

Third District Court of Appeal

State of Florida

Opinion filed October 10, 2019.
Not final until disposition of timely filed motion for rehearing.

No. 3D17-49
Lower Tribunal No. 09-2379

Janet Ray Weininger,
Appellant,

vs.

Michael Joe Weininger,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Rosa C. Figarola,
Judge.

ADR Miami LLC and Juan Ramirez, Jr.; Zumpano Patricios & Winker, P.A.
and Leon N. Patricios and Heather K. Stoessel, for appellant.

Gilbert C. Betz, P.A. and Gilbert C. Betz, for appellee.

Before EMAS, C.J., and FERNANDEZ and HENDON¹, JJ.

PER CURIAM.

¹ Judge Hendon did not participate in oral argument.

The former wife appeals the trial court's final judgment of dissolution of marriage. Specifically, the former wife challenges the trial court's refusal to award permanent alimony and the court's distribution of marital assets. For the reasons articulated below, we reverse for equitable distribution of the USAA Subscriber account and affirm in all other respects.

BACKGROUND

The parties, Janet Ray Weininger ("Janet") and Michael J. Weininger ("Michael"), were married in February 1977. They had two children – Peter and Christina. Both children were adults when the parties filed for divorce on January 28, 2009.

Throughout the marriage, Michael was the family's primary breadwinner. Michael was a pilot in the Air Force when the parties met. When he retired from active duty, he continued to fly for the Reserves, and began flying as a pilot for Delta Airlines. He later retired from the Reserves and worked only for Delta. Janet worked sporadically and/or part-time.² Following the birth of their first child, the parties agreed that Janet would be the homemaker because Michael's career required significant travel.

² Janet sold furniture out of catalogs from 1978 to 1980. When Michael transitioned to the Reserves towards the end of 1987, Janet obtained her real estate license and sold model homes on the weekends for approximately one year.

The family lived comfortably on Michael's income. They sent their children to private schools, and they paid for the children's college education.³

The couple acquired several properties over the course of their marriage. They purchased the family home in Palmetto Bay, two rental properties in Tampa, and land in Alabama. The properties were purchased and maintained with funds from the couple's joint accounts. The rental income, along with Michael's salary and bonuses, were deposited in joint accounts.

Michael acquired several retirement accounts and insurance policies throughout his career with the Air Force, the Reserves, and Delta Airlines. Michael began receiving military retirement benefits in December of 2012, at the age of 60. His military retirement benefits were not shared with Janet. Michael also acquired the following during the marriage: a Charles Schwab investment account; a Delta Pilots Savings Plan and a Delta Pilots Defined Contribution Plan ("Delta Retirement"); and a USAA Subscriber's Account.

Janet also acquired her own funds during the marriage. She maintained an individual IRA, and also received approximately \$9 million from a lawsuit stemming from the capture and death of her father during the Bay of Pigs invasion. Janet established the Wings of Valor trust ("the Trust") with the lawsuit proceeds and

³ Michael's understanding was that his obligation ended when each child obtained a four-year college degree. Janet, however, maintains that there was never any limitation placed on the children's education and living expenses.

deposited approximately \$8 million therein – naming her children, their spouses, her grandchildren and herself as beneficiaries. In 2012, the Trust had a gross declared value of \$9,488,494.00. The record reflects that Janet maintained approximately \$1 million from the award and used the funds to set up the Trust.

Janet testified that she is only permitted to use Trust distributions for educational or medical expenses. Thus, any funds disbursed for purposes unrelated to the same would require Janet to reimburse the Trust. Here, Janet testified that she requested, and received, Trust funds to cover ordinary living expenses.

Following allegations of infidelity, the parties separated and Janet filed for divorce. By that time, Michael had already moved out of the marital home and into an apartment in Texas with his mistress. While the parties were separated, Michael continued to pay the mortgage, taxes and insurance on the properties, with the exception of the Alabama lot. Janet covered the maintenance and repair expenses, and she received the rental income generated therefrom. The parties agreed to divide the real properties as marital assets, and both claimed credits for their respective payments.

