

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000989-MR
AND
NO. 1997-CA-001141-MR

JOHN WILLIAM CULVER

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM WHITLEY CIRCUIT COURT
HONORABLE FARMER H. HELTON, SPECIAL JUDGE
ACTION NO. 88-CI-174

JOYCE PARKER CULVER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

* * * * *

BEFORE: COMBS, KNOPF, and KNOX, Judges.

KNOPF, JUDGE: This is an appeal and cross appeal from a decree of dissolution and orders dividing marital property, restoring non-marital property and allocating marital debt. Finding that the trial court erred in retrospectively applying the 1996 amendment to KRS 403.190(4), we affirm in part, reverse in part, and remand for further proceedings.

The appellant, John William Culver, and the appellee, Joyce Parker Culver, were married in 1969, and separated on March 28, 1988. Joyce filed a petition for dissolution of the marriage shortly thereafter. For various reasons, the trial court did not

enter a decree of dissolution until February 28, 1996. The court reserved the issues with respect to property division for later adjudication. The court entered findings of fact, conclusions of law and a judgment dividing the marital assets on March 19, 1997. The court modified that order by another order entered on April 10, 1997. John now brings an appeal from those orders, and Joyce cross-appeals on several issues.

Both John and Joyce take exception to the trial court's division of their respective retirement plans. Joyce has a Kentucky Teacher's Retirement Plan, which is classified as non-marital property and exempt from distribution pursuant to KRS 161.700(2). The trial court calculated the value of her retirement plan at \$468,000.00. John has a pension from his former employer, Whayne Supply Company, with an estimated value of between \$425,000.00 and \$500,000.00, and which the trial court valued for distribution at \$475,000.00. The trial court included both plans in the division of marital property, but awarded each plan to its respective owner.

The primary issue on appeal concerns the application of the 1996 amendment to KRS 403.190(4). Prior to 1996, KRS 403.190(4) provided that if retirement benefits of one (1) spouse are exempted from classification as marital property, then the retirement benefits of the other spouse shall also be exempted. This court held that the clear meaning of the statute required that the other spouse's retirement benefits had to be exempted, even when the value of that spouse's benefits greatly exceeded

that of the exempt spouse's benefits. Turner v. Turner, Ky. App., 908 S.W.2d 124, 125 (1995). Recognizing the potential inequity of such a situation, the General Assembly amended KRS 403.190(4) to limit the exemption. 1996 Ky. Acts ch. 328, § 2(4). Under the current statute, which became effective on July 15, 1996, the level of exemption provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse.

John argues that the trial court improperly treated both pension plans as marital. He points out that the version of KRS 403.190(4) in effect at the time of the entry of the dissolution decree would require that both his and Joyce's retirement plan be treated as non-marital. In the alternative, he contends that the trial court arbitrarily valued his pension plan in excess of the stipulated value of \$404,048.00. If the 1996 amendment to KRS 403.190(4) is applied, then John asserts that the \$63,952.00 of Joyce's teacher's pension should be treated as marital property.¹

Joyce cross appeals from the trial court's treatment of the pension plans. Joyce contends that since her teacher's retirement plan is treated as non-marital property, she is

¹ Regardless of which version of KRS 403.190(4) is applied, John's argument is incorrect. None of Joyce's teacher retirement benefits may be treated as marital property, or considered as an economic circumstance during the division of marital property. KRS 161.700(2).

disqualified from receiving any regular retirement benefits under the Social Security Act, either in her own right or as John's spouse.² Therefore, she states that the trial court should have included John's retirement pension and his Social Security benefits to determine whether his retirement benefits exceeded hers. Had the trial court properly applied the 1996 amendment to KRS 403.190(4) and considered sources of retirement benefits, Joyce argues that all of his pension plan should have been treated as marital property and divided equally.

As a matter of law, we find that the statute in effect on the date of the entry of the dissolution decree applies when considering the treatment of exempt pensions. KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless expressly so declared." Nonetheless, legislation has been applied to causes of action which arose before its effective date and in the absence of an express declaration that the provision is to be so applied, where the courts have determined that the provision was remedial or procedural in nature and that retroactive application of the provision was consistent with the legislative intent. Spurlin v. Adkins, Ky., 940 S.W.2d 900, 901 (1997). As explained in Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991):

² However, Joyce did not present any evidence to the trial court that she is disqualified from receiving Social Security benefits.

A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed as to make it effect the evident purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.

Id. at 36; quoting, 73 Am.Jur.2d Statutes § 354 (1974).

In this case, the trial court applied the 1996 amendment to KRS 403.190(4) to the division of the pension plans, even though the dissolution decree was entered more than four (4) months prior to the effective date of the statute. The correct date for valuation of marital assets is the date of the dissolution decree. Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990). Trial courts often enter a bifurcated dissolution decree, reserving the property distribution issues for later adjudication. Since all property acquired prior to the entry of

the decree is presumed to be marital, Stallings v. Stallings, Ky., 606 S.W.2d 163, 164 (1980), entry of the decree serves to fix the rights of the parties as of that date.

