr. Bothwell raises five claims of error on appeal.² He contends that the Family Court erred by: (1) excluding his proffered evidence of the current value of the parties' automobiles and motorcycle, (2) treating Mr. Bothwell's 401(k) plan as a liquid asset, (3) miscalculating Mr. Bothwell's income, (4) finding that Mrs. Bothwell had only one job, and (5) refusing to order Mrs. Bothwell to reimburse Mr. Bothwell for interim alimony payments that he made.

4. The Family Court has broad discretion to divide marital property under 13 *Del. C.* § 1513, and this Court reviews that Court's decision under an abuse of

² In his opening brief, Mr. Bothwell asserts six claims of error in the "Summary of the Argument" section. That brief only contained five arguments, however. Because this Court does not know what Mr. Bothwell intended to assert in the missing argument (which was labeled Argument IV in the "Summary of the Argument" section) that issue is deemed waived.

discretion standard.³ This Court will not disturb the Family Court's factual findings unless they are clearly wrong.⁴

5. Mr. Bothwell first argues that that the Family Court erred in refusing to admit evidence of the current value of the parties' three vehicles. The Family Court refused to admit that evidence because it was contrary to the stipulated values that Mr. Bothwell provided at the pretrial conference, and also because Mr. Bothwell did not produce the evidence during discovery or before trial. The Family Court's ruling was also consistent with the pretrial order signed by both parties, which provided that the parties were bound by their stipulations. Accordingly, the Family Court did not abuse its discretion in refusing to admit the evidence.

6. Mr. Bothwell's second argument relates to the Family Court's treatment of his 401(k) retirement plan. When dividing the parties' marital property, the Family Court treated Mr. Bothwell's 401(k) plan as a liquid asset, even though Mr. Bothwell could not access the funds (without paying a penalty) before he reached a specified age. Mr. Bothwell argues that the 401(k) plan should have been treated

³ *Wife (L.R.) v. Husband (N.G.)*, 412 A.2d 333, 334 (Del. 1980).

⁴ *Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213, 1216 (Del. 1983).

separately from the parties' liquid assets and distributed pursuant to a Qualified Domestic Relations Order ("QDRO").⁵

7. Although generally the Family Court uses a QDRO to divide 401(k) plans, there is no rule or statute requiring that treatment, and the circumstances of this case justified the Family Court's decision to treat the plan as a liquid asset. First, that treatment does not penalize Mr. Bothwell, because under the Family Court's order he does not owe Mrs. Bothwell any money and therefore he will not be forced to cash-out his 401(k). Second, the treatment of the 401(k) plan as a liquid asset was equitable, given Mr. Bothwell's conduct between the time of the parties' divorce and the Family Court's ancillary order. The Family Court noted that Mr. Bothwell had refused to cooperate with Mrs. Bothwell's efforts to refinance the marital home, thereby costing Mrs. Bothwell approximately \$8,000 in additional interest payments. By treating the 401(k) as a liquid asset, the Family Court alleviated any further financial stress on Mrs. Bothwell by minimizing the amount of money she owed her former husband under the property distribution order. Under those circumstances, the Family Court did not abuse its broad discretion by treating the 401(k) as a liquid asset.

⁵ Generally, pension plans are divided by the Family Court under a QDRO, in order to avoid the anti-assignment rule in the Employee Retirement Income Security Act of 1974 ("ERISA"). Here, ERISA's anti-assignment rule will not affect Mr. Bothwell's 401(k), because the Family Court apportioned the entire value of that asset to Mr. Bothwell. The Family Court apportioned Mrs. Bothwell's 401(k) and Mr. Bothwell's pension under a QDRO.

8. Mr. Bothwell next argues that the Family Court miscalculated his income. The evidence showed that Mrs. Bothwell earned \$33,657 a year, while Mr. Bothwell earned \$51,132 from his primary job, and \$4,200 from his second job. Despite that evidence, the Family Court's order listed Mr. Bothwell's income at \$59,652 rather than \$55,322. Mr. Bothwell argues that the Family Court's miscalculation caused the Family Court to award Mrs. Bothwell a higher percentage of the parties' assets.

9. Although the Family Court miscalculated his income,⁶ Mr. Bothwell has not shown that the miscalculation materially affected the Family Court's division of the marital assets. First, it is undisputed that Mr. Bothwell earns about \$21,000 more than Mrs. Bothwell. Although the Family Court's statement that "Husband is earning not quite two times the income of Wife" was not totally correct, it is undisputed that Mr. Bothwell's salary is significantly higher than Mrs. Bothwell's salary. Second, the parties' relative income level was only one of several factors the Family Court considered in deciding to award Mrs. Bothwell 60% of the parties' assets. The Family Court chose to award Mrs. Bothwell more assets in lieu of ordering Mr. Bothwell to pay alimony. The Family Court found that it was fair to award Mrs. Bothwell a greater share of the marital assets, because Mr. Bothwell had paid no child support until December 2003 (two months

⁶ The Family Court appears to have added the income from Mr. Bothwell's second job twice.

after the divorce), and had refused to allow his former wife to refinance the marital home, causing Mrs. Bothwell financial stress as a result.

10. Although the Family Court made a mathematical error in calculating Mr. Bothwell's income, Mr. Bothwell has not shown that the \$4,200 discrepancy materially affected the Family Court's division of the parties' assets. That Court correctly found that Mr. Bothwell earns significantly more than Mrs. Bothwell, and its award was based on other factors besides the parties' income disparity.

11. Mr. Bothwell next contends that the Family Court erred in finding that Mrs. Bothwell did not have a second job. At the hearing, Mr. Bothwell testified that Mrs. Bothwell earned a second income working for a caterer. Apart from his testimony, however, Mr. Bothwell did not produce any evidence to support that contention. On cross-examination, Mr. Bothwell admitted that he had contacted the caterer, and that the caterer had denied that Mrs. Bothwell was employed there. Moreover, Mrs. Bothwell testified that she did not have a second job. Based on that evidence, the Family Court's factual finding was not clearly wrong.

12. Finally, Mr. Bothwell argues that the Family Court abused its discretion by refusing to order reimbursement of the interim alimony that he had paid to Mrs. Bothwell. The interim alimony statute does not require reimbursement, and the Family Court's decision was based on Mr. Bothwell's failure to pay child support and his refusal to allow Mrs. Bothwell to refinance the mortgage. Under those

circumstances, the Family Court did not abuse its discretion in concluding that reimbursement of the alimony would be inequitable.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice