RENDERED: AUGUST 8, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000042-MR
AND
NO. 2002-CA-000079-MR

RICKEY DALE HAYDON — APPELLANT/CROSS-APPELLEE

v.

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 99-CI-01302

DEBRA JEAN HAYDON — APPELLEE/CROSS-APPELLANT

OPINION

AFFIRMING IN PART
AND
VACATING IN PART

** ** ** ** **

BEFORE: JOHNSON, KNOPF, AND McANULTY, JUDGES.

McANULTY, JUDGE: Rickey Dale Haydon ("Rickey") appeals from two orders of the Franklin Circuit Court issued during litigation dissolving his marriage to Debra Jean Haydon ("Debra"). Specifically, Rickey appeals from an April 17, 2001 order which declared Kentucky Revised Statutes (KRS) 61.690(2) unconstitutional as special legislation. Further, Rickey

appeals from the trial court's Findings of Fact, Conclusions of Law and Order, entered December 13, 2001, that divided the marital debts and assets between the parties. Debra cross-appeals the trial court's denial of her motion to recover attorneys fees, as well as her request to have KRS 61.690(3) held unconstitutional. We affirm in part and vacate in part.

Rickey and Debra were married on February 4, 1983. During their marriage, both parties were employees of the Commonwealth of Kentucky. Rickey was employed by the Department of Transportation as an Engineer Tech III, while Debra worked as a supervisor for the Cabinet for Families and Children. Both Rickey and Debra maintained accounts with the Kentucky Retirement System and the Kentucky Employees Deferred Compensation Plan. Two children were born of the marriage.

The parties separated on October 30, 1999. On November 5, 1999, Debra filed a Petition for Dissolution of Marriage, asserting that the marriage was irretrievably broken and that there was marital property and debts to be divided. Debra also requested custody of the children, as well as child support. In his response to Debra's petition, Rickey requested that the parties be awarded joint custody of the children.

On November 15, 2000, the circuit court entered its Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage. In this decree, the trial court dissolved the

marriage and accepted several agreements between Rickey and Debra concerning custody of the children, visitation with the children, possession of vehicles and personal property, payment of health insurance premiums for the children and the payment of expenses incurred by the children for extracurricular pursuits. The trial court also ordered Rickey to pay monthly child support to Debra in the amount of $737.60. No decision was made concerning the division of the parties' retirement and deferred compensation accounts, the division of the marital debt, the division of money deposited with the court and Debra's motion for attorneys fees.

The division of retirement and deferred compensation accounts maintained by both parties was heavily contested during this divorce proceeding. The record reveals that Debra's retirement account balance was $31,989.56. Rickey's retirement account balance was $44,166.02. Concerning the deferred compensation accounts, Debra maintained $10,112.63 in her account while Rickey's balance was $76,694.47. Rickey argues that these accounts constitute non-marital property under the provisions of KRS 61.690(2). Debra, however, argued that KRS 61.690(2) was a special law in violation of Section 59 of the Kentucky Constitution, making the parties' respective interests in these accounts martial property that must be divided pursuant to KRS 403.190. On April 17, 2001, the trial court found KRS

61.690(2) to be a special law prohibited by the Kentucky Constitution, as well as the due process clause of the federal Constitution. Consequently, the trial court determined that these accounts constituted marital property subject to division.

A hearing was held in this matter on November 1, 2001 concerning the division of the marital debt and the division of the disputed accounts. During this hearing, Rickey offered evidence that, prior to this marriage, he accrued 109 months of service with the Commonwealth. This period of service resulted in a balance of $3,690.14 in his retirement account. Debra did not contest Rickey's argument that this amount must be considered non-marital property. Debra, on the other hand, stated that she began her employment with the Commonwealth on October 15, 1979, making some portion of her retirement account balance non-marital. Debra waived this issue after failing to present any evidence concerning the value of her non-marital contribution.

Based upon presented evidence, the trial court found that Debra's marital contribution to her retirement amount was $31,989.56 and Rickey's marital contribution was $40,475.88. Accordingly, Rickey's retirement account balance exceeded Debra's by a total of $8,486.32. The trial court ruled that, pursuant to KRS 403.190(4), this difference represented the marital property subject to division. Having arrived at this

conclusion, the trial court awarded each party one-half of that balance, which equaled $4,243.16.

