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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-001037-MR

SHANNON DOYLE-FORTWENGLER APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 09-CI-500277

JEFFREY B. FORTWENGLER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, D. LAMBERT, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Shannon Doyle-Fortwengler appeals from an order of the Jefferson Family Court determining the parties' respective interests in a 401(k) account. We affirm.

Shannon and Jeffrey Fortwengler married in July 2002. Shannon was a homemaker and primary caregiver for the couple's five children. When the

parties married, Jeffrey was employed by Brown and Williamson, which provided a 401(k) plan. At the time of the marriage, the account balance was $65,422.74. In 2003, Brown and Williamson was purchased by Reynolds American and Jeffrey's Brown and Williamson 401(k) rolled into a Reynolds American 401(k) plan. Jeffrey lost his job with Reynolds American in 2005, but later found employment with Kindred Health Care.

The parties separated in late 2008. The petition for dissolution was filed in early 2009, and the decree dissolving the marriage was entered in late 2009. At the time of the entry of the decree, the value of the 401(k) was $151,260.

Several financial issues were reserved for trial, after which the family court entered findings of fact and conclusions of law. The family court found the marital contributions to the 401(k) totaled $29,600.00. The family court awarded Jeffrey $127,663.50, reflecting the total of his nonmarital interest, his share of the growth, and his one-half share of the marital interest. Shannon was awarded $23,596.50, reflecting her one-half share in marital contributions and growth.

An appeal followed. Because the testimony as to the value of the marital contribution was based solely on Jeffrey's employee contributions, this Court reversed and remanded for additional evidence, but did not direct the family court to use a particular method to calculate the parties' respective interests. *Fortwengler v. Fortwengler*, 2010-CA-001315-MR, 2012 WL 4464435 (Ky.App. 2012).

On remand, the trial court conducted a hearing. During the hearing, the parties introduced the 401(k) quarterly statements from July 2002 through September 2005. In addition, and over Shannon's objection, Jeffrey introduced demonstrative exhibits he prepared averaging the gains and losses during the marriage to determine the increase in growth of the 401(k).

The family court found that Jeffrey provided consistent, reliable answers to questions from counsel for each party and explained how the value of the account fluctuated on a daily basis. It further found that Jeffrey's demonstrative exhibit was supported by the evidence and Jeffrey satisfied his burden to prove the existence of his nonmarital interest and its growth. The family court found the value of Jeffrey's nonmarital interest was $104,282.19 and the marital interest in the 401(k) was $46,928.30, which it evenly divided. Shannon appealed.

Shannon contends that the record does not support the family court's findings regarding the parties' marital and nonmarital interests in the 401(k). Her primary argument is that the family court erred when it calculated the parties' respective interests in the 401(k) based on the average growth rate rather than the 401(k) quarterly statements.

In her appellate reply brief, Shannon contends the family court could not rely on Jeffrey's average growth rate method of calculation because it did not rely on that method in issuing its first order. She argues the law-of-the-case doctrine mandates her desired result.

The law-of-the-case doctrine provides:

> When an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal.

Siler v. Williford, 375 S.W.2d 262, 263 (Ky. 1964). As stated in *H.R. ex rel. Taylor v. Revlett*, 998 S.W.2d 778, 780 (Ky.App. 1999), "[t]he crucial requirement is that the appellate court enters a final decision on the question rather than merely commenting on the issue." This Court did not comment on how to calculate the parties' interest in the 401(k). There was no discussion.

Additionally, the doctrine has no application to questions of fact. It applies to the determination of questions of law. "[I]f an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case." *Inman v. Inman*, 648 S.W.2d 847, 849 (Ky. 1982). However, if on remand there was a change in issues or evidence, the doctrine does not apply. *Id*.

This Court remanded the case to the family court for a new hearing on the issue of the parties' marital and nonmarital interests in the 401(k). Following our directive, the family court conducted that hearing and made the appropriate factual findings. The law-of-the-case doctrine has no application.

When awarding property in a dissolution of marriage proceeding, the court is required to first categorize the property as either nonmarital or marital

under the framework provided in Kentucky Revised Statutes (KRS) 403.190. *Holman v. Holman*, 84 S.W.3d 903, 907 (Ky. 2002). After the property is properly categorized, the court is required to allocate the nonmarital property to its owner. *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001). Finally, the court must equitably divide the marital property between the parties. *Id.*

If the same item of property consists of marital and nonmarital components, a trial court "must determine the parties' separate nonmarital and marital interests in the property on the basis of the evidence before the court." *Id.* When nonmarital property increases in value as the result of "joint efforts of the parties," the increase in value is presumed to be marital property. *Id.* at 910. When the value of nonmarital property "increases after marriage due to general economic conditions, such increase is not martial property[.]" *Id.* "[F]actual findings underpinning the determination of whether [property] is marital or nonmarital are entitled to deference and, consequently, should be reviewed under the clearly erroneous standard." *Smith v. Smith*, 235 S.W.3d 1, 6-7 (Ky.App. 2006).

It is undisputed that the funds in the 401(k) as of the date of the parties' marriage were Jeffrey's nonmarital property. The increase in value is due to the contributions by Jeffrey and his employer in addition to passive accrual of investment income due to economic conditions. The trial court's finding that the balance of the account at the time of marriage is a nonmarital asset was supported by the evidence, as was the finding that the contributions to the account made

during the parties' marriage were marital property. The passive growth of the funds in the account is both marital and nonmarital.

Shannon's arguments concern the method used to calculate the parties' respective interests in the 401(k). She argues the family court improperly used Jeffrey's method by adopting the calculations contained in his demonstrative exhibits, which used an average growth rate rather than the quarterly statements.

The family court did not make a specific finding that it relied exclusively on Jeffrey's demonstrative evidence. It found that the "demonstrative documents are supported by the evidence contained in the record." Shannon did not request such a finding pursuant to Kentucky Rules of Civil Procedure (CR) 52.02 or 52.04. As stated in *Cherry v. Cherry,* 634 S.W.2d 423, 425 (Ky. 2004): "The failure, if there was a failure, on the part of the trial judge to make adequate findings of fact was not brought to his attention as required by CR 52.02 or CR 52.04; consequently, it is waived." Although the family court admitted Jeffrey's demonstrative evidence, it also reviewed the entire record, including the quarterly statements. Therefore, it cannot be said that the family court definitively relied exclusively on Jeffrey's demonstrative evidence.

Moreover, the decision to admit Jeffrey's demonstrative evidence was within the sound discretion of the family court and will not be reversed absent a showing an abuse of that discretion. *Young v. J.B. Hunt Transp., Inc.,* 781 S.W.2d 503, 509 (Ky. 1989). The use of charts is "common practice" to help the finder of fact have a better understanding of the witness's oral testimony. *Meglemry v.*

Bruner, 344 S.W.2d 808, 809 (Ky. 1961), *overruled on other grounds by Nolan v. Spears*, 432 S.W.2d 425 (Ky. 1968). The fact that Jeffrey prepared the documents goes to the weight, rather than the admissibility of the documents.

The value of the marital and nonmarital interests of the parties was a factual finding subject to the clearly erroneous standard of review. *Smith*, 235 S.W.3d at 6-7. Although Shannon suggests that Jeffrey's demonstrative evidence was inaccurate when compared to the quarterly statements, she has not given a specific sum that would result if a different method was used.

Shannon points out that the family court found a marital interest of $46,928.30, a finding which she maintains is clearly erroneous because the 401(k) records show a total marital contribution of $53,225.24. The fallacy in Shannon's argument is that regardless of the marital contribution, the family court was required to divide the existing marital property, not the amount invested over the marriage. The evidence demonstrated that the value of the 401(k) fluctuated over time depending on the financial market and, therefore, the amount of the marital contribution is not determinative.

Based on the foregoing, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Bonita K. Baker Louisville, Kentucky	William D. Tingley Louisville, Kentucky