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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001179-MR

DONNA HUDNALL REED;
and DIANA L. SKAGGS — APPELLANTS

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HENRY F. WEBER, JUDGE
ACTION NO. 95-FC-6411

WILLIAM F. REED — APPELLEE

AND

NO. 1997-CA-001322-MR

WILLIAM F. REED — CROSS-APPELLANT

V.

CROSS APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HENRY F. WEBER, JUDGE
ACTION NO. 95-FC-6411

DONNA HUDNALL REED — CROSS-APPELLEE

OPINION AFFIRMING IN PART,
AND VACATING AND REMANDING IN PART

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; COMBS and GARDNER, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal and cross appeal from a final decree entered by the Jefferson Circuit Court in a marital dissolution action. Appellant/cross-appellee (hereinafter appellant) contends that the trial court erred by excluding all of appellee/cross-appellant's (hereinafter appellee) retirement benefits from being classified and divided as marital property, by finding that appellee sufficiently traced his nonmarital interest in certain property, by failing to grant her request for an award of attorney's fees, by erring in the valuation and division of certain marital property and by awarding her inadequate maintenance for a limited duration. Appellee contends on cross appeal that the court erred by making an award of maintenance. We agree with appellant's contention regarding the classification as nonmarital property of all of appellee's retirement benefits, but disagree with her remaining contentions. Moreover, we disagree with appellee's contention on cross appeal. Hence, we affirm in part, and vacate and remand in part.

Appellant, Donna Hudnall Reed, and appellee, William F. Reed, were married in April 1980 and a final decree dissolving their marriage was entered in November 1996. No children were born to the marriage. During the marriage appellant was employed as a public school teacher and public school administrator while appellee was employed as a sports journalist. The parties divided much of their marital property by agreement, but they disagreed as to the classification of all of appellee's retirement benefits as nonmarital property, other property

acquired during the marriage, the valuation of certain marital property, and appellant's claim for an award of maintenance and attorney's fees. After conducting an evidentiary hearing, the court entered a final decree of dissolution. In accordance with KRS 161.700(2), the court classified all of appellant's contributions to her teachers' retirement account as nonmarital property and also classified all of appellee's retirement benefits as nonmarital property. The court reasoned that on the date the case was submitted for decision, KRS 403.190(4) provided that if one spouse's retirement benefits were excluded from classification as marital property, the other spouse's retirement benefits must also be excluded from classification as marital property. The court then made findings of fact as to the value of certain marital property, divided that property, assigned liability for nonmarital debts, awarded appellant maintenance of $500 per month for seven years and denied her request for an award of attorney's fees. However, the court also granted appellee thirty days in which to submit proof regarding his claim that a particular money market account and IRA were nonmarital. Proof as to this issue was adduced at a subsequent hearing. By supplemental order, the court classified a portion of both the money market account and the IRA as nonmarital property and then divided the remainder of the accounts as marital property. This appeal and cross appeal followed.

First, appellant contends that the court erred by excluding all of appellee's retirement benefits from being classified and divided as marital property. We agree.

All property acquired by either spouse during the marriage and before entry of a decree of legal separation or dissolution must be classified as marital property unless the property falls within a particular statutory exclusion. KRS 403.190(2); Stallings v. Stallings, Ky., 606 S.W.2d 163 (1980). The statutory exclusions at issue here are contained in KRS 161.700(2) and KRS 403.190(4). KRS 161.700(2) states that teachers' retirement benefits cannot be classified as marital property or "considered as an economic circumstance in the division of marital property in an action for dissolution of marriage pursuant to KRS 403.190(1)(d)." On the date this case was tried, KRS 403.190(4) stated that "[i]f the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be." However, effective July 15, 1996, before the court entered a final decree of dissolution in November 1996, KRS 403.190(4) was amended to include the following sentence: "However, the level of exception provided to the spouse with the greater retirement benefits shall not exceed the level of exception provided to the other spouse."