Turning its attention to the deferred compensation accounts[1], the trial court found all contributions to those respective accounts were made during the marriage, making those accounts marital property. In making its calculations, the court found that Rickey's account balance exceeded Debra's by $66,851.84. Rickey, however, sought a non-marital offset of $26,280.36 from his deferred compensation account. In arriving at this amount, Rickey testified that from September 1992 to August 1997, he received a total of $107,041.30 as a death beneficiary on an account held by his mother. Rickey testified that during this period, the parties agreed to increase the contribution to his deferred contribution account. This agreement allowed the couple to obtain income tax advantages and save for the children's future educational expenses. The requested offset amount, according to Rickey, reflected the additional amount contributed to his deferred compensation account pursuant to his agreement with Debra.

[1] We are compelled to note that the trial court, in finding the deferred compensation accounts to be marital property, erroneously found that these accounts are administered by the Kentucky Employees Retirement System (KERS). Deferred compensation accounts are, in fact, administered by the Kentucky Public Employees Deferred Compensation Authority, an agency entirely separate from KERS. Accordingly, KRS 61.690(2), a statute that regulates only those accounts administered by KERS, is inapplicable. Hence, the trial court, while correctly finding the deferred compensation accounts to be marital property, did so by utilizing incorrect reasoning.

Upon further examination, Rickey conceded that he failed to segregate his mother's death benefits from the rest of the marital property. While he did purchase some certificates of deposit with his mother's death benefits, most of this money was used to satisfy family obligations. Rickey also testified that the certificates of deposits were cashed in and applied to other marital indebtedness. Thus, the entire $107,041.30 was ultimately used for various marital expenses. Accordingly, the court held that Rickey was not entitled to any offset against his deferred compensation account and divided the difference in those accounts, $66,581.84, equally between the parties[2].

Concerning marital debt, Debra asserted that she assumed responsibility for approximately $38,000.00 of marital debt. Rickey assumed responsibility for approximately $20,000.00 of marital debt. Debra testified that all of the debts she assumed were credit card debts incurred for various marital expenses. She did not introduce any documentation concerning specific marital expenses. Rickey alleged that, throughout their marriage, Debra had a problem with fiscal responsibility. In fact, Rickey testified that Debra's spending habits forced her to seek debt-counseling services and pursue

[2] The trial court did order a qualified domestic relations order be entered directing the Kentucky Employees Retirement System, not the Public Employees Deferred Compensation Authority, "to properly segregate and transfer from Mr. Haydon's deferred compensation account the sum of $33,290.92 for the benefit of Ms. Haydon's deferred compensation account..."

debt consolidation. Further, Rickey stated that he was not aware of some debts Debra incurred during the marriage, including a debt of $10,425.43 on an American Express account. Debra conceded that Rickey was not aware of the American Express account, but maintained this account was used for various marital expenses. Rickey did admit that he knew about most of Debra's debt and that all of this debt was accumulated during the marriage. Rickey did not offer any evidence to indicate that Debra's debt was incurred for a non-marital purpose. In fact, Rickey acknowledged that Debra usually made purchases for the family.

Concerning his $20,000.00 in credit card debt, Rickey testified that all but $2,650.00, the cost of a computer purchased for his daughter from a previous marriage, was incurred for marital expenses. Debra testified that some of Rickey's debt was caused by his work as a member and officer of the Optimist International organization. Debra, however, failed to produce any documentary evidence to support this assertion.

Taking account of the evidence and testimony before it, the trial court determined that Rickey's $2,650.00 computer purchase was a non-marital debt. After adjusting Rickey's assumed debt obligation accordingly, the trial court found that Debra assumed $20,650.00 more in marital debt than Rickey. To

equalize the parties' debt obligations, Rickey was ordered to pay one-half of the excess debt.

The trial court also disposed of two additional issues in its December 13, 2001 order. First, the parties had $6,384.09, the remaining equity after the sale of the marital residence, on deposit with the clerk of the court. The court divided this account equally between the parties, with Rickey and Debra each receiving $3,192.04. The second issue involved Debra's request for attorneys fees. Without discussion of this request, each party was ordered to pay their own attorneys' fees. This appeal and cross-appeal followed.