The major issues in the trial court were Janet's right to alimony, the equitable distribution of assets, and Michael's dissipation of the same. Specifically, Janet argued that Michael dissipated marital assets on, among other things, his mistress and her son and failed to provide for the family – causing Janet to exhaust her

personal funds. Janet also claimed that, due to the long-term nature of the marriage and the disparity between the parties' income, she was entitled to permanent alimony. Michael, on the other hand, contended Janet voluntarily depleted her personal income to support their adult children and spent more than reasonably required to maintain the marital home. Michael further argued that his forced retirement, and the equitable distribution of his pension funds, placed both parties in the same financial position and eliminated the need for alimony.

Following a bench trial, the court found that Janet was financially able to meet her needs and necessities, and therefore, denied her request for alimony. The court further found that Michael had not dissipated the Charles Schwab Account during the pendency of the divorce proceedings and that the contributions made by Michael, and Delta, to the Delta Retirement Account during the separation were nonmarital. Additionally, the court determined that the value of the furniture that Michael purchased for the former marital home was \$30,000, and awarded Michael a credit for the same. Finally, the court determined that the USAA Subscriber Account was not subject to equitable distribution. This appeal followed.

STANDARD OF REVIEW

“A trial court’s decision to either award or deny alimony will not be disturbed on appeal unless the record demonstrates that the trial court abused its discretion.” Williams v. Williams, 904 So. 2d 488, 491 (Fla. 3d DCA 2005). Similarly, a trial

court's ruling on equitable distribution is reviewed for an abuse of discretion. Rodriguez v. Rodriguez, 994 So. 2d 1157, 1159 (Fla. 3d DCA 2008).

ANALYSIS

The issues on appeal are whether the trial court erred in: (1) denying Janet permanent alimony, (2) finding that Michael did not dissipate the Charles Schwab Account, (3) valuing the Delta Retirement account as of the date the parties filed for divorce, (4) relying on Michael's testimony to award him a credit for furniture, and (5) failing to distribute the USAA Subscriber's Account between the parties.

Alimony

Janet contends that the court abused its discretion in denying her alimony. Consistent with the record evidence and for the following reasons, we find no error.

“In a proceeding for dissolution of marriage, the court may grant alimony to either party” § 61.08(1), Fla. Stat. (2016). “In determining whether to award alimony . . . , the court shall first make a specific factual determination as to whether either party has an actual need for alimony . . . and whether either party has the ability to pay alimony” § 61.08(2). The relevant statute sets forth factors the court must consider in determining whether to award alimony. Id. These factors include: the standard of living established during the marriage; the duration of the marriage; and the financial resources of the parties, inclusive of assets distributed to each at dissolution. Id.

“Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage.” § 61.08(8), Fla. Stat. (2016). In the case of a long-term marriage, the courts recognize an initial rebuttable presumption in favor of awarding permanent alimony. Alcantara v. Alcantara, 15 So. 3d 844, 845 (citing Schlagel v. Schlagel, 973 So. 2d 672, 676 (Fla. 2d DCA 2008)); § 61.08(4), Fla. Stat. (2016) (“[T]here is a rebuttable presumption that a . . . long-term marriage is a marriage having a duration of 17 years or greater.”). “[T]he party seeking alimony . . . ha[s] the burden to prove her financial need and the husband’s ability to pay.” Demont v. Demont, 67 So. 3d 1096, 1101 (Fla. 1st DCA 2011) (citing Esaw v. Esaw, 965 So. 2d 1261, 1266-67 (Fla. 2d DCA 2007)). “A trial court can overcome [the presumption] by making detailed findings of fact regarding a spouse's need and the other spouse's ability to pay, as well as by considering all the relevant statutory factors listed in section 61.08(2).” Hua v. Tsung, 222 So. 3d 584, 588 (Fla. 4th DCA 2017); see also Fitchel v. Fitchel, 141 So. 3d 593, 595 (Fla. 4th DCA 2014).