The relationship between KRS 161.700(2) and KRS 403.190(4) was addressed in Waggoner v. Waggoner, Ky., 846 S.W.2d 704 (1992), cert. denied, 510 U.S. 932, 114 S.Ct. 346, 126 L.Ed.2d 310 (1993), and Turner v. Turner, Ky. App., 908 S.W.2d 124 (1995). Both of these opinions preceded the 1996 amendment

to KRS 403.190(4). In Waggoner, a teacher's spouse challenged the constitutionality of KRS 161.700(2), asserting that the statute was special legislation and also that it violated his right to equal protection. Our supreme court rejected those arguments and held that the statute was constitutional. The court stated that "[t]he combination of KRS 161.700(2) and KRS 403.190(4) protects the spouse of a teacher covered by the [Teachers' Retirement System] plan." Waggoner, 846 S.W.2d at 708. In Turner, a teacher argued that the legislature "never intended to exempt a teacher's spouse's pension to the extent that its value exceeded the value of the teacher's pension." A panel of this court disagreed, holding that "[b]oth KRS 161.700(2) and KRS 403.190(4) are unambiguous in their language leaving no doubt that the legislature intended to exempt, as marital property, the entire pensions of a teacher and his/her spouse upon divorce." Turner, 908 S.W.2d at 125. The panel acknowledged, however, that this interpretation of KRS 403.190(4) "can lead to a very inequitable result," but emphasized that "it is up to the legislature and not this court to correct the problem." Id.

In response to Turner, the legislature amended KRS 342.190(4) by adding a sentence that made clear that if one spouse's retirement benefits are by statute excluded from classification as marital property or not considered as an economic circumstance, then the retirement benefits of the other spouse are excluded but only to the extent that they do not exceed the value of the first spouse's retirement benefits.

As noted earlier, it is settled that the date for classifying property as marital or nonmarital is the date of entry of a final decree of dissolution or legal separation. Further, all property acquired during the marriage prior to the entry of a final decree is marital property unless a statutory exclusion is applicable. KRS 403.190(2); Stallings, supra. Moreover, marital assets such as retirement benefits are to be valued as of the date of the final decree. Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990). Thus, the version of KRS 403.190(4) in effect as of the date of entry of the decree determines the classification of retirement benefits as marital or nonmarital property.

Moreover, contrary to the trial court's conclusions, application of the amended version of KRS 403.190(4) herein does not result in an improper retroactive application of that statute. "A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991) (quoting 73 Am.Jur.2d Statutes § 354 (1974)). In Waggoner, supra, the teacher's spouse argued that applying KRS 161.700(2) to his spouse's contributions to the teachers' retirement system prior to the statute's enactment was an improper retrospective application of the statute. The supreme court disagreed, noting that the date of the teacher's contributions was not the sole factor in its decision. Rather,

the court held that the legislature expressed an intention that accumulated teachers' retirement contributions should be excluded in their entirety from classification as marital property regardless of whether some of those contributions preceded the enactment of KRS 161.700(2). The court stated that "[b]ecause the provision imposes no new duty in respect to transactions or considerations in the past, we find no invalid retrospective application of KRS 161.700(2) to the case at bar." Waggoner, 846 S.W.2d at 709.

Here, an evidentiary hearing was first conducted in May 1996 but a final decree was not entered until November 1996, subsequent to the effective date of the amendment to KRS 403.190(4). Nevertheless, the court refused to apply the amended version at the time it entered a final decree.

In this respect, the court erred. As in Waggoner, supra, the 1996 amendment to KRS 403.190(4) did not impair vested rights, create a new obligation, or impose a new duty. Moreover, University of Louisville v. O'Bannon, Ky., 770 S.W.2d 215, 216 (1989), cited by the court for the proposition that "a statute will not be given retroactive effect," is inapposite to the instant action since it is settled that the law in effect on the date a final decree is entered governs the classification of property as marital or nonmarital. Hence, the court's division of pension benefits must be vacated and remanded with directions to divide as marital property so much of the value of appellee's retirement benefits which exceed the value of appellant's teachers' retirement benefits.

Next, appellant contends the court erred by finding that appellee adequately traced the portions of his nonmarital interests in a money market account and an IRA. We disagree.

KRS 403.190(2)(b) states that "[p]roperty acquired [during the marriage] in exchange for property acquired before the marriage" is not considered marital property. Further, KRS 403.190(3) provides that the "presumption of marital property is overcome by a showing that the property was acquired by a method listed in [KRS 403.190(2)]." In Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990), our supreme court noted that the concept of "tracing" was developed through case law to clarify a spouse's burden of proving that property acquired during the marriage was in exchange for nonmarital property. The court stated that "we adhere to the general requirement that nonmarital assets be traced into assets owned at the time of dissolution, but relax some of the draconian requirements heretofore laid down. We take this position, in part, in reliance upon the trial courts of Kentucky to detect deception and exaggeration or to require additional proof when such is suspected." Chenault, 799 S.W.2d at 579.

Here, the record reflects that the trial court gave conscientious attention to this particular issue. In its decree, the court found that appellee had established that the money market account and the IRA were funded by proceeds from the liquidation of his nonmarital thrift and supplemental thrift plans, but that appellee had failed to establish the proportion of marital and nonmarital interests in the two investments.

Appellee was then given thirty days in which to submit additional proof as to this issue. An evidentiary hearing was subsequently conducted during which appellee adduced documentary evidence and oral testimony. The court asked questions of appellee and otherwise had an opportunity to assess his credibility. See Chenault, supra. Based upon the evidence adduced at the hearing, the court found that appellee met his tracing burden regarding $16,545.48 of the $29,624.00 money market account and $35,153.95 of the IRA account. We cannot say that these findings are clearly erroneous. Hence, they may not be disturbed. CR 52.01.

Next, appellant contends that the court erred by failing to grant her request for an award of attorney's fees. We disagree.

A trial court is vested with considerable discretion in determining whether to award attorney's fees. KRS 403.220. Further, an appellate court will not disturb a trial court's decision in this vein absent a clear showing of an abuse of discretion. Giacalone v. Giacalone, Ky. App., 876 S.W.2d 616 (1994). Here, we simply cannot say that the trial court abused its discretion by failing to make such an award. See Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). The court clearly considered the financial resources of each party. Given the fact that appellant indeed has sufficient resources to pay her own costs and attorney's fees, there is no basis for concluding that the trial court abused its discretion by denying an award. Certainly, the mere fact that appellee's income is greater than appellant's income, standing alone, provides no basis for such a

conclusion. See Russell v. Russell, Ky. App., 605 S.W.2d 33 (1980), cert. denied, 453 U.S. 922, 101 S.Ct. 3158, 69 L.Ed.2d 1004 (1981).

Next, appellant contends that the trial court abused its discretion by relying upon appellee's oral testimony, unsupported by documentary evidence, regarding the balances in certain bank accounts. Although appellant argues that she objected during trial on the basis that the testimony complained of was hearsay, she fails to cite to the location of any such objection in the videotaped transcript. Hence, this claimed error was not adequately preserved for review. See Reffitt v. Hajjar, Ky. App., 892 S.W.2d 599 (1994). More important, we fail to perceive that the court's findings as to the balances in the account are clearly erroneous in any event.

Appellant also contends that the court erred by failing to classify appellee's expense account receivables for the year 1996 as marital property. She argues that appellee was reimbursed by his employers for his prior year's expenses, but that he intentionally withheld requesting reimbursement for his 1996 expenses until after the evidentiary hearing herein. However, appellant fails to support this allegation by a citation to the record. Moreover, the trial court was in the position of hearing appellee's testimony in this vein and determining any issue as to his credibility. We simply cannot say that the court abused its discretion by refusing to speculate as to the amount of appellee's future expense reimbursements and to include such a sum as marital property.

Finally, appellant contends that the court erred by awarding her maintenance which was inadequate in both amount and duration. By contrast, appellee contends on cross appeal that the court erred by making an award of maintenance. We disagree with the contentions of both parties.

Appellant conceded at trial that ninety percent of the trips taken by the parties during the marriage were necessitated and financed by appellee's employers. Moreover, appellee adduced evidence regarding differences in claims in the record as to appellant's monthly expenses. In making its award, the court carefully reviewed the factors set forth in KRS 403.200(2). Specifically, the court considered the standard of living established during the marriage, the financial ability of appellant to meet her reasonable needs after dissolution, and appellee's ability to meet his needs while providing maintenance. We simply cannot say that an award of $500 a month for seven years amounted to an abuse of discretion. Moreover, we find no abuse of discretion in the court's rejection of appellee's contention that appellant's alleged fault should defeat her claim to maintenance. However, since this action must be remanded for reconsideration as to the issue of the division of pension benefits, the maintenance award must also be vacated and reconsidered on remand once the pension benefits are divided. See Hollon v. Hollon, Ky., 623 S.W.2d 898 (1981); Brunson v. Brunson, Ky. App., 569 S.W.2d 173 (1978).

For the reasons stated, the court's decree is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed in this opinion.

ALL CONCUR.

BRIEF FOR DONNA HUDNALL REED; and DIANA L. SKAGGS:

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