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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002126-MR

TERRI LAVONNE MCMAHON — APPELLANT

v.

APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE M. BRENT HALL, JUDGE
ACTION NO. 99-CI-000984

JOHN PAUL DOUTHITT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES; SHAKE,[1] SENIOR JUDGE.

MOORE, JUDGE: Terri McMahon appeals from an order of the Hardin Family Court calculating the amount of military retirement benefits to which she is entitled from her former husband, John Paul Douthitt. For the reasons so stated, we affirm.

When the parties divorced in 1999, John had been an active member of the United States Army for sixteen years during the parties' marriage.

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

Accordingly, a portion of his military retirement pay was marital property. But because John was not yet retired, the parties could not calculate his retired pay. They agreed that Terri would receive 40% of the marital portion of John's retirement and that when he retired, they would calculate the percentage of John's actual retirement income to which Terri was entitled. This would be done by formulating a hypothetical retired pay as if John had reached retirement age at the time of the parties' divorce in 1999 and by determining what percentage of John's retired pay was earned during the marriage.

John retired on August 31, 2003, but Terri contends she was not aware of this until five years later. Upon learning of John's retirement, Terri filed a motion on February 6, 2008, in the Hardin Family Court to secure the portion of John's retirement to which she was entitled, as well as the amounts John was in arrears.

The family court held hearings on the matter and subsequently entered three different orders regarding the amount of John's retirement to which Terri was entitled. Each order reached a different result, and each order was conclusory, failing to explain how the family court reached its decision.

The only order from which Terri appealed was entered October 17, 2008. Before this Court, she challenges the percentage of John's retirement she was awarded and the amount of arrearage she was awarded. Terri also argues that

the family court erred in failing to award her prejudgment interest and attorneys' fees.

The law is clear that pension plans should be valued on the date of the divorce decree. *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986); *see also Armstrong v. Armstrong*, 34 S.W.3d 83, 86 (Ky. App. 2000) (citing *Clark v. Clark*, 782 S.W.2d 56, 62 (Ky. App. 1990)). Terri is not entitled to share in any of John's nonmarital portion of his retirement benefits. *See Foster v. Foster*, 589 S.W.2d 223, 225 (Ky. App. 1979)). This is why a hypothetical retired pay, figured as if John had retired in 1999, is necessary in order to compute the amount of John's actual retired pay to which Terri is entitled.

Both parties have relied on the *Uniformed Services Former Spouses' Protection Act, Dividing Military Retired Pay* (DFAS) pamphlet[2] to assist them in determining Terri's portion of John's retirement. The family court determined that the *Poe* percentage was 25.183407 percent.[3] However, the family court's order is silent regarding its rationale or factors used to determine this figure.[4] It provided

[2] This pamphlet is attached to Terri's brief filed with the family court on June 20, 2008, and was relied upon by Terri before the family court and in her brief before this Court. Specifically, in her brief before the family court, Terri "[u]tiliz[ed] the hypothetical example C(3) of the attached flyer from DFAS. . . ." And, in her appellate brief at page 7, Terri again used hypothetical C of the DFAS, which is attached to her brief at Appendix K. We point this out to highlight one of several inconsistencies in Terri's family court brief, her appellate brief and then her reply brief before this Court. Notwithstanding her statements in her family court brief and on page 7 of her appellate brief, on page 4 of her reply brief before this Court, Terri writes that "[a] hypothetical award to Appellant based upon the hypothetical analysis (C) on page 7-9 of the DFAS pamphlet is inappropriate in this case."

[3] The family court actually included two different percentages: 25.18407% and 25.183407%. We believe this is a typographical error. Nonetheless, the difference between the two percentages is de minimus.

[4]

no explanation of how it reached its decision. And, the parties greatly debate what figures are the appropriate ones to use.

Pursuant to Kentucky Civil Rule (CR) 52.04:

> A final judgment shall not be reversed or remanded because of the failure of the trial court to make a finding of fact on an issue essential to the judgment unless such failure is brought to the attention of the trial court by a written request for a finding on that issue or by a motion pursuant to Rule 52.02.

Civil Rule 52.02 affords parties the opportunity to request additional findings. The reason for requiring specific findings of fact is to provide a reviewing court with a basis for understanding the lower court's "view of the controversy." *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

Here, without the benefit of the videotapes of the hearings or an explanation of how the family court reached its conclusion, we would be speculating as to the family court's precise reasoning for its decision. Under these circumstances and pursuant to well-established law, it was incumbent upon Terri to move the family court for findings supporting its conclusions. She failed to do so; hence, this is fatal to her appeal. *See Underwood v. Underwood*, 836 S.W.2d 439, 445 (Ky. App. 1992), *overruled on other grounds by Neidlinger v. Neidlinger*, 52

Both parties cite to video tape recordings of hearings in the family court. However, those recordings were not made a part of the appellate record and are not before the Court for our review. It was Terri's responsibility as appellant to ensure that the record on appeal contained all of the necessary portions of the trial court record. *See Clark v. Commonwealth*, 223 S.W.3d 90, 102 (Ky.2007) (citations in footnotes omitted). "We are required to assume that any portion of the record not supplied to us supports the decision of the trial court." *Id.*

S.W.3d 513, 519 (Ky. 2001); *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); *Whicker v. Whicker*, 711 S.W.2d 857, 860 (Ky. App. 1986).

We pause to note that although the October 17, 2008 order is the only one appealed, the family court's first order, dated July 8, 2008, was likewise conclusive and absent of any explanation supporting the court's rationale. Interestingly, both parties moved the court for findings explaining that order. In particular, Terri asked that the court "[a]lternatively, . . . enter specific Findings of Fact to demonstrate the Court's Judgment, which itemizes the amount calculated each month and year. Otherwise, the Court of Appeals will not be able to decipher the Court's Order." John, in a similar motion, asked the court "[t]o clarify the Order entered July 8, 2008, pursuant to Civil Rule 52 and Civil Rule 59.05 insomuch as Respondent cannot discern from the Order what the percentage of future entitlement of the Petitioner would be. Respondent is unable to tell what calculations the Court relied upon to arrive at the arrearage amount and how that calculation may affect future entitlement of the Petitioner." We could not agree more.

The family court entered a second order on September 23, 2008, concluding that it had miscalculated the arrearage that John owed. Again, the court did not set forth any factual findings relative to its calculations. But apparently, Terri was satisfied with this order and did not move the family court for additional findings or an explanation of its decision.

John thereafter filed a motion to alter, amend or vacate the second order. In that motion, he attached an exhibit setting forth the calculations he believed were correct pursuant to the DFAS pamphlet. On its face, it appears that in the family court's third order, entered on October 17, 2008, the court agreed with John because the percentage the court used was the same that John advocated. Nonetheless, the family court's order was again conclusive and failed to set forth any factual findings supporting its rationale or the basis of its acceptance of any of the figures advanced by John. We are left to speculate on this, and Terri did not move the family court to make additional findings as she had with the court's order of July 8, 2008. Thus, we are precluded from further review.

Regarding the arrears, the family court's ruling is also conclusive. And, as Terri points out in her brief, "[s]ince the court provided no analysis nor spreadsheet supporting its decision to reduce the Judgment by more than $5,000 (compare this Order to the September 22, 2008 Order), it is difficult to scrutinize calculations made by the trial court." We agree. However, it was incumbent on Terri to move the family court for additional findings, and her failure to do so is fatal to this argument.

Terri also argues that the family court erred in denying her request for prejudgment interest and attorneys' fees.[5] However, the family court did not include any language in its order regarding either. Accordingly, it was incumbent upon Terri to timely file a motion under CR 52.02 or 59.05 when the family court

[5] John argues that Terri did not request prejudgment interest and attorneys' fees. But in her brief before the family court, she clearly asked for both.

failed to rule on either request. *See e.g., Richardson v. Rees*, 283 S.W.3d 257, 265 (Ky. App. 2009); *Kentucky Farm Bureau Ins. Co. v. Gearhart*, 853 S.W.2d 907, 910 (Ky. App. 1993) (citing *Whittenberg Engineering & Construction Company v. Liberty Mutual Insurance Company*, 390 S.W.2d 877, 884 (Ky. 1965)). Having failed to so move, Terri did not preserve this issue and is therefore precluded from seeking relief from this Court pursuant to CR 52.04. *See id*.

ALL CONCUR.

BRIEF FOR APPELLANT:

Douglas E. Miller
Radcliff, Kentucky

BRIEF FOR APPELLEE:

Dawn Blair
Elizabethtown, Kentucky