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Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002032-MR

JON R. WILBURN — APPELLANT

v.

APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JEAN CHENAULT LOGUE, JUDGE
ACTION NO. 04-CI-00502

JENNIFER SCRIVNER WILBURN — APPELLEE

OPINION
AFFIRMING AND REMANDING

** ** ** ** **

BEFORE: THOMPSON AND WINE, JUDGES; KNOPF,[1] SENIOR JUDGE.

THOMPSON, JUDGE: This case arises from a dissolution of marriage action filed in the Madison Circuit Court by Jennifer Scrivner Wilburn. Jon R. Wilburn appeals alleging that: (1) the court erred when it granted Jennifer's CR 59.05 motion as it pertained to time-sharing with the parties' minor child; (2) the court erroneously valued and divided the parties' various retirement plans; (3) the court erred when it allowed Jennifer to purchase the marital residence based on an appraisal submitted by Jennifer and when it

[1] Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

did not allow Jon reimbursement for mortgage payments during the pendency of the dissolution action; and (5) that the court did not equitably divide the personal property. Because the court's award of both a percentage amount and dollar amount of Jon's military pension to Jennifer, that issue is remanded to the trial court for clarification. On all other issues, we affirm.

The parties were married on September 29, 1990, and have one child born on October 10, 1993. At the time Jennifer filed her petition for dissolution she also sought an *ex parte* civil restraining order allowing her temporary custody, exclusive occupancy of the martial residence and requiring that Jon have no contact with Jennifer or visitation with their child until the motion could be heard. In support of her *ex parte* motion, Jennifer submitted an affidavit detailing instances of violence, threats, and acts of intimidation throughout the marriage. The *ex parte* order was entered and Jon was subsequently escorted through the marital residence by a police officer and permitted approximately ten minutes to retrieve his personal belongings.

At the hearing on Jennifer's temporary motion, the court heard Jennifer's testimony regarding her husband's outbursts of anger and physical threats and violence. Following her testimony, Jon's counsel stipulated that there were adequate grounds to keep the restraining order in effect during the pendency of the proceedings.

Prior to the final hearing, the parties met with the court's caseworker and mediated an agreed custody/time-share arrangement which was entered into the record on June 8, 2004. Pursuant to that agreement, the child would primarily reside with Jennifer.

Jon would have time-sharing every other weekend from Friday at 6:00 p.m. until Sunday at 6:00 p.m. Additionally, he would have the child every other Tuesday from 3:15 p.m. until 8:00 p.m., and every other Thursday from 3:15 p.m. until school began on Friday. When school was not in session, the parties agreed to work out together as to when the child was to be returned. In addition to equal time-sharing during the summer months and scheduled holiday visits, the parties agreed that each would use the other as the "first option" when a babysitter was needed.

The parties were further able to agree on the issue of temporary maintenance and child support. Jon was ordered to pay $556 per month as temporary child support and $520.50 per month as temporary maintenance during the pendency of the action. Since both parties expressed an intent to jointly file bankruptcy, there was no allocation of any marital debts.

Any harmony between the parties expressed in the agreed orders had dissipated by the date of the final hearing held on February 10, 2005. At the center of the parties' disagreement was the custody of the parties' child. In fact, there was little evidence produced at the final hearing other than the parties' testimony regarding the care of the child. Citing Jennifer's refusal to cooperate with his exercise of his time-sharing rights agreed to in the agreed schedule, Jon requested sole custody of the child. The major conflict between the parties arose from the babysitting provision contained in the agreement. Jon maintained that for the sole purpose of depriving him of the "extra" visitation after school, Jennifer altered her work schedule so that she could pick up the

child from school. Jennifer, however, testified that the time-sharing schedule set forth in the agreement had thus far worked well and the child was satisfied with the arrangement and was doing well in school.

Initially, the court awarded joint custody of the parties' child with Jennifer designated as primary residential custodian. Jon was awarded time-sharing from Thursday after school until Sunday at 6:00 p.m. every other week. On opposite weeks, he was awarded time-sharing from Wednesday after school until Friday morning. Holiday and summer time-sharing was ordered pursuant to the agreed parenting schedule.

The court divided the various retirement accounts held by the parties as follows:

> (a) That the Petitioner established that her retirement account with Park Federal is non-marital property.
> (b) The Petitioners Janus Account is to be divided equally via Qualified Domestic Relations Order.
> (c) That the Respondent's military retirement equals out to $369.79 per month to be paid to the Petitioner. This amount was calculated by both parties using the following equation: 133/240 x 0.5 = 27.7%.
> (d) All accounts are to be divided by entry of subsequent Qualified Domestic Relations Orders.

