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Commonwealth Of Kentucky

Court Of Appeals

NOS. 96-CA-001919-MR AND 96-CA-002024-MR

ROBERT J. YELTON, SR. — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM PENDLETON CIRCUIT COURT
HONORABLE ROBERT I. GALLENSTEIN, SPECIAL JUDGE
ACTION NO. 94-CI-000145

NANCY A. YELTON — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

* * * * * * * * *

BEFORE: GUIDUGLI, JOHNSON and SCHRODER, Judges.

JOHNSON, JUDGE: Robert J. Yelton, Sr. (Bob) appeals and Nancy A. Yelton (Nancy) cross-appeals from the findings of fact, conclusions of law and final judgment entered by the Pendleton Circuit Court on March 13, 1996, that resolved all issues concerning the parties' marital and non-marital property. We affirm.

Bob and Nancy were married on June 4, 1988, and separated on July 27, 1994. Bob filed a petition for the dissolution of the parties' marriage on October 25, 1994. The parties agreed to dismiss the dissolution action on November 3, 1994; however, Bob reopened the matter two months later in January 1995. Bob filed a motion to bifurcate the issues of dissolution and division of property. Nancy objected and moved for temporary maintenance. The motion to bifurcate was denied.

On April 5, 1995, the trial court ordered the parties to serve pre-trial memorandum on each other regarding the issues of property division and maintenance and outlining their respective positions. Following the service of pretrial memoranda, the parties and their attorneys were ordered to meet for the purpose of preparing and filing a joint trial memorandum.

On May 5, 1995, Bob was ordered to pay Nancy $1,200 per month in temporary maintenance and the matter was set for a final hearing on all contested issues on September 6, 1995. Nancy's motion to amend the order to allow for retroactive payment of maintenance was denied. On August 18, 1995, Nancy moved that the case be removed from the court's trial docket and sought leave to depose Bob's expert witnesses. The motion was granted. However, the trial court allowed Bob to proceed on the issue of the dissolution of marriage. A decree of dissolution was entered on September 16, 1995, which reserved all other issues for later adjudication. It was further ordered that the marital estate would be determined as of September 6, 1995, the original hearing

date.

At the time of the final hearing in January 1996, Bob was sixty (60) years old and had worked as an insurance agent in Pendleton County under a contract with State Farm Insurance Companies (State Farm) since 1974. Nancy was forty-six (46) years old, and although she had a license to practice law in Kentucky, she had not been employed since December 1991. As she anticipated, Nancy became employed in February 1996 for the Office of the Attorney General in Frankfort, and waived any claim to permanent maintenance.

In the final judgment, the trial court assigned assets valued at $138,764.58 to Bob as his non-marital property, including $80,210 in pension benefits with State Farm. Nancy was assigned non-marital property valued at $9,827.84. Nancy was assigned debts of $11,950.68; Robert was ordered to be responsible for debts of $4,664.22. The marital estate, valued at $469,404.22, was divided equally. Further facts will be supplied as necessary for an understanding of the issues raised in this appeal and cross-appeal.

In his appeal, Bob argues that the trial court erred in its treatment of his termination pay to which he is entitled pursuant to his contract with State Farm. The trial court found the termination pay to be in the nature of a pension and determined the increase in value of the termination pay during the marriage to be $144,635, a figure supported by the testimony of Nancy's expert, William B. Donlin (Donlin).

Bob argues that the termination pay, which he will receive when his relationship with State Farm is terminated by either party for any reason, is too speculative to be considered a divisible asset for the following reasons: (1) the payments are subject to future contract changes and the solvency of State Farm; (2) the amount depends on how well Bob does the last twelve months before he retires and how well his successor maintains the policies in effect for an additional twelve months after his retirement; and (3) the amount of the payments depends upon how long Bob lives both before and after his retirement. He contends that this Court should follow the holding in Lawyer v. Lawyer, 702 S.W.2d 790 (Ark. 1986) We disagree.

The question of whether termination benefits are marital or non-marital property has been answered differently among the states. See Lawyer, supra (five-year termination payments "next to impossible" to place present value on); In re the Marriage of Skaden, 139 Cal.Rptr. 615, 566 P.2d 249 (1977) (termination benefits same kind of property interest as retirement pension); Mallett v. Mallett, 323 S.C. 141, 473 S.E.2d 804 (1996) (purpose of termination benefits is to replace commissions husband will earn after divorce action and therefore, non-marital); and In re the Marriage of Wade, 923 S.W.2d 735 (Tex.Ct.App.1996) (anticipated termination payments are based on "cumulative commissions" and are earned "in much the same manner as retirement benefits"). Although we may use foreign authority as a guideline in our decision-making, we are not bound to follow

these holdings. Paducah Area Public Library v. Terry, Ky., 655 S.W.2d 19, 24 (1983). However, we believe the holding in In re the Marriage of Wade, supra, to be helpful in addressing Bob's arguments concerning the speculative nature of the benefits:

> The right to the termination payments came into existence upon [the husband's] execution of the agency agreement on March 1, 1977, which was during the parties' marriage. The majority of the benefits reflected in the termination payments were earned by work he performed for State Farm throughout the entire marriage. Furthermore, the fact that the amount of the actual payments will be based on commissions received during a twelve-month period sometime after the dissolution of the marriage does not mean that the payments are separate property because . . . the commissions are cumulative over an agent's entire career.

Id. at 737 (footnote omitted).

There was similar conflict among the states on the issue of whether a noncontributory retirement/pension plan was marital or non-marital property. See Foster v. Foster, Ky. App., 589 S.W.2d 224 (1979), and the cases cited therein. In determining the noncontributory plan in that case to be marital, this Court held as follows:

> We feel that the direction of the Kentucky courts has been set by Beggs v. Beggs, Ky., 479 S.W.2d 598 (1972). Although that case concerned a contributory fund, in contrast to the noncontributory fund in the instant case, the vested rights, not the contribution of the teacher, were determinative. Even though this pension plan was noncontributory, it was a part of the consideration earned by the

> husband during marriage. In addition, and most importantly, it was vested so that the husband was entitled to receive monthly payments upon termination for any cause, with only the amount to be fixed.

Id. at 224 (emphases added). Bob's right to termination pay from State Farm is both vested and matured. It is this essential aspect of the termination pay that mandates its inclusion as property in the marital estate. Duncan v. Duncan, Ky. App., 724 S.W.2d 231, 232-233 (1987). For this reason, we believe the trial court properly included the increase in the value of the termination payments attributable to Bob's efforts during the marriage as part of the marital estate.

Bob attempts to persuade this Court that since the number of policies in effect at the time of the dissolution were "practically the same" as when the parties married, the entire termination pay should be considered as his non-marital property. He argues that any increase in the value of the termination pay is not due to the joint efforts of the parties during the marriage. This argument is absurd as the evidence showed that in any given year, Bob's policies turned over at the rate of 20%. If Bob had not expended any "efforts" during the marriage, the number of policies would have been near, if not at, zero, at the time of dissolution.

Bob also argues that the trial court erred in relying on Donlin's value of the termination pay. We find no error in this regard as Donlin's valuation was clearly based on the value

of the termination pay provided by State Farm for the years at issue.

Finally in this regard, Bob contends that the trial court erred in requiring immediate payment to Nancy for her share of this item of property. Clearly, whenever possible, it is preferable to make a clean division of property so the parties are "spared further entanglement." See Duncan v. Duncan, supra, at 233. The trial court has considerable discretion in this regard and considering the extent of marital and non-marital property Bob has available, we are unable to discern any abuse of the trial court's discretion in this regard.

In addition to the arguments concerning the termination pay, Bob has raised three other allegations of error. First, Bob contends that the trial court erred in including in the marital estate the sum of $6,280.87, which represents earnings during the marriage in the form of interest on funds deposited in an Individual Retirement Account (IRA). The IRA had a value of $4,470.61 at the time of the marriage. This was the sum assigned to Bob as his non-marital property. He insists that the increase in value is not due to the efforts of either party and under the holding in Daniels v. Daniels, Ky. App., 726 S.W.2d 705 (1986) (increase in value of stock purchased with non-marital property was non-marital), should have been treated by the trial court as his non-marital property.

This is not a novel argument. In Mercer v. Mercer, Ky., 836 S.W.2d 897 (1992), the case relied upon by the trial

court, our Supreme Court clearly recognized that "[i]nterest income paid to someone for the use of their money is not the equivalent of an appreciation in value of a capital asset." Id. at 899. Further, the Court held that "accumulated interest earned from nonmarital funds deposited in a savings account is income and is to be treated as marital property and should be appropriately divided between the parties." Id. at 900. See also Sousley v. Sousley, Ky., 614 S.W.2d 942 (1981). We perceive no significant difference between a savings account and the IRA at issue in this case--both are interest bearing assets--warranting a result different than that required by Mercer.

Next, Bob argues that the trial court erred in requiring him to pay Nancy cash for her half of a growth stock fund which had a marital balance of $30,261.26. Bob contends that the sale of the stock fund has tax consequences which will diminish the percentage of the funds he will realize. Again, as discussed in the context of the termination pay, we find no abuse of the trial court's discretion in this regard. The judgment does not require Bob to sell the asset, and nothing prevents him from paying Nancy's share from other personal funds.