Before addressing the arguments presented before us, we are compelled to point out that Rickey has largely ignored the requirements of Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(iv), in that his brief lacks "ample references to the specific pages of the record . . . supporting each of the statements narrated." Similarly, Rickey's brief fails to comply with CR 76.12(4)(c)(v), which requires "ample supportive references to the record and citations of authority pertinent to each issue of law[.]" Rickey's brief contains no citations to the record. Although this deficiency is potentially fatal, we have nonetheless addressed the merits of this appeal solely because of the nature of the issues presented. However, we

strongly caution Rickey's counsel to refrain from violating the rules of this Court in the future.

On appeal, Rickey presents three arguments for our review. First, Rickey argues that the trial court erred in declaring KRS 61.690(2) unconstitutional. We agree.

In addressing the constitutionality of KRS 61.690(2), the trial court first analyzed the question of whether KRS 61.690(2) and 403.190 can be harmonized. The trial court concluded that, by deeming retirement benefits to be "exempted" from KRS 403.190(2) rather than "excepted," the two statutes could be harmonized. While we agree that these statutes can be harmonized, we believe a better explanation exists.

At the time this matter was litigated in the Franklin Circuit Court, KRS 61.690(2) provided as follows:

> A retirement allowance, a disability allowance, a member's accumulated contributions, or any other benefit under the system shall not be classified as marital property or as an economic circumstance as provided in KRS 403.190 in an action for dissolution of marriage.

KRS 403.190 governs the disposition of property in a divorce proceeding. KRS 403.190(4) applies to any system or plan regulated by ERISA, as well as a public retirement system administered by an agency of state or local government. KRS 403.190(4) states in pertinent part as follows:

> If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted, or not considered, as the case may be. However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse . . .

We now turn to rules of statutory construction to determine whether KRS 61.690(2) and KRS 403.190(4) can be harmonized. "The construction and application of statutes is a matter of law and may be reviewed de novo." Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet, Ky., 983 S.W.2d 488, 490 (1998). "The essence of statutory construction is to ascertain and give effect to the intent of the legislature." Hale v. Combs, Ky., 30 S.W.3d 146, 151 (2000). To ascertain the intent of the legislature, courts should view statutes as a whole, considering not only its language but also its spirit. Combs v. Hubb Coal Corp., Ky., 934 S.W.2d 250, 252 (1996). However, the language in the statutes bears the greatest importance, and statutes may not be interpreted in a manner that conflicts with the stated language. Hoy v. Kentucky Industrial Revitalization Auth., Ky., 907 S.W.2d 766, 768 (1995), citing Layne v. Newberg, Ky., 841 S.W.2d 181, 183 (1992). Accordingly, a court may not insert language to arrive at a meaning different from that created by the stated language in a statute. Beckham v. Bd. Of

Educ. Of Jefferson County, Ky., 873 S.W.2d 575, 577 (1994). Kentucky statutes must be given a liberal construction, and the language used must be given its ordinary meaning, except when the language used has a special meaning in the law; in such a case, the technical meaning is appropriate. KRS 446.080(1) and (4); Withers v. University of Kentucky, Ky., 939 S.W.2d 340, 345 (1997). Finally, courts are responsible for drawing all reasonable inferences from the act as a whole to sustain its validity. Waggoner v. Waggoner, Ky., 846 S.W.2d 704 (1992).

In accordance with the aforementioned principles, we conclude that KRS 61.690(2) and KRS 403.190(4) can be harmonized. Reviewing these two statutes reveals that KRS 61.690(2) specifically states that retirement benefits "shall not be classified as marital property . . . as provided in KRS 403.190." The plain language of these statutes clearly provide a scheme for determining the extent that state government retirement benefits may be exempted from classification as marital property in divorce proceedings. Under KRS 61.690(2), if a spouse's retirement benefits are excluded from classification as marital property, then KRS 403.190(4) requires that those benefits are excluded only to the extent that those retirement benefits are set-off by the other spouse's retirement benefits. In other words, any retirement benefits that exceed

the level of exclusion matched by either spouse's retirement benefits are subject to classification as marital property.

