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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000615-MR

CHERRYL KIRILENKO

APPELLANT

v. APPEAL FROM BOYLE CIRCUIT COURT
HONORABLE DOUGLAS BRUCE PETRIE, JUDGE
ACTION NO. 10-CI-00518

KENNETH KIRILENKO

APPELLEE

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: KRAMER, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Cheryl Kirilenko appeals from a judgment of the Boyle Circuit Court in a matter involving the dissolution of her marriage to Kenneth Kirilenko. Cheryl argues that the trial court erred in applying Kentucky law to characterize Kenneth's Connecticut state disability retirement benefits as his non-marital property. Rather, she argues that Connecticut law applies to determine the divisibility of those benefits, and that those benefits may be marital under

Connecticut law. We agree with Cherryl that, under the particular facts of this case, Connecticut has the most significant relationship to the asset in question. Consequently, we reverse the trial court's judgment and remand for additional findings of fact and conclusions of law concerning the divisibility of those benefits under Connecticut law.

The relevant facts of this matter are not in dispute. Cherryl and Kenneth Kirilenko were married on June 7, 1986 in Phoenix, Arizona. Following their marriage, they resided in the State of Connecticut, where Kenneth worked as an employee of that state. In 2000, Cherryl relocated to Kentucky for employment reasons, while Kenneth remained in Connecticut. On July 1, 2001, Kenneth retired and began receiving disability retirement benefits from the Connecticut State Employees Retirement System (SERS). Kenneth subsequently moved to Kentucky.

The parties separated in 2004, but Cherryl did not file a petition for dissolution of the marriage until 2010. They ultimately resolved all of the issues relating to division of property except for Kenneth's disability retirement benefits. Cherryl argued that the benefits were subject to division as marital property under Connecticut law; while Kenneth argued that any future disability benefit payments are non-marital property under Kentucky law. In an order entered on March 27, 2014, the trial court agreed with Kenneth and awarded all future disability retirement payments to him as his non-marital property. This appeal followed.

The sole question on appeal is whether the trial court properly applied Kentucky law over Connecticut law to characterize Kenneth's disability retirement plan as non-marital property. Since this involves a matter of law, our review is *de novo* and without deference to the trial court's determination. *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 810 (Ky. 2004). Cherryl relies on Connecticut authority as holding that disability retirement benefits are marital property to the extent that the employee's right to receive those benefits vested during the marriage. *Mickey v. Mickey*, 974 A.2d 641 (Conn. 2009). However, under Kentucky law pension and retirement benefits are marital to the extent that they were accumulated during the marriage. *Holman v. Holman*, 84 S.W.3d 903, 908 (Ky. 2002). On the other hand, Kentucky treats disability benefits as income replacement in the event of the employee's disability. "Since the future income of each spouse is not classified as marital property, disability benefits which replace future income should not be classified as marital property." *Id.*

The trial court found that, absent an agreement to the contrary, the law of the marital domicile applies in dissolution of marriage proceedings. *Fehr v. Fehr*, 284 S.W.3d 149, 153 (Ky. App. 2008), *citing Rowley v. Lampe*, 331 S.W.2d 887 (Ky. 1960). The trial court found no evidence that the parties had agreed to apply Connecticut law to Kenneth's disability retirement. Furthermore, the court noted that both parties were domiciled in Kentucky at the time Cherryl filed the dissolution petition. Therefore, the trial court found that it must apply Kentucky law to the characterization and division of Kenneth's disability benefits.

Cherryl argues that the applicable law should be determined under the standards set out in the *Restatement (Second) of Conflict of Laws* (1971). In particular, Section 258 of the *Restatement* provides:

(1) The interest of a spouse in a movable acquired by the other spouse during the marriage is determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the movable under the principles stated in § 6.

(2) In the absence of an effective choice of law by the spouses, greater weight will usually be given to the state where the spouses were domiciled at the time the movable was acquired than to any other contact in determining the state of the applicable law.

In addition, Section 259 of Restatement provides:

A marital property interest in a chattel, or right embodied in a document, which has been acquired by either or both of the spouses, is not affected by the mere removal of the chattel or document to a second state, whether or not this removal is accompanied by a change of domicile to the other state on the part of one or both of the spouses. The interest, however, may be affected by dealings with the chattel or document in the second state.

Applying these standards, Cherryl points to a number of factors which support applying Connecticut law to Kenneth's disability retirement benefits.

Kenneth accrued the benefits under the SERS plan while a Connecticut state employee. He became disabled while living and working in Connecticut. And he was awarded disability under the provisions of the Connecticut SERS plan.

Cherryl also points out that Kenneth chose the 50% spouse payment option with her designated as a contingent annuitant. Since Kenneth is already receiving

benefit payments, Cheryl states that neither the payment option nor the designation of the contingent annuitant can be changed under Connecticut law. Cheryl argues that the parties' move to Kentucky should not alter their respective rights in the SERS plan. Rather, she takes the position that Connecticut law has the most significant connection to Kenneth's disability retirement benefits.

In rejecting the *Restatement* approach, the trial court observed that, while Kentucky has traditionally followed the *Restatement of Conflict of Laws* in such matters, we have not wholly adopted the *Restatement* approach for all conflict issues. *Saleba v. Schrand*, 300 S.W.3d 177, 182 n.2 (Ky. 2009). In light of the Kentucky authority regarding choice of law in dissolution matters, the trial court concluded that the *Restatement's* approach could not be applied in this case. We agree with the trial court that the decisions in *Fehr* and *Rowley* have been cited broadly for the principle that the applicable law is to be determined by the parties' domicile at the time the petition was filed. *See e.g., Cardi v. Cardi*, No. 2009-CA-001965-MR, 2011 WL 5419688, at 10 (Ky. App. 2011). However, both cases involved much different questions.

In *Fehr*, the primary question concerned whether a Kentucky trial court has jurisdiction to decide the parties' marital interests in real property located in another state. This Court concluded that the trial court had jurisdiction to determine the parties' respective interests, but not to affect title to such real property. *Fehr*, 284 S.W.3d at 152-53. This Court also found that, since both parties remained domiciled in Kentucky throughout the marriage, their interests in

the property must be determined under Kentucky law. *Id.* at 153. In contrast, the current case does not involve interests in real property located outside of Kentucky. In addition, Kenneth's right to receive disability benefits accrued while the parties were domiciled in Connecticut.

Similarly, the former Court of Appeals in *Rowley* focused on the parties' domicile to determine the applicable law relating to grounds for divorce. The question in *Rowley* concerned whether a Kentucky court could grant a divorce based upon conduct which was a legal cause for divorce in Kentucky, but was not cause for divorce in the state where the conduct occurred. *Rowley*, 331 S.W.2d at 888-90. The Court concluded that Kentucky law must apply because the petitioner was domiciled in Kentucky when she filed the action. Consequently, the Court determined that, under Kentucky law, it was not necessary that the petitioner have been a resident of Kentucky at the time the conduct occurred in order for a divorce to be granted. *Id.* at 890-91. The matters involving the characterization and division of property are significantly different from the jurisdictional issue addressed in *Rowley*.

Kentucky has never explicitly adopted the *Restatement* approach set out in §§ 258 and 259 for matters involving the characterization and distribution of property in a dissolution action. However, the Kentucky Supreme Court has adopted the "most significant relationship" test articulated in § 188 of the *Restatement (Second) of Conflict of Laws* for tort and contract disputes. *Schnuerle v. Insight Commc'ns Co., L.P.*, 376 S.W.3d 561, 566-67 (Ky. 2012); *Saleba*, 300

S.W.3d at 181. But while the *Restatement's* “most significant relationship” test may not be appropriate for all personal property and interests acquired during the marriage, we conclude that it is applicable to the SERS plan disability retirement benefits at issue in the current case.

As noted above, Kenneth’s right to receive disability benefits is contractual based upon a statutorily created retirement plan. His right to receive those benefits accrued in Connecticut, and the benefits are payable pursuant to Connecticut law. Therefore, we conclude that Connecticut has the most significant relationship to that asset, and consequently, the characterization and distribution of those benefits should be determined under Connecticut law.

Since the benefits accrued and vested during the marriage, Kenneth has the burden to establish that his disability retirement is non-marital under Connecticut law. *See Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). But contrary to Cheryl’s argument, the Connecticut court in *Mickey* did not hold that SERS disability retirement is always divisible as marital property. Rather, the Supreme Court of Connecticut held that such benefits are divisible as marital property to the extent that they are attributable to the employee’s actual years of service, but are non-marital to the extent that they have been enhanced and accelerated as a result of the employee’s disability. *Mickey*, 974 A.2d at 663.¹

¹ This approach is similar to the situation presented in *Bailey v. Bailey*, 399 S.W.3d 797 (Ky. App. 2013), where the disability benefits converted to regular pension benefits when the employee reached retirement age. Since such pension benefits are marital, this Court concluded that the benefits would be divisible as marital property at the point of conversion. *Id.* at 802-03.

The record does not clearly establish the extent, nature and terms of Kenneth's disability retirement benefits. There is no evidence whether the benefits include a retirement component, or whether they are subject to conversion to retirement benefits at some point in the future. Likewise, the record does not clearly show that the SERS plan administrator would honor a Qualified Domestic Relations Order (QDRO) purporting to divide the benefits. Since these involve questions of fact, the parties must address these issues to the trial court. We merely hold that the trial court must determine the characterization and divisibility of the benefits based upon Connecticut law.

Accordingly, the judgment of the Boyle Circuit Court is reversed and this matter is remanded for additional findings of fact and conclusions of law concerning the characterization and division of Kenneth's disability benefits under Connecticut law.

ALL CONCUR.

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