Here, the trial court acknowledged that this was a long-term marriage and began its analysis under the assumption that Janet was entitled to permanent

alimony.⁴ However, the trial court ultimately denied Janet’s request after concluding that: (1) Janet had significant income from the Trust; (2) she was going to receive a significant amount of money from the equitable distribution; and (3) she was able bodied, educated, and capable of working. By contrast, Michael lacked the ability to pay because he was forced to retire. In sum, the trial court found that Janet failed to prove an actual need for alimony.

While Janet testified that she had restricted access to the Trust’s funds, and that the Trust loaned her money during the separation to support herself, she failed to provide any supporting documents and her testimony was inconsistent and incomplete. In fact, the trial court found her testimony to be “untenable.” Consistent with the record, we find no abuse of discretion, and accordingly, we do not disturb the trial court’s denial of alimony.

Property Distribution

Schwab Account

Marital assets should be distributed equally between the parties, unless there is a justification, such as dissipation, for an unequal distribution. § 61.075(1)(a)-(j), Fla. Stat. (2016); see Rabbath v. Farid, 4 So. 3d 778, 780 (Fla. 1st DCA 2009)

⁴ Although the trial court did not expressly state that Janet was entitled to this presumption, the section of the trial court’s order analyzing the request for alimony begins with, “[n]o award for permanent alimony is made **although this is a long term marriage . . .**” (emphasis added).

(defining dissipation as “where one spouse uses marital funds for his or her own benefit and for a purpose unrelated to the marriage at a time when the marriage is undergoing an irreconcilable breakdown”). “The evidence must support and the trial court must make a specific finding that a party engaged in intentional misconduct that resulted in the dissipation of a marital asset during the dissolution proceedings before the trial court can include that asset in the equitable distribution scheme.” Tradler v. Tradler, 100 So. 3d 735, 740 (Fla. 2d DCA 2012) (citing Roth v. Roth, 973 So. 2d 580 (Fla. 2d DCA 2008)).

Here, Janet alleges that the Schwab Account constituted marital funds and Michael dissipated the same. Michael admits to using the funds in the Schwab Account to pay for his living expenses while the parties were separated. These expenses include, among others, attorney’s fees, federal income taxes, and furniture and household goods for his new house. The trial court found that having utilized his Delta salary to pay the mortgages on the rental properties, Michael’s only source of funds to support himself was the Schwab Account. Under these circumstances, Michael justifiably used the Schwab Account to pay for his living expenses. See Lopez v. Lopez, 135 So. 3d 326, 329 (Fla. 5th DCA 2013) (“One party’s use of an asset out of necessity and for reasonable living expenses does not justify an award of a depleted asset absent evidence of misconduct.”) (internal citations omitted).

Because we find that Michael's expenses were logically justified, we find no error by the trial court.

Along the same lines, we find no prejudice to Janet in the trial court's denial of her request to depose Michael's mistress as to the Schwab Account. The record shows that Janet possessed a detailed accounting of Michael's withdrawals from the Schwab Account. Therefore, the mistress' testimony would not have revealed additional information about Michael's spending.

Delta Retirement

As noted above, the trial court valued the Delta Retirement account as of the day the parties filed for divorce, over Janet's objection. Upon review, we find no error.

Courts have broad discretion to value marital assets using a date that is fair and equitable under the circumstances. § 61.075(7), Fla. Stat. (2016); see also Perimutter v. Perimutter, 523 So. 2d 594, 596 (Fla. 4th DCA 1987). As such, courts generally avoid selecting a date that would result in distributing an increase in property value that was "due to nonmarital efforts." Jahnke v. Jahnke, 804 So. 2d 513, 516 (Fla. 3d DCA 2001).