Thus, when read together, KRS 61.690(2) and KRS 403.190(4) provide for the classification of state government sponsored retirement benefits as marital property, but only to the extent those retirement benefits exceed the statutory set-off. Curiously, this is precisely the manner in which the trial court divided the retirement benefits of the parties herein. To the extent that Rickey's retirement benefits exceeded Debra's by $8,486.31, the trial court divided that excess amount equally between the parties as marital property. By awarding each party $4,243.16, the trial court treated the retirement benefits of these parties exactly as required under Kentucky law.

Rickey argues that Turner v. Turner, Ky. App., 908 S.W.2d 124 (1995) supports his belief that these statutes require each spouse to retain his or her own retirement benefits regardless of the amount of those benefits. In Turner, the wife had accumulated modest benefits in the Kentucky Teachers Retirement System. Her husband had accumulated substantial retirement benefits during his private sector employment. At the time Turner was decided by the Kentucky Supreme Court, KRS 403.190(4) did not limit the exclusion of benefits from marital property only to the extent those benefits were set-off by the other spouse's benefits. Thus, the husband's substantial

pension was exempted from division and declared to be non-marital property because KRS 161.700(2) required the wife's pension to be designated as non-marital property. In response to the inequitable result produced by Turner, the legislature amended KRS 403.190(4) in 1996 to add the set-off provision as previously discussed herein. See 1996 Ky. Acts, Ch. 328, Sec. 1. Hence, Rickey's reliance on Turner is simply misplaced.

Rickey also asserts that the trial court improperly declared KRS 61.690(2) unconstitutional pursuant to Section 59 of the Kentucky Constitution. Again, we agree.

Section 59 of the Kentucky Constitution prohibits the General Assembly from passing local or special legislation concerning any of the twenty-eight (28) subjects specifically enumerated. Section 59 further provides that "[i]n all other cases where a general law can be made applicable, no special law shall be enacted."

Kentucky law is clear concerning the identification of general and special laws. A general law relates to things as a class, while a special law relates to particular persons or things of a class. Johnson v. Commonwealth, 291 Ky. 829, 165 S.W.2d 820 (1942). The fact that the general assembly passes a law dealing with a special subject does not per se make that law special legislation. Kentucky Milk Mktg. & Anti-Mon. Com'n v. Borden Co., Ky., 456 S.W.2d 831 (1969). The primary purpose for

the prohibition against special legislation is to prevent special privileges, favoritism and discrimination, and to ensure equality under the law. See Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994). Classifications based on reasonable and natural distinctions that relate logically to the purpose of the act do not violate Section 59 of the Kentucky Constitution. Kling v. Geary, Ky., 667 S.W.2d 379 (1984).

Kentucky's highest court has established requirements legislation must meet in order to be declared constitutional under Section 59. The test of constitutionality, as established in Schoo v. Rose, Ky., 270 S.W.2d 940, 941 (1954), is that the legislation must apply equally to all in a class and there must be distinctive and natural reasons inducing and supporting the classification. We believe KRS 61.690(2) passed the Schoo test.

The trial court held that the first prong of Schoo was not satisfied because the spouse of a participant who does not have a retirement plan, or who has a plan that is of lesser value than the participating spouse, will not be entitled to an equal offset of benefits. This analysis is incorrect. Again, KRS 61.190(2) classifies these retirement benefits as non-marital property as provided by KRS 403.190(4), which provides that when one spouse's benefits are excepted from marital property, the other spouse's benefits are also excepted from consideration as marital property. Further, KRS 403.190(4)

clearly requires that "the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse."

From the plain language of these statutes, if one spouse has no retirement benefits, then no level of exception is provided to that spouse. Furthermore, if the participant's level of exception may not exceed the level of exception of the spouse with no benefits, it follows that the participant's benefits simply will have no level of exception either. Thus, in this situation, the entire amount of the participant's benefits will be considered marital property subject to division in a dissolution action.

Similarly, if a participant's spouse has a retirement plan that is of lesser value than that of the participating spouse, then the participant's benefits are excepted from being classified as marital property only to the extent of the non-participant's benefits. Any benefits the participant may have above the amount of benefits held by the non-participant spouse are divisible as marital property. Thus, even if the spouses of participants are considered part of the class created by KRS 61.690(2), the statute applies equally to every member of the class.