Additionally, within 60 days, Jennifer was ordered to refinance the marital residence. Thereafter she would be solely responsible for the mortgage payment and she would make a payment to Jon in an amount equal to his marital equity, $7, 994.35. As to the parties' personal property, with the exception of a .357 magnum gun awarded to Jon, the court found that the remainder of the personalty had been previously divided.

THE PARTIES' CR 59.05 MOTIONS PERTAINING TO THE TIME-SHARING ARRANGMENT

Jon filed a timely CR 59.05 motion objecting to the time-sharing arrangement arguing that his work schedule did not permit him to have the child on Thursday nights and further requested that the time-sharing arrangement be equal between the parties.

Jennifer also filed a CR 59.05 motion requesting that the court alter the visitation to every other weekend and one night every week as provided for in the agreed parenting schedule so as to allow the child to attend his Wednesday church youth meetings. The court found that the best interest of the child would be served by a time-share schedule that provided that Jon have the child every other Friday after school until Sunday at 6:00 p.m. and every Tuesday until Wednesday morning when the child would be returned to school. Jon does not contest the award of joint custody or the designation of Jennifer as the primary residential custodian but contends that the court erred when it did not order an equal time-sharing arrangement.

Jon contends that the court "modified" time-sharing when it deviated from the schedule set-forth in the decree. Jon's reliance on KRS 403.320(3) and its application to modification of an order granting or denying time-sharing rights is misplaced. Although the court's "Findings of Fact, Conclusions of Law and Dissolution Decree" stated that it was a final and appealable order, it did not achieve finality until the court ruled on the parties' pending CR 59.05 motions. *See Gullion v. Gullion*, 163 S.W.3d 888,

891 (Ky. 2005). It is axiomatic that there can be no modification of a time-sharing order unless there is a final time-sharing order to modify. *Id*. at 892.

The question presented is whether the time-sharing granted to Jon is reasonable. KRS 403.320(1). Joint custody "contemplates shared decision-making rather than delineating exactly equal physical time with each parent." *Fenwick v. Fenwick*, 114 S.W.3d 767, 777 (Ky. 2003). The custody should be shared in such a "way that assures the child frequent and substantial contact with each parent under the circumstances." *Id*. at 778.

Both parties are loving parents who understandably desire as much time with their child as possible under the circumstances. After hearing the evidence, including the parties' schedules as well as that of the child, the court determined that the schedule set was in the best interest of the child. The time-sharing arrangement which permits Jon to have the child every other weekend and one night every week in addition to equal time-sharing during the summer months certainly provides for frequent and substantial contact. We find nothing unreasonable about the court's final time-sharing schedule.

THE DIVISION OF THE RETIREMENT ACCOUNTS

Jon was retired from the military and received $1, 335 per month from his military pension. The parties were married for 133 months of the 240 months of his military service. Both agree that the correct formula to calculate Jennifer's portion of the military benefits was 133/240 x .5= 27.7% which, at the time of the hearing, had a current

value of $369.79 per month. Jon complains, however, that the court should have restricted Jennifer's portion to $369.79 per month for a period of 133 months, the length of the marriage. Jennifer, he contends, would not be entitled to lifetime benefits and would receive no cost of living increases.

Divisible military retirement pay is now subjected to state law regarding the division of marital assets in a dissolution by virtue of the Federal Uniform Services Former Spouses Protection Act. 10 *U.S.C.A.* §1408. We can find no Kentucky authority which would limit the duration of the award of the pension benefits to the length of the marriage. The relation of the length of the marriage to the military service is properly calculated in the formula applied by the trial court. The circuit court properly determined that Jennifer was entitled to that portion of Jon's military pension benefits attributable to his years of service during the marriage. As stated in *Spratling v. Spratling,* 720 S.W.2d 936 (Ky.App. 1986), a vested military retirement is a valuable marital asset and each spouse is entitled to a portion of retirement pay from and after the time it is received. *Id*. at 937. Jennifer's marital share of the pension plan will continue for so long as Jon is entitled to receive benefits. *See Light v. Light*, 599 S.W.2d 476 (Ky.App. 1980).