Here, the pre-filing contributions to the Delta Retirement account were marital assets because the contributions were attributable to Janet's efforts to advance Michael's career. Conversely, the post-filing contributions were nonmarital because

Michael earned the contributions by continuing to work for Delta during the nine years of protracted divorce proceedings while the parties lived apart. For these reasons, we find that the trial court properly utilized the date of the filing to value the Delta Retirement account.

Credits for Rental Properties

As previously noted, Michael continued to make the mortgage payments on the parties' two rental properties after Janet filed for divorce, while Janet retained the rental income⁵ and claimed 50% of the mortgage payments on her tax returns. The trial court awarded Michael a 50% credit for these mortgage payments. Janet claims that this award was in error. We disagree.

“Reimbursement or credit for a party's payment of marital property-related expenses during separation is a matter of judicial discretion in light of all relevant circumstances.” Stock v. Stock, 693 So. 2d 1080, 1086 (Fla. 2d DCA 1997) (citing Knecht v. Knecht, 629 So. 2d 883, 888 (Fla. 3d DCA 1993) (“In our view, Kelly clearly provides the trial court the latitude to allocate the parties' liabilities and award the parties credits so as to achieve an equitable decree.”) (citing Kelly v. Kelly, 583 So. 2d 667, 668 (Fla. 1991))). Here, Janet benefitted from the mortgage payments made by Michael. The trial court was well within its discretion to offset Janet’s

⁵ Janet was solely responsible for maintaining and repairing the former marital home and rental properties, and she received a credit for the full amount of funds spent on the maintenance of the properties.

benefits by awarding Michael a credit for these payments. Therefore, we affirm the trial court's credit award.

Furniture

Michael received a credit for furniture that he purchased for the marital home. Janet argued that the trial court should have reduced the furniture's value based on the value of furniture that Michael took possession of during the separation. "A trial judge has no duty . . . to make findings of value if the parties have not presented any evidence on that issue." Aguirre v. Aguirre, 985 So. 2d 1203, 1207 (Fla. 4th DCA 2008). The only evidence presented at trial regarding the value of the furniture was Michael's testimony. Since there was no evidence showing a contrary value, the trial court properly relied on his testimony. See Marquez v. Lopez, 187 So. 3d 335, 337 (Fla. 4th DCA 2016) ("In determining the value of assets, a trial court may rely on one spouse's testimony where neither presents expert testimony.") (citations omitted).

Here, Janet failed to produce a figure that the trial court could have relied on to reduce the value of the furniture, and the trial court could not have reduced the value based on its own speculation. See Bardowell v. Bardowell, 975 So. 2d 628, 629 (Fla. 4th DCA 2008) ("Distribution of marital assets . . . must be supported by factual findings in the judgment or order based on competent substantial evidence.").

Because Janet failed to provide contrary evidence refuting the value of the furniture, we affirm the trial court's valuation of the furniture.

USAA Subscriber's Account

During their marriage, the parties insured their vehicles with USAA and Michael paid the insurance premiums. At all times relevant, their USAA Subscriber account was funded with distributions from said automobile insurance policy. In this connection, USAA makes yearly profit distributions into the Subscriber's account based on the premiums collected and the claims paid. Here, Michael testified that he had no access to the funds and that the proceeds would simply pass to his estate upon his death. Michael conceded that a portion of the account constituted marital property. However, when Janet requested equitable distribution of same, Michael argued that the account was a contingent asset and thus, not subject to equitable distribution. The trial court agreed.

Upon review, we find that the trial court erred by failing to equitably distribute the account funds. The fact that the account funds could be distributed upon Michael's death, does not change their nature as a marital asset. Janet should have received a credit for her marital portion of the account. Accordingly, we remand this matter for the equitable distribution of the account consistent with this opinion. The trial court's findings otherwise are affirmed.

Affirmed in part; reversed in part.