Our research reveals that the Kentucky Supreme Court addressed this issue in Waggoner, supra. In Waggoner, the

Supreme Court addressed the constitutionality of KRS 161.700(2), which is substantively identical to KRS 61.690(2). KRS 161.700(2) exempts benefits accrued under the Teachers Retirement System from classification as marital property pursuant to KRS 403.190(1)(d). The Supreme Court held in Waggoner that, even though KRS 161.700(2) sets up teachers as a special class, the statute does not violate Section 59 since every member of that class is treated equally. Hence, having found that every member of the class created by KRS 61.690(2) is treated equally under the statutory scheme, we believe that KRS 61.690(2) satisfies the first prong of Schoo.

We also believe that the second prong of Schoo is satisfied because distinctive and natural reasons supporting the classification of state governmental retirement accounts as non-marital property exists. The Supreme Court acknowledged the legislative motivation behind pension exemptions for public employees is "that pension exemptions in favor of state and local government employees encouraged their continued service despite salaries which were legislatively found to be lower than those in private enterprise." Commonwealth Revenue Cabinet v. Cope, Ky., 875 S.W.2d 87, 90 (1994). Further, "[w]hile the wisdom of such an approach is not indisputable, it is not arbitrary and bears a substantial relation to a permissible governmental purpose." Id. We believe that the same rationale

applies in this matter currently before us. Therefore, KRS 61.690(2) does not violate Section 59 of the Kentucky Constitution.

We also agree with Rickey that KRS 61.690(2) does not violate the equal protection clauses of the Kentucky and United States constitutions. As a general rule, a statute is presumed valid and will survive an equal protection challenge if it can be shown that the classification drawn by the statute is rationally related to a legitimate state interest. Weiand v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88 (2000). Under the rational basis test, a classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Id., at 93. As previously discussed herein, the desire to attract and retain state employees is ample reason to support the classification of state governmental retirement benefits as non-marital property. Accordingly, the trial court erred when it held the statute to be in violation of the equal protection clauses.

We also believe that the trial court erred in holding that KRS 61.690(2) is an unjust taking of Debra's property rights without due process of law. In order for Debra to have a due process claim, she must first have a property interest in the retirement benefits. Id. Property rights are created and

defined by state law. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 94 L.Ed.2d 494 (1985). In Kentucky, it is the pension, not the benefits which is the marital asset that can be divided by the court. Armstrong v. Armstrong, Ky. App., 34 S.W.3d 83 (2000). Weiand, supra, points out that Debra may never receive any of Rickey's pension benefits because there is a possibility that she could predecease Rickey prior to the time Rickey's benefits become payable. Therefore, no violation of due process can exist because Debra has not acquired a property interest in Rick's benefits.

At this point, we must reiterate that, even though the trial court erred in declaring KRS 61.690(2) unconstitutional, it correctly determined the value of the benefits Debra was entitled to receive from Rickey's retirement account. Thus, we vacate the trial court's April 17, 2001 Order which found KRS 61.690(2) unconstitutional, but affirm the trial court's award to Debra in the amount of $4,243.16 which represents her share of the marital portion of the parties' retirement accounts.

Second, Rickey argues that the trial court erred by not restoring a portion of his mother's death benefits, calculated to be $26,280.36, to him as non-marital property. In support of this argument, Rickey alleges that, pursuant to an agreement with Debra, the parties jointly decided to use his

mother's death benefits for living expenses and contribute a greater portion of his wages into his deferred compensation account. We find this argument to be completely without merit.

KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital. This presumption must be rebutted by clear and convincing evidence. Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 502 (1998). In order for Rickey to overcome this presumption, he must provide evidence tracing the monies claimed as non-marital property back to a non-marital source. Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816 (2002). Rickey admits that he failed to trace any alleged non-marital assets back to the proceeds received from his mother's death benefits. Moreover, Rickey never segregated any of the benefits he received from his mother's account, but rather commingled those funds with other marital property and utilized that money to pay various marital expenses. Accordingly, we believe the trial court, despite its erroneous belief that KRS 61.690(2) applied to deferred compensation accounts, properly concluded that all of the money in Rickey's deferred compensation account was marital property. In any event, the trial court's method of allocating the funds contained in these deferred compensation plans fairly divided these assets between the parties.