Jon does not dispute that the court applied the proper formula nor does he dispute that cost of living increases are payable for awards based on a division of retirement benefits awarded as a percentage or fraction of the member's retirement pay. He premises his assignment of error on the statement by Jennifer's counsel at the final

hearing that the current monthly value of her percentage share of the retirement benefits is $379, and the court's inclusion of that amount in its findings as limiting her to that amount. A review of the hearing reveals that counsel only agreed that Jennifer's marital share is 27.7%, thus, Jennifer did not agree that she could receive only $379 from the pension. Although the circuit court's order states that the value of Jennifer's interest is $379, the court further found that she is entitled to 27.7%. If, as Jon interprets the court's order, Jennifer was awarded a set monthly amount as to her marital share of the pension plan she would not be entitled to the benefit of the cost of living increases. However, an award of her percentage share, like any other marital asset would necessarily include cost of living increases attributable to her share. It is within the trial court's discretion to divide marital property which includes the method of payment of pension benefits. *See Overstreet v. Overstreet*, 144 S.W.3d 834 (Ky.App. 2003).

It is impossible for this court to determine whether the court held that Jennifer was entitled to a percentage of the pension or to $379 per month. In his CR 59.05 motion, Jon did not request that the court clarify its ruling in regard to the military pension and apparently only became aware that it was susceptible to two different interpretations after the Defense Finance and Accounting Service, the agency responsible for payment of military benefits, increased Jennifer's benefits when Jon received a cost of living increase in his benefits. We find the court's award of both a percentage amount of the pension plan and a set dollar amount to be confusing and, therefore, in need of

clarification. On remand the court shall specifically state whether Jennifer is awarded 27.7% as her marital share of the pension plan or if she is awarded $379 per month.

Jennifer concedes that her Kentucky State Retirement System account is entirely marital and states that she is willing to stipulate to the entry of a qualified domestic relations order awarding Jon one-half of that account as of June 24, 2005, the date of the entry of the decree. Therefore, we need not address the divisibility of that account.

Jon objects to the court's division of two remaining retirement accounts, a Janus account and Park Federal account which he argues should be equally divided. However, the evidence reveals that both accounts were the result of Jennifer's employment with State Bank & Trust from March 1981 to May 1992; thus, the circuit court properly classified the majority of the accounts as non-marital.

Jon seeks reimbursement for taxes paid on the Janus account as a result of its conversion from a 401-K account to a Roth IRA. The taxes were paid during the marriage from marital funds. The court, within its discretion, ruled that Jon is not entitled to seek reimbursement for that amount We agree.

THE MARITAL RESIDENCE

In the bankruptcy proceeding, the parties reaffirmed the mortgage on the marital residence and Jennifer requested that the court permit her to purchase the residence. Pursuant to an appraisal submitted by Jennifer, the trial court valued the residence at $145, 000 and ordered her to refinance the home in sixty days.

Jon did not submit an appraisal at the final hearing but testified that he believed the value of the home to be much higher; the only appraisal he submitted as evidence, however, was with his CR 59.05 motion. "A party cannot invoke CR 59.05 to raise arguments and to introduce evidence that should have been presented during the proceedings before the entry of the judgment." *Gullion*, 163 S.W. 3d at 893. The appraisal submitted by Jon with his CR 59.05 motion could not be considered by the trial court.

There is no basis for concluding that Jennifer's appraiser was in any way incompetent and, on the state of the evidence, there was no error in the trial court's reliance on the value placed on the residence by the appraiser.

THE FAILURE TO DIVIDE THE PERSONAL PROPERTY

Jon complains that Jennifer received the majority of the personal property. With the exception of the gun which Jennifer was ordered to return to Jon, the court found that the remainder of personal property had been divided. Again, Jon did not present any evidence as to the value of any personal property or what personal property each party received. In the absence of any request that the court divide the personal property, the lack of proof of the specific property requested and its value, and in view of the testimony that the personal property had been divided, we can find no basis on which to find error in the trial court's ruling that there was no personal property requiring division.

CONCLUSION

Based on the forgoing, we remand this action for the limited purpose of clarifying whether Jennifer's marital share of the military pension is $379 per month or 27.7%, and the entry of a Qualified Domestic Relations Order awarding Jon one-half of the Kentucky retirement system account. In all other respects the findings of fact and conclusions of law are affirmed.

WINE, JUDGE, CONCURS.

KNOPF, SENIOR JUDGE, CONCURS IN THE RESULT.

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BRIEF FOR APPELLEE:

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