

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002175-MR

SHELLEY BENNETT

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 93-CI-003039

JANET BENNETT

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, DYCHE AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Shelley E. Bennett (Shelley) appeals from an August 20, 1997 Fayette Circuit Court order which required him to be responsible for the entire deficiency amount owed to Janet Bellamy Bennett (Janet), his ex-wife, after distribution was made to her from a Qualified Domestic Relations Order (QDRO) set up to disburse to her the previously awarded sum of \$59,793, which represented her share of the value of Shelley's medical practice. Finding no merit in appellant's argument on appeal, we affirm.

The parties to this appeal were married on February 8, 1980. The parties have two children, one of whom is still a minor. Shelley filed his petition for dissolution of marriage on

September 17, 1993, in Fayette Circuit Court.<sup>1</sup> On the same date a property agreement (the agreement) was filed. The agreement was drafted by Shelley's attorney and Janet was not represented by counsel but acknowledged that she was fully informed of her right to obtain separate counsel prior to the execution of the agreement. The agreement purported to resolve all issues relating to the dissolution in an equitable and agreeable manner.

No additional action was taken in the case until June 23, 1994, when Shelley moved for a pretrial conference. In response Jane obtained counsel and filed a pre-trial memorandum in which she requested the court "to set aside the property settlement agreement and to set discovery deadlines to proceed with this action." After discovery and a hearing, the trial court entered an order on January 19, 1995, in which it found "the agreement as to the division of personal property, division of real property and waiver of maintenance by the Respondent [Janet] are not unconscionable or manifestly unfair." However, the trial court kept open the issues as to Shelley's retirement account and partnership assets, as well as, the issue of marital debts. After extensive discovery and continuous posturing by the parties, the court entered its next order in this matter on February 7, 1997. That order incorporated the January 19, 1995 order and also awarded Shelley his IRA/401K account and the real estate owned at the time of separation, finding that Janet had been fully advised as to these assets when she signed the

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<sup>1</sup>Although each party lists a Morehead, Rowan County, Kentucky address as his/her address, the dissolution was filed in Fayette Circuit Court. Neither party raises this as an issue.

agreement. However, the court further found the value of the medical practice (\$161,342.00) had not been fully and adequately disclosed to Janet prior to the execution of the agreement. As such, the trial court determined that Janet was entitled to an interest in the medical practice, the amount to be determined at a later date after additional proof as to her marital interest was presented. Subsequently, a decree of dissolution was finally entered on April 2, 1997. That order dissolved the marriage, granted joint custody of the minor child to the parties, set child support, incorporated the original agreement, awarded Janet the sum of \$59,793.00 as her share of the value of Shelley's medical practice, and ordered Shelley to pay \$5,000 towards Janet's attorney's fees.

The only issue remaining was the fact that Shelley had no available liquid assets by which he could pay Janet the sums awarded. Therefore, the parties negotiated another agreement by which Janet would receive a lump sum cash payment from Shelley's pension plan which had a value of approximately \$200,000. In order to achieve this agreement, a QDRO was executed entitling Janet to receive \$64,876.74 from the doctor's pension plan. This amount would cover her interest in the medical practice, attorney fees and interest due and owing on said amounts. The QDRO was approved by the court and entered into the record on July 31, 1997. However, instead of resolving and finalizing the dissolution, this order led to yet another contested issue which is the subject of this appeal.

Within a week after the QDRO was entered, Janet filed a motion to "enforce payment of the judgment and to alter, amend, or vacate [the] QDRO and for [additional] attorneys fees." The trial court found that the only method by which Shelley could immediately pay Janet her share of the medical practice was from the QDRO. Therefore, Janet discovered that she faced significant penalties and tax consequences if she immediately withdrew the money from the QDRO. In fact, it was learned that she would lose approximately \$20,000 to \$25,000 of the \$64,876.74. This amount represented approximately one-third (1/3) of the only amount she was to receive from the dissolution. Thereafter, the trial court, having thoroughly reviewed the matter, entered its final order on August 20, 1997. In its order, the court kept the QDRO in effect (reasoning that Janet would never recover any money except from the pension fund) but further ordered Shelley to be responsible for the entire dollar amount of the judgment previously ordered plus interest. Under this order Shelley would be responsible for any deficiency resulting from penalties and taxes if Janet exercised her rights under the QDRO. From this order Shelley appeals.