For his final argument, Rickey asserts that the trial court erred in ordering him to pay one-half of the excess credit card debt Debra accumulated during the marriage. We disagree.

Under Kentucky law, there is no presumption that debts incurred during a marriage are marital debts. Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 523 (2001). There are several factors a trial court could use to determine whether debts are marital or non-marital. These factors include whether the debt was incurred to purchase marital assets, whether the debt was necessary to provide for the maintenance and support of the family, and the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness. Id. Further, there is no requirement that marital debts be divided equally or in the same proportion as marital property. Id. All issues concerning the assignment of debts incurred during the marriage are reviewed for abuse of discretion. Id.

In this matter, the trial court found that $38,000.00 of debt that Debra incurred, and $17,350.00 of Rickey's debt was marital debt. In reaching this conclusion, the trial court found that this debt was used to provide for the maintenance and support of the Haydon family. While Rickey argues that Debra had a problem with fiscal responsibility during the marriage and incurred debts without his knowledge or authorization, Rickey also admitted that these debts were accumulated during the

marriage. Rickey's admission, coupled with testimony from both parties that Debra was usually responsible for making purchases for family maintenance, expenses and support clearly demonstrate that all of the disputed debt was marital in nature. Since the trial court considered the factors propounded in Neidlinger, we believe that the trial court did not abuse its discretion in ordering Rickey to pay half of the excess debt.

In her cross-appeal, Debra presents two arguments for our consideration. First, Debra argues that the trial court erred by failing to award her attorneys fees. We find this assertion to be completely without merit.

KRS 403.220 allows a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorneys fees of the other party. Attorneys fees are awarded only if a disparity in the relative financial resources of the parties exists in the payor's favor. Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986). But even if such a disparity exists, whether to make such an assignment and, if so, the amount to be assigned is entirely within the discretion of the trial court. Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 514 (1975).

In this case, Debra and Rickey were awarded all personal property each party possessed at the time the divorce decree was entered. The trial court also divided the marital assets and debts equally. With these facts, it is clear that no

disparity of financial resources existed in Rickey's favor. Thus, the court properly refused to award Debra attorneys fees.

Finally, Debra contends that the trial court erred by not finding KRS 61.690(3), as amended in 2000 to direct Kentucky Retirement Systems to honor only child support orders and not qualified domestic relations orders (QDRO), to be unconstitutional. To support this contention, Debra argues that if KRS 61.690(2) is unconstitutional, then KRS 61.690(3), as a logical extension of KRS 61.690(2), must also be declared unconstitutional. We have previously determined herein that KRS 61.690(2) is, in fact, constitutional. Therefore, we will not address the merits of Debra's argument concerning the constitutionality of KRS 61.690(3) because, by her own admission, this issue is moot.

Debra, however, does present a legitimate concern regarding the Kentucky Retirement Systems' interpretation of KRS 61.690(3). According to its amicus curiae brief, the Retirement Systems contends that, by specifically deleting qualified domestic relations orders from KRS 61.690(3), the General Assembly did not intend for the Retirement Systems to accept or honor qualified domestic relations orders. Debra points out that Kentucky Retirement Systems has never repealed 105 KAR 1:190, an administrative regulation adopted in November 1991 to provide a framework for administering and processing qualified

domestic relations orders. While acknowledging that 105 KAR 1:190 has not been repealed, we believe that the trial court erred by entering the QDRO without making Kentucky Retirement Systems a party to the action. Enforcement of a QDRO presents a special problem. The issuing court is requiring a non-party to comply with its order. Thus, the retirement plan is only obligated to honor the QDRO as provided by statute. Since ERISA does not apply to a qualified governmental plan, the Retirement Systems' plans are subject only to state law. 29 U.S.C. §1003(b)(1); 29 U.S.C. §1002(32). In fact, if the plan administrator rejects a tendered QDRO, a court may not simply order the plan to comply with the order. Rather, the plan must be joined as a party to the action in order for any judgment against it to be effective. See Burton v. Dowell Division of Dow Chemical Co., Ky., 471 S.W.2d 708, 710-711 (1971).

