

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001656-MR

DEANNE DANIELS DARGAVELL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 02-CI-02630

ROBERT ALLEN DARGAVELL

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Deanne Daniels Dargavell¹ appeals from the findings of fact, conclusions of law and decree of dissolution of marriage entered by the Fayette Circuit Court on July 11, 2003. In her appeal, Deanne contends the trial court erred by failing to require her husband, Robert Allen Dargavell, to designate Deanne as the primary beneficiary on a life insurance policy in order to protect her financial interests in the event Robert's retirement plan administrator does not recognize

¹ We note that Deanne was restored her maiden name of "Daniels" in the decree but has continued to use Dargavell throughout the appeal.

Deanne's survivorship rights to his retirement benefits at a later date. We affirm.

Deanne and Robert were married on May 27, 1968. There are two adult children born of the marriage. The parties were able to agree as to the division of most of the marital property. However, a final hearing was held June 9-10, 2003, and testimony taken as to several contested issues. Following the hearing, the trial court entered its findings of fact, conclusions of law and decree of dissolution of marriage. Only the issue of the life insurance policy remains and is the basis of this appeal.

Robert was employed as a policeman for the Lexington-Fayette Urban County Government (hereinafter "LFUCG") during