

RENDERED: December 17, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003259-MR

GEORGE W. PHILPOT

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE FARMER H. HELTON, JUDGE
ACTION NO. 96-CI-0067

ANNA RUTH PHILPOT

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JOHNSON, KNOX AND SCHRODER, JUDGES.

JOHNSON, JUDGE: George W. Philpot appeals from the findings of fact, conclusions of law, and final judgment entered by the Bell Circuit Court on September 5, 1997, that dissolved the marriage between him and Anna Ruth Philpot, and decided all issues concerning the parties' marital and non-marital property. Having concluded that the trial court's findings of fact are supported by the evidence and that the trial court did not abuse its discretion in its division of the property, we affirm.

George and Ruth were married on January 19, 1989, and separated on February 1, 1996. George filed a petition for dissolution of the marriage on March 1, 1996. Evidence was submitted and on September 5, 1997, the trial court entered its final judgment dissolving the marriage and deciding all property issues.

On September 15, 1997, George filed a motion to alter, amend or vacate the final judgment.¹ George argued that the trial court had erred in the division of his pension, his IRA, the cabin, and in the assignment of responsibility for medical bills and insurance. Ruth filed a response to George's CR 59.05 motion on September 22, 1997, in which she argued that the motion was a nullity and should not be considered since George's new attorney, Mary-Ann Smyth Rush, had not filed a notice of entry of appearance. Ruth also argued that "the distribution of property was just in all respects and proper according to the law."

Rush then filed a notice of entry of appearance, followed by two re-notices for the CR 59.05 motion to be heard by the trial court. On October 17, 1997, George filed a reply to Ruth's response. The reply supplemented George's earlier arguments by including three exhibits that had not been previously introduced into evidence. On October 17, 1997, Ruth filed a motion to strike the exhibits. She argued that since the exhibits had not been introduced before the final judgment, they were inadmissible as a matter of law. George, without supporting

¹Kentucky Rules of Civil Procedure (CR) 59.05.

legal authority, filed a response to the motion to strike on October 22, 1997. George argued that the trial court should consider the exhibits to "prevent a manifest injustice" in the action. On November 21, 1997, the trial court denied the motion to alter, amend, or vacate, and made additional findings of fact relating to the division of property.

We first consider Ruth's claim that this Court does not have subject matter jurisdiction over this appeal because attorney Rush failed to file a notice of entry of appearance, before filing the CR 59.05 motion. While both parties failed to cite any authority in support of their positions, the law provides that when a pleading is not properly signed, in violation of a rule, dismissal is not mandatory, but rather at the court's discretion.² Since the trial court addressed the CR 59.05 motion, it obviously chose, within its discretion, not to dismiss the motion as being improperly filed.³

Ruth also argues that we should not consider the three exhibits George attached to his CR 59.05 motion because these exhibits constitute evidence outside the record. When the trial court denied George's CR 59.05 motion, it did not rule on Ruth's motion to strike the exhibits, or in any way address these

²See 61B Am. Jur. 2d § 886 (1999).

³See also In re Estate of Herring, 970 S.W.2d 583 (Tex.App. Corpus Christi 1998) (court held that the trial court may not treat an unsigned pleading as a nullity); and Horton v. Horton, Ky., 263 Ky. 413, 420, 92 S.W.2d 941 (1936) ("court is not authorized to disregard them after permitting them to be filed") (citation omitted).

exhibits. Thus, it is impossible for this Court to determine what weight, if any, the trial court placed on the exhibits. However, since we affirm the trial court's rulings that were favorable to Ruth, any consideration by the trial court of George's exhibits would have been harmless error.

We will now turn our attention to addressing the issues raised by George in his appeal. We begin by noting that George has failed to comply with CR 76.12(4)(c)(iv) by not providing "a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner"; and by not providing "ample supportive references to the record." While we are not required to review the issues due to George's noncompliance with CR 76.12, we will, nonetheless, do so. However, counsel should take note of the availability of sanctions for such deficiencies.⁴

The trial court, in dividing property, must assign each spouse his or her non-marital property and then divide the couple's marital property in "just proportions," without regard to marital misconduct and in light of the following factors: each spouse's contribution to the acquisition of the marital assets, including homemaking duties; the value of each spouse's non-marital property; the duration of the marriage; and the economic circumstances of each spouse at the time of distribution.⁵ The role of this Court is to review the trial court's judgment to

⁴CR 76.12(8).

⁵KRS 403.190(1) (a)-(d).

determine whether its factual findings are clearly erroneous or whether it abused its discretion in applying the law to the facts.⁶ The trial court has "wide discretion" in the division of marital property.⁷ The trial court's division of property will be upheld absent a showing of abuse of discretion.⁸

George argues that the trial court abused its discretion when it granted Ruth a portion of his pension. The trial court found that George's monthly pension benefit was \$1850.00; that George's pension increased in value during four years of the marriage; that George had worked a total of 29.3 years at General Motors; and that Ruth was thereby entitled to "at least 11%" of his pension income, or \$200 per month.

George argues correctly that only a vested pension can be considered marital property and be subject to division.⁹ In his brief, George notes that the pension plan vested in "January 1989", "before" the parties were married on January 19, 1989:

Quite clearly, [George's] pension vested before the marriage between [George and Ruth] ever occurred. Although [Ruth] was married to [George] for four years of his active work with General Motors, the pension vested before they married, and [George's] benefits were not increased during the four years he worked while married to [Ruth]. Therefore, according to the applicable case law and KRS

⁶CR 52.01; Herron v. Herron, Ky., 573 S.W.2d 342, 344 (1978).

⁷Davis v. Davis, Ky., 777 S. W.2d 230, 233 (1989).

⁸Herron, supra.

⁹Owens v. Owens, Ky.App., 672 S.W.2d 67 (1984) and Fry v. Kersey, Ky.App. 833 S.W.2d 392 (1992).

403.190, George's pension was not divisible as marital property and the award of any of [George's] interest in his pension to [Ruth] in the final decree was clearly error by the trial court.

George's argument ignores the fact that at trial George admitted the value of his pension was enhanced over the four years he worked at General Motors during the marriage. George cites Vanover-May v. Marsh, Ky.App., 793 S.W.2d 852 (1990), for the proposition that in determining the marital share of a pension the trial court should not consider the time period the parties were married that occurred after retirement. In the case sub judice, the trial court did not consider the time period occurring after George retired, but instead only considered the four years that George worked while he was married to Ruth. Furthermore, in dividing the marital property under KRS 403.190(1)(b), the trial court is required to consider the value of each spouse's non-marital property, such as the non-marital portion of George's pension. Therefore, we find no abuse of discretion by the trial court in dividing George's pension.

George also claims that the trial court erred in awarding "Ruth a portion of [his] IRA." The IRA was owned by George before the marriage. It had a balance of \$4,000.00 at the beginning of the marriage; and at the time of dissolution its value was shown to have increased to over \$18,000.00. The trial court, in its amended findings, addressed the concern raised by George regarding the IRA and stated, "[e]xcept for the \$200.00 a month no value has been placed on the amount of the IRA and the

Pension Fund except in the over-all picture." Thus, George is in error when he claims the trial court awarded Ruth a portion of his IRA. Again, any consideration that was given to the non-marital IRA was done in relation to dividing the martial property pursuant to KRS 403.190(1)(b).

George next claims that the trial court abused its discretion in awarding Ruth a lien on the Corbin property. The parties purchased this property during the marriage from George's mother for \$4,000.00. George claims that there is no indication that Ruth contributed any amounts to the \$4,000.00 that was used to buy the property. However, there is evidence to the contrary from George himself in his deposition testimony:

Q. I think you also admitted that you and your wife purchased your mother's property for \$4,000.00?

A. Yes sir.

Q. During the marriage?

A. Yes sir.

Q. From marital funds?

A. Yes.

Once again, the record contains no evidence to support George's claim that the \$4,000 used to purchase the Corbin property could be traced to his non-marital property. However, George was awarded the Corbin property as part of the division of martial property. The fact that the trial court awarded Ruth a lien on the property to secure her monetary claim against George cannot be deemed an abuse of discretion. The trial court's judgment

ordering George to execute a lien in actuality did not give Ruth any additional rights that she did not already possess in the form of a judgment lien.¹⁰

George's last issue concerns the award of the cabin to Ruth as "pre-marital", or non-marital, property. Ruth testified, and the trial court found, that while both parties had worked to improve the cabin, "all the money put into the cabin was from the pre-marital funds of [Ruth]." In its order denying George's CR 59.05 motion, the trial court made additional findings that "pre-marital property of [Ruth's] was eventually sold with a substantial amount of profit being reinvested in the property referred to as the cabin." Ruth's testimony supported the trial court's finding that George had received, near the time the parties separated, \$7,885.00, constituting one-half of that profit from Ruth's non-marital property. George did not dispute this, nor did he dispute Ruth's claim that the funds invested in the cabin were primarily her non-marital funds. The presumption that property purchased during the marriage is marital property is overcome by this evidence of Ruth's non-marital investment. In its division of the cabin, the trial court considered both the value of Ruth's non-marital contributions and George's contributions to the improvement of the cabin.

Despite George's claim that some evidence was introduced purporting to show that Ruth had obtained ownership of the cabin during the marriage in 1991 , George testified to the

¹⁰See KRS 426.720.

contrary in his own deposition by stating that Ruth owned the cabin when they married. There was also evidence that Ruth already owned the cabin before the marriage, but was merely paying the debt on the cabin during the marriage. Even if the cabin were deemed to be marital property, the trial court was within its authority to award it to Ruth as a part of the overall division of marital property. George does not allege that the award of the cabin is otherwise inequitable in the context of the overall property division. We find no abuse of discretion related to the cabin. Clearly, whenever possible, it is preferable to make a clean division of property so the parties are "spared further entanglement."¹¹

Accordingly, the judgment of the Bell Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary-Ann Smyth Rush
London, KY

BRIEF FOR APPELLEE:

Gerald L. Greene
Pineville, KY

¹¹See Duncan v. Duncan, Ky.App., 724 S.W.2d 231, 233 (1987).