Finally, Bob insists the trial court erred in making an equal division of the marital property. Both parties requested an award of more than half the marital estate: Bob argued he should get more than 66% as he made the greater financial contribution; Nancy argued she was entitled to a greater share as she had a significantly lower earning capacity, a significantly

smaller amount of non-marital property and because of her intangible contributions to the marriage. In making an equal division, the trial court set out the factors set forth in Kentucky Revised Statutes (KRS) 403.190(1) and made the following findings:

> 9. [Bob] contributed to the marriage by virtue of the fact that he was employed full-time throughout the marriage as an insurance agent earning income from $80,000.00 per year in the year of the marriage, to $150,000.00 per year in more recent years.
>
> 10. [Nancy] was employed as an attorney on a full-time basis for the first four years of the marriage. Throughout the marriage, she was also active in numerous community, political and charitable organizations.
>
> 11. The parties went through extensive efforts with fertility specialists and in-vitro fertilizations in an attempt to have children. None of those efforts were [sic] successful.
>
> 12. The marriage lasted for seven (7) years, during which time [Nancy] left the job market with [Bob's] prior knowledge and consent to pursue community and charitable activities and other interests of a purely personal nature.
>
> 13. This Court has accepted substantially as true the summaries of fact from the parties contained in their respective trial briefs relating to the contribution of each spouse. The Court heard the testimony of [Bob] and his witnesses on this issue.
>
> 14. [Bob's] nonmarital estate is significantly greater than [Nancy's] nonmarital estate.

> 15. [Bob's] earning capacity of approximately $140,000.00 per year is significantly greater than [Nancy's] earning capacity of approximately $40,000.00 per year.
>
> 16. It is clear that during this marriage both parties contributed significantly to the marital goals and objectives, and it would seem unfair and unjust to award a greater percentage of the marital property to either party. On the basis of the facts of this case outlined above, the Court finds tha[t] an equal division of marital property is just.

We have recited at length the trial court's findings and conclusions in this regard to dispel the notion that the trial court did not consider those factors set forth in KRS 403.190(1). It is abundantly clear that the trial court was aware of, and complied with, the statute's mandate. The trial court obviously considered the parties' respective contributions and needs. Nevertheless, Bob insists that the trial court did not give sufficient consideration to his greater financial contribution to the acquisition of the property and that it gave too much consideration to Nancy's contribution as a homemaker, particularly because Nancy did not bear any children. Further, Bob argues that the trial court erred in taking into consideration Nancy's community activities as homemaker services, as he contends the statute contemplates such services to include only "cooking, cleaning and working around the house."

We find Bob's arguments in this regard to be without any merit. It is settled that the trial court's findings will

not be disturbed unless clearly erroneous. Johnson v. Johnson, Ky. App., 564 S.W.2d 221, 222-223 (1978). The trial court has "wide discretion" in the division of marital property. Davis v. Davis, Ky., 777 S.W.2d 230, 233 (1989). While there is no presumption of equal division, see Herron v. Herron, 573 S.W.2d 342, 344 (1978), such a division will be upheld absent a showing of an abuse of discretion.

Not only are we convinced that the findings articulated by the trial court are supported by the evidence of record, but we believe that it did not err as a matter of law in considering the range of Nancy's involvement in the community in dividing the marital estate. Bob's limited interpretation of KRS 403.190 would require the trial court to penalize any spouse who volunteers his or her time to benefit the community and would preclude recognition of the types of intangible efforts (such as Nancy's performance as a "State Farm Wife") expended by a non-employed spouse.

However, even if Bob were correct, the fact that Nancy was primarily responsible for running the household, albeit with the help of a housekeeper one day every other week, and the fact that her post-decree financial situation is significantly weaker than Bob's, are sufficient facts to persuade this Court that the trial court did not abuse its discretion in dividing the property equally. Further, Bob's own manager testified that Nancy's involvement and visibility in the community were important to Bob's business.

The major contention in Nancy's cross-appeal concerns the trial court's failure to include in the marital estate any sum representing the increase in the value of Bob's business. Bob has been a sole proprietor selling insurance for State Farm for over twenty years. As the trial court found, Bob is a "captive" agent, and pursuant to his contract with State Farm cannot sell insurance other than that written by State Farm. State Farm owns Bob's customer list, policies, forms, manuals, and computer equipment. Bob cannot sell his contract with State Farm or appoint his replacement.

Both parties offered the testimony of experts on the issue of the value of the business and its increase during the marriage. Nancy's expert, Donlin, using a discounted cash flow or discounted earnings method, testified that the value of the business increased by $165,700 during the marriage. Bob's expert, Alan Motta, using the same method of valuation, testified that the value of the business had actually decreased from 1988, when the parties married, to 1995.