On appeal Shelley argues that Janet accepted the payment from the QDRO as full satisfaction of the debt owed and she is bound by that agreement and personally responsible for all taxes and penalties associated with early withdrawal. He also contends that to hold him responsible for the entire amount is inequitable and he will, in effect, be making a larger distribution than was originally ordered. He argues that at a

minimum the parties should share the consequences of an immediate withdrawal from the pension plan. We do not agree with appellant's contentions.

First, it must be pointed out that the court did not divide the pension plan. Under the original property settlement agreement entered on the day the petition was filed and which the court deemed not unconscionable or manifestly unfair, Shelley received the entire amount in the fund. Second, the amount Janet was awarded was her marital interest in the medical practice. Shelley was ordered to pay the full amount to Janet. As the trial court stated at the August 15, 1997 hearing,

"[The judgment amount is] her part of the estate...that's her part of the marital value, and she doesn't have to pay any penalties, she doesn't have to pay any 10%, and she doesn't have to pay any income tax on it either. That's her share of the estate. I don't care where he gets the money, but whatever her share of the estate is, if it requires liquidation or whatever, that's what she's supposed to get."

Later, after learning of the potential loss to Janet due to the tax consequences, the judge said this result "blindsided" her and that she was not going to make Janet pay the penalty, but rather that the loss was Shelley's problem.

Appellant cites several cases from foreign jurisdictions to support his contention. However, we do not believe that these cases do, in fact, support his position. Berthiaume v. Berthiaume, 368 N.W.2d 328, 333 (Minn. Ct. App. 1985), held:

It is within the trial court's discretion to consider the tax consequences of a property award. (Citations omitted).

Given the evidence presented in the instant case, the trial court's determination that a withdrawal from the trust will be necessary and its consideration of the potential tax consequences of the withdrawal was not an abuse of its broad discretion.

In Dice v. Dice, 742 P.2d 205, 208 (Wyo. 1987), the appellate court remanded for the trial court to consider the tax consequences by stating:

Conversely, on remand, the court may want to determine the cash-out value after considering the penalty and income-tax amounts and withdrawal costs, and accord a present value of that computable amount as an obligation for present payment by the husband. We only determine that withdrawal after tax cash value should be reflected in divorce-decree division if an immediate cash payment is required. In divorce settlement, exercised discretion by the trial court requires federal income-tax assessment. (Citation omitted).

In Shaw v. Shaw, 117 N.C. App., 552, 554, 451 S.E.2d 648, 649 (1995), a case very similar to the one before this Court, the court held:

The defendant had placed evidence before the trial court that such a withdrawal would result in the loss of employer contributions or harsh tax consequences. The trial court must consider these issues before requiring the defendant to make the lump sum distributive award payment. This case must be remanded to the trial court for a determination of whether the defendant has assets, other than the thrift plan, from which he can make the distributive award payment. If he does not, the trial court must either (1) provide for some other means by which the defendant can pay \$8,360.72 to the plaintiff; or (2) determine the consequences of withdrawing that amount from the thrift plan and adjust the award from defendant to plaintiff to offset the consequences.

Finally, in the case of In Re Marriage of Lee, 816 P.2d 1076, 1078 (Mont. 1991), the case was remanded to the trial court with the following instructions:

We therefore remand to the District Court to make an equitable distribution of the marital estate specifically considering tax consequences to both parties in making its decision. Our ruling does not require the District Court to adopt the property distribution proposed by either party.

In each of the cases cited by appellant, the appellate court indicated that the trial court must make a determination of the tax consequences on the distribution of marital funds prior to entering its order. In the case sub judice the trial court did exactly what it was required to do. The court, at first, was unaware of the tax consequences when it entered the QDRO. However, once the issue of the significant difference between the ordered amount and the net proceeds was presented to the court, it held a hearing and determined that Janet was to receive her full share and Shelley would be responsible for the tax consequences. This decision was based upon full review of the record which included what each party had received under the original property settlement agreement and after numerous hearings, memoranda and full disclosure of the parties' assets and liabilities. The court indicated in its April 2, 1997 order (granting Janet her share of the medical practice and attorney's fees) that there was a disparity in the income of the parties.

Considering that disparity in the parties' income, the division of property permitted by the agreement and the fact that the trial court made a determination as to the effect of the tax

consequences under the QDRO, we do not believe that the trial court abused its discretion or that its order was clearly erroneous. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982); Perrine v. Christine, Ky., 833 S.W.2d 825 (1992).

For the foregoing reasons, we affirm.

COMBS, JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

BRIEF AND ORAL ARGUMENT FOR  
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BRIEF AND ORAL ARGUMENT FOR  
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