

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000353-MR
AND
NO. 2001-CA-000567-MR

RITA A. JOHNSON

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 92-CI-04022

DONALD EUGENE JOHNSON,
BY AND THROUGH HIS GUARDIAN,
VIVIAN N. McKEEHAN

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING
** ** * * * * *

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: This appeal/cross-appeal arises out of a proceeding for dissolution of marriage. Both parties challenge the trial court's allocation of proceeds from a structured settlement. Finding no abuse of discretion, we affirm.

The Appellant\Cross-Appellee, Rita Johnson ("Rita") and Donald Johnson ("Donald") were married in the 1970's. In 1983, Donald was struck by a motor vehicle, leaving him a quadriplegic and leaving Rita to raise their four children, ages five to 12. Donald was confined to the VA hospital. Initially, Rita was appointed Donald's guardian. She pursued a personal injury claim on Donald's behalf and derivative claims for herself. A structured settlement resulting from that litigation called for

payments of \$2,000 per month for the greater of Rita's life expectancy, or 40 years, in addition to periodic and increasing lump sum payments every five years – the last payment to be made in the year 2017, in the amount of \$100,000.00. Thereafter, the U.S. government filed suit against Rita to recoup some of the money it had expended for Donald's care. As a result of that litigation, a settlement was reached, in which the government receives half of the lump sum payments from the structured settlement.

In 1991, Donald's mother, Vivian McKeehan, ("McKeehan"), Appellee/Cross-Appellant herein, was appointed guardian, by order of the Jessamine District Court. In 1992, Donald through McKeehan, as his guardian, filed a petition for dissolution in the Fayette Circuit Court. On May 6, 1998, the court entered a decree of dissolution, incorporating the parties' property settlement agreement, which provides, in pertinent part:

The parties further agree that upon entry of this Property Settlement Agreement and in consideration of the covenants contained herein, Husband waives his interest in the marital residence Wife assumes all responsibility for the debts on the subject property and indemnifies and holds Husband absolutely harmless as to said debts. Husband agrees to convey his interest in said property to Wife by Quit Claim Deed or other appropriate instrument.

The parties acknowledge and agree that to due to their lengthy separation and Petitioner's incapacity, the marital estate subject to division, with the exception of the above-mentioned residence consists of the remaining payments to be received under the terms of a structured settlement Agreement with Guaranty National Insurance Company In addition, . . . that . . . structured

settlement has been further modified by a Stipulation for Compromise/Settlement, filed in the U.S. District Court . . . wherein the United States of America will receive 50% of the "additional lump sums" . . . in consideration of and reimbursement for indebtedness incurred for the care and treatment of Husband by the Department of Veterans Affairs.

. . . the parties further agree that, commencing with the payment . . . of \$2,000.00 due April 1, 1998, under the structured settlement, they shall equally divide all monies received

. . . .

In addition, the parties further acknowledge and agree that in the event Petitioner's eligibility status for continued care and treatment by the Department of Veterans Affairs changes such that he is no longer eligible prior to expiration of the benefits payable under the structured settlement, they shall re-submit the issue of allocation of said future benefits due and accruing for further consideration and re-allocation by the Court.

(Emphasis added.)

On August 21, 2000, McKeehan, filed a motion on Donald's behalf, requesting a hearing on the issue of reallocating future payments of the structured settlement proceeds, on the ground that Donald was no longer eligible for continued long term care at a VA facility. At hearing, McKeehan testified about the plans she had made to take her son home and care for him there, because his eligibility status for long term care at the VA had changed. McKeehan explained that she had added on a room to her home in California for Donald and that she was being instructed in caring for him (for example, he is fed

through a tube). McKeehan also testified that Donald appeared to be aware of, and more relaxed in, her presence. Testimony was also presented by Ella Smith, an R.N. and VA employee, about legislative changes regarding long term care through the VA, and Donald's change of eligibility status for that type of care, as well as the type, amount and cost of care he would need - 16 hours of in-home care per day, at a cost of \$275.00 per day, essentially paid out of McKeehan's pocket. Some skilled nursing services would also be required at times; however, those would be covered. Rita also testified at the hearing. She has remarried, her current husband is on disability, all the children are grown. The three boys - now ages 22, 25 and 26 - still live at home. The youngest apparently has difficulty reading; he works for Goodwill; and Rita does not believe he could support himself. The older two boys do work and pay her "rent." Rita testified that she is not currently working and is under a doctor's care. She had applied for disability. Rita previously worked as a deli manager and as a salesperson/cashier at Lazarus. She did not work outside the home when the children were small.

On January 22, 2001, the trial court entered an opinion and order, which provides, in pertinent part:

The record reflects that the Respondent [Rita] has received most of the proceeds from the structured settlement. The record also reflects that the Respondent and her children did not assist in the care of the Petitioner [Donald] and that the Petitioner's mother has borne the expenses and expended an enormous amount of time being with the Petitioner.

Having considered the testimony presented, the records and the arguments of counsel, the Court hereby rules that the Petitioner shall

receive most of the remaining funds from the structured settlement. The Court finds that equity requires that the payments should not be equally divided between the parties.

Therefore, it is hereby ORDERED that the Petitioner shall receive seventy-five percent (75%) of all future payments, both the monthly payments and lump sum payments, and the Respondent receives the remaining twenty-five percent (25%). It is further ORDERED that any additional lump sum payments which are payable to the Respondent's estate in the event of her death be assigned the Petitioner's estate. It should be noted that the lump sum payment referred to in this order refers to the amount going to the parties after the government has received its share.

On February 21, 2001, an amended order and opinion was entered, the purpose of which "is to include the language to insure that this Order is appealable."

On appeal, Rita maintains that the trial court abused its discretion in granting Donald's motion and in ordering "a change in the division" of the settlement proceeds. Rita attempts to persuade us that there are alternative means of care for Donald, that he could be placed in a nursing home, and that she needs the money "for the very roof over her head."

Donald notes that Rita's response is consistent with her conduct after the accident - that she stopped visiting Donald not long after his injuries, that she did not encourage continued visits from the children, that she negotiated a structured settlement payable to her, measured by her life expectancy and collected over \$280,000.00 of that settlement money without any concern for her husband, until the government compelled her to give up a portion of future payments. On cross-appeal, Donald

argues that the trial court abused its discretion by failing to grant his motion entirely and award all of the remaining structured settlement payments to him.

KRS 403.190(1) provides that:

In a proceeding for dissolution of the marriage . . . the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

In the original property settlement, the parties agreed that the remaining payments under the structured settlement were marital, subject to division; further, that if Donald's eligibility status for VA care changed, the issue of reallocation of those payments could be submitted to the court. KRS 403.190(1) does not require equal division of marital property. "This court may not disturb the findings of the trial court in a case involving dissolution of marriage unless those findings are clearly erroneous" Johnson v. Johnson, Ky. App., 564 S.W.2d 221, 222 (1978). Under the facts of this tragic case, we cannot say that the trial court's findings are truly erroneous. Thus, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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