We agree that the 1996 amendment to KRS 403.190(4) was remedial. The General Assembly intended to ameliorate the effect of the literal language of the prior version of the statute as interpreted in Turner v. Turner supra. However, a retrospective application of the 1996 amendment to KRS 403.190(4) would operate to impair the vested rights of the parties. We appreciate that this result works a hardship on Joyce, and that it runs against the General Assembly's intent in enacting the amendment to KRS 403.190(4). Nonetheless, we must reverse the trial court's division of the pension plans and remand for consideration under the law in effect prior to July 15, 1996. The court's ruling on this issue renders Joyce's cross-appeal moot.

As for John's argument that the trial court arbitrarily valued his pension in excess of its "stipulated" value, the record refutes his contention. In her statement of marital assets and liabilities, filed with the trial court on April 16, 1996, Joyce valued John's pension plan at \$404,048.00. This amount was based upon a statement from Whayne Supply Company for the period ending December 31, 1994. Since pensions must be valued as of the date of the entry of the dissolution decree, the trial court was not bound to accept this earlier figure.

John also argues that the trial court improperly considered his disability income and Social Security benefits as marital property. Yet curiously, Joyce contends that the trial court erred by not considering John's Social Security benefits in its division of the pension plans. In fact, the trial court merely assumed that Joyce would receive one-half of John's Social Security benefits upon reaching age sixty-two (62).³ We agree with John that disability income and Social Security benefits are not divisible marital assets. However, we find no indication in the trial court's orders that these benefits were included in the value of the pension plans.

John next argues that the trial court's award of 360 shares of non-marital stock was clearly erroneous because it was not supported by the record. On March 19, 1997, the trial court entered a decree finding that the parties accumulated 13,025 shares of Wayne Supply stock during the marriage. The court valued the shares at \$70.00 each, for a total of \$911,750.00

In response to a motion to alter, amend or vacate the judgment, pursuant to CR 59.05, the trial court entered an amended judgment on April 10, 1997. The trial court found as follows:

The best evidence the Court can find of record is that the Respondent [John], some eighteen months prior to the marriage of the

³ As stated above, Joyce disputes this assumption.

parties, purchased 740 shares of Whayne Supply Company stock. The Petitioner [Joyce] says that she cashed two (2) \$1,000.00 Bank Certificates for a value of \$2,000.00 and paid it on this purchase. At the time of this purchase the stock had a value of approximately \$28.00 a share. The installment records cited by the Petitioner referred to a purchase of 735 shares in 1972 on an installment bases. This, the Court finds, does not support her contention that she helped pay for the 740 shares. However, the Court will accept her testimony that she invested \$2,000.00 in the original purchase of her pre-marital money. At the price of \$28.00 a share this would entitle her to 72 shares and after the five to one split amounted to 360 shares. The Respondent, the Court finds, is entitled to, after the five to one split, 3,340 shares of this purchase. [D]educting the 3,700 shares from the 14,875 shares leaves 11,175 shares as marital property.

Record on Appeal [ROA] at pp. 266-67.

John argues that the trial court's findings are not supported by the record. He contends that the trial court erred in accepting Joyce's testimony that she cashed two (2) \$1,000.00 certificates of deposit prior to the marriage in order to purchase the stock. Thus, he contends that the trial court should not have designated the 360 shares as marital property.

We disagree. John's argument essentially concerns a factual dispute. The trial court was faced with competing testimony concerning Joyce's contribution to the pre-marital stock purchase. The trial court resolved this issue against John based on Joyce's testimony that she supplied \$2,000.00 of her own

funds for the purchase. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses". CR 52.01. Furthermore, the appellant did not provide this Court with a copy of the trial transcript, as required by CR 75.01. When the evidence is not presented for review, this Court is confined to a determination as to whether the pleadings support the judgment, and on all issues of fact in dispute we are required to assume that the evidence supports the findings of the lower court. Porter v. Harper, Ky., 477 S.W.2d 778, 779 (1972).

Likewise, we cannot review John's arguments concerning the allocation of marital debt, and the trial court's failure to credit him for payments made during separation. Nor do we find any basis to set aside the trial court's apportionment of the marital assets as clearly erroneous. In dividing marital property, the court is authorized to "divide the marital property without regard to marital misconduct in just proportions" after considering all relevant factors. KRS 403.190(1). In the absence of a trial transcript, we cannot find the trial court's allocation of marital property to be unconscionable.

Lastly, John contends that the trial court failed to restore his premarital interest in the marital residence. We find no error in the trial court's calculations. The record

reflects that the marital residence was worth \$200,000.00; \$17,500.00 of which came from John's premarital assets. The trial court awarded the \$182,500.00 marital interest in the house to Joyce. The court also factored John's \$17,500.00 non-marital contribution into the calculation separately. However, this interest was offset by the trial court's decision to charge John with eight (8) years rental value of the marital residence and furniture. Therefore, the allocation was based on substantial evidence and will not be disturbed.

Accordingly, the judgment of the Whitley Circuit Court is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Gerald L. Greene
Greene & Lewis
Pineville, Kentucky

BRIEF FOR APPELLEE/
CROSS-APPELLANT:

R. Gregory Lathram
Barbourville, Kentucky