The Retirement Systems was not made a party to this action in the trial court. Thus, a qualified domestic relations order could only be enforced against it as provided by the version of KRS 61.690 in effect when the Retirement Systems received the order. Since we have dismissed Debra's argument concerning the constitutionality of KRS 61.690(3) as moot, we find no statute mandating that the Retirement Systems must honor qualified domestic relations orders. Thus, the trial court did not possess jurisdiction to require the Retirement Systems to

honor a particular order outside of this statutory authority. Debra, however, is not prejudiced by the trial court's error since the December 13, 2001 order allows Rickey to satisfy the obligations concerning the retirement and deferred compensation accounts with a direct cash payment to Debra.

For the aforementioned reasons, the Franklin Circuit Court's judgment declaring KRS 61.690(2) unconstitutional and requiring that a QDRO be entered directing the Kentucky Retirement Systems to divide the parties' KERS accounts are vacated. The remaining judgments are otherwise affirmed.

JOHNSON, JUDGE, CONCURS.

KNOPF, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

KNOPF, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: Respectfully, I concur in part and dissent in part from the majority opinion. I fully agree with the majority on the issues relating to the characterization of a portion of Rickey's mother's death benefits as marital, the division of marital debt, and the trial court's denial of attorneys fees. I also agree that, since the Kentucky Employee Retirement Systems (KERS) is not a party to this action, the trial court did not have jurisdiction to order it to comply with a qualified domestic relations order (QDRO). Furthermore, I agree with the majority that the 2000 version of KRS 61.690(2) is

constitutional. Whatever property rights the parties may have in the other party's state-employee retirement plan are created by state law, and those rights may be modified or eliminated by state law. Weiand v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88, 93 (2000). The result may appear unfair, and the justification for the statute is debatable.[3] Nevertheless, "[i]t is elementary that the legislative branch of government has the prerogative of declaring public policy and that the mere wisdom of its choice in that respect is not subject to the judgment of a court." Fann v. McGuffey, Ky., 534 S.W.2d 770, 779 (1975); *see also* Reda Pump Co. v. Finck, Ky., 713 S.W.2d 818 (1986). Moreover, the debate is academic considering that the General Assembly repealed that statute during its 2002 session. 2002 Ky. Acts ch. 52, § 14.

However, I disagree with the trial court and the majority that the offset provisions of KRS 403.190(4) apply to the trial court's division of the retirement plans. The purpose

[3] In its *amicus curiae* brief, KERS takes the position that the 2000 amendments to KRS 61.690(2) & (3) have a legitimate policy justification of curtailing its administrative responsibility to administer QDROs. "In the twelve years between the enactment of the QDRO amendment in 1988, and its effective repeal in 2000, the obligation to honor the ever-growing number of QDROs forced the Retirement Systems to allocate more and more personnel to the task of administering them. . . . Thus, the legislature's amendment of subsection (3) was a policy decision designed to afford some relief to a burgeoning administrative responsibility." However, this administrative responsibility is no greater than that imposed upon private pension plans.

of this statute is to equalize the treatment of retirement plans where one spouse has an exempt plan but the other spouse does not. Waggoner v. Waggoner, Ky., 846 S.W.2d 704, 708 (1992). If the retirement benefits of one spouse are excepted from classification as marital property, or not considered as an economic circumstance during the division of marital property, then the retirement benefits of the other spouse shall also be excepted. However, the level of exception provided to the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse. KRS 403.190(4). In other words, the non-exempt plan is excepted from consideration as marital property, but only up to the value of the exempt plan.

Since we are holding that KRS 61.690(2) is constitutional, KRS 61.690(2) exempts both Rickey's and Debra's retirement plans from consideration as marital property. Thus, there is no need to apply the offset provisions of KRS 403.190(4). Rather, the entire value of both plans should be considered the parties' separate, non-marital property.

I also agree with the majority that KRS 61.690(2) does not apply to the parties' deferred compensation plans. KRS 61.690(2) applies only to accounts administered by KERS, not to accounts administered by the Kentucky Public Employees Deferred

Compensation Authority.[4] Consequently, such plans are not exempted from consideration as marital property under KRS 61.690(2), and the trial court properly considered them as marital property to the extent that they were accrued during the marriage.