The trial court did include in the marital estate the increase in value of the real estate where the business is located but declined to treat the business as a marital asset as follows:

> While most of the goodwill created by [Bob's] business is owned by State Farm because of its interest in the policies and customer lists, [Bob] also enjoys certain elements of goodwill. [Bob] enjoys the goodwill that his own name has associated with it, as well as the

> goodwill created by the location where his business has operated for many years. The restrictions on transfer of the agency do not preclude the existence of goodwill owned by [Bob]. However, this Court does find that the goodwill attached to [Bob's] agency is so indistinguishably intertwined with the goodwill of State Farm that it would prevent the agency from being treated as a marital asset and valued as such.

The trial court also found that because Bob could not sell or transfer his contract with State that it had no "ascertainable value."

There is no question that the increase in value of a nonmarital business is marital property subject to division upon dissolution. Goderwis v. Goderwis, Ky., 780 S.W.2d 39, 40 (1989); Marcum v. Marcum, Ky., 779 S.W.2d 209, 210 (1989); Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984). However, that value, or lack thereof, ascribed to marital property by the trial court will not be disturbed unless it is shown to be clearly erroneous. Goderwis, supra, at 41. The trial court was not required to accept the testimony of Nancy's expert. Drake v. Drake, Ky., 721 S.W.2d 728, 729-730 (1986). The trial court's finding that the agency had not increased in value or that the value was not ascertainable is supported by the evidence. The trial court specifically stated that it accepted the testimony of Bob and others that his earnings increased primarily because State Farm's premiums increased.

Nancy faults the trial court for failing to find that the goodwill component of the value of the business increased

during the marriage. The concept of goodwill recognizes that there is a pecuniary value in the expectation that clients or customers will return to the business because of its reputation. Clark v. Clark, Ky. App., 782 S.W.2d 56, 59 (1990). Clark also makes clear that the "marketability" of the goodwill is not a dispositive factor in its inclusion in the value of a business upon dissolution. Id. at 60. However, unlike the situation in Clark, Bob does not have any business that he can transfer. Further, there was no specific value attributed to goodwill. In any event, there was expert testimony that if Bob were to terminate his relationship with State Farm and sell other insurance, his credibility with his custormers would be severely affected. Thus, the trial court's findings are not clearly erroneous.

Next, Nancy argues that the trial court erred in awarding her a total of $4,800 in temporary maintenance during the thirteen-months this action was pending, a period when she was unemployed and in which Bob was earning $12,500 a month.[1] Nancy emphasizes that not only was she unemployed, but the vast majority of marital assets were under Bob's control.

The question of maintenance, particularly temporary maintenance, is one peculiarly within the discretion of the trial court. Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 894

[1]Actually, Nancy was awarded $1,200 for nine months for a total of $10,800, but Bob was given credit in the final judgment for five months of maintenance based on Nancy's motion to continue the final hearing, a motion granted over Bob's objection.

(1992). While this Court may have made a different award, we cannot find that the trial court abused its discretion in this regard. The evidence indicates that Nancy was doing volunteer work in a political campaign in the hopes of getting a permanent job, a goal which she achieved. Also, Nancy was advanced from the division of the property the sum of $20,000 during the pendency of the action. Under these circumstances, we find no reason to disturb the trial court's ruling in this regard.

The penultimate issue raised in Nancy's cross-appeal is whether the trial court erred in failing to award her prejudgment interest on her share of the marital property from the date the marital estate was fixed, September 6, 1995, until the date of the final decree, March 22, 1996. Nancy's reliance on KRS 360.040 in misplaced as that statute by its express terms pertains only to judgments. The trial court's order of September 6, 1995, merely dissolved the marriage and established that date as the cut-off for valuing the marital estate. The determination of the value of the estate and Nancy's share was not made until the final judgment in March 1996. We know of no authority that would require the trial court to award Nancy interest prior to the final judgment.

Finally, Nancy argues the trial court erred in failing to award her attorney's fees. As with many of the other issues raised in this appeal and cross-appeal, the decision whether or not to award such fees is left to the sound discretion of the trial court. Giacalone v. Giacalone, Ky., 876 S.W.2d 616, 620-

621 (1994). It is apparent from the record that Nancy has sufficient funds available with which to pay her attorney.

Accordingly, the judgment of the Pendleton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT/CROSS-APPELLEE:

Hon. Jerry M. Miniard
Florence, KY

BRIEFS AND ORAL ARGUMENT FOR APPELLEE/CROSS-APPELLANT:

Hon. Timothy B. Theissen
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