Likewise, KRS 61.690(3), which allows KERS to refuse to honor a QDRO dividing a retirement account, does not apply to the deferred compensation accounts. However, the trial court did err by issuing a QDRO to KERS ordering it to segregate the funds in the deferred compensation accounts. Because KERS does not administer those accounts, that portion of the QDRO must be set aside, and a new QDRO issued to the Deferred Compensation Authority.[5]

---

[4] The Deferred Compensation Authority is established pursuant to KRS 18A.230 *et seq.*, and is administered as part of the Personnel Cabinet. KRS 12.020 II 14(d). In contrast, KERS is established pursuant to KRS 61.510 *et seq.*, and is administered as part of the Finance and Administration Cabinet. KRS 12.020 II 9(l).

[5] It has come to my attention that the Deferred Compensation Authority has taken the position that a deferred compensation plan established pursuant to 26 U.S.C. § 457 is not subject to a QDRO. Although there is some question about when a QDRO will be honored in such situations, federal law allows a § 457 plan to be subject to a QDRO. 26 U.S.C. § 414(p)(11). *See generally,* "Code Sec. 457 Deferred Compensation Plans for State and Local Governments and Tax-Exempt Employers," 1A Pension Plan Guide (CCH) ¶ 8018 at 9926. (Mar. 3, 1999). It is not clear from the record whether the plan at issue is a § 401k or a § 457 plan. Furthermore, if the trial court wished to divide the benefits prospectively, the Deferred Compensation Authority would have to be made a party to the action before it could be required to

Since the trial court found KRS 61.690(2) unconstitutional, it treated the plans as marital to the extent that they were accrued during the marriage. Accordingly, the trial court subtracted Debra's deferred compensation account balance ($10,112.63) from Rickey's account balance ($76,694.74), and concluded that the difference ($66,581.84) was a marital asset subject to division. To equalize its division of the deferred compensation plans, the trial court ordered Rickey to pay Debra $33,290.92 as her share of his plan. Because KRS 61.690(2) does not apply to the deferred compensation plans, the trial court properly treated the plans as marital property, albeit for the wrong reason. Furthermore, the trial court's valuation of the deferred compensation accounts seems fair.

However, I would note that the value of the deferred compensation plans is subject to fluctuations based on the financial market. In addition, neither Rickey nor Debra is near retirement age, and the deferred compensation plans generally are subject to a substantial tax penalty for early withdrawal. Consequently, I believe that a present-value division of these assets would be inequitable. Rather, the marital portion of the plan should be divided according to the formula set out in

---

comply with a QDRO dividing the plans. However, these are matters which could be addressed upon remand.

Newman v. Newman, Ky., 597 S.W.2d 137 (1980) and Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981).[6]

Accordingly, I would remand this matter back to the trial court for a re-calculation of the division of marital property. The deferred compensation plans are not exempt from consideration as marital property. Although the trial court properly valued these accounts, I believe that the court's present-value division of these assets was inequitable under the circumstances. On the other hand, the retirement plans are excluded from consideration as marital property, and under KRS 61.690(2), no part of those plans is subject to division. Consequently, I would vacate the trial court's division of the retirement and deferred compensation plans, and would remand this matter to the trial court to re-calculate the allocation and division of these plans.

[6] *See also* Louise E. Graham and James E. Keller, 15 Kentucky Practice Domestic Relations Law, § 15.28, pp. 534-36 (2d ed. 1997 & 2003 Supp.) for a discussion of permissible methods for calculating divisible marital benefits in defined contribution plans.

BRIEF FOR APPELLANT:

Steven G. Bolton
Frankfort, Kentucky

BRIEF FOR APPELLEE:

J. Guthrie True
David J. Guarnieri
Johnson, Judy, True &
Guarnieri, LLP
Frankfort, Kentucky

BRIEF FOR AMICUS CURIAE
KENTUCKY RETIREMENT SYSTEMS:

Robert W. Kellerman
Lee A. Webb
Frankfort, Kentucky

J. Eric Wampler
James Dodrill
Frankfort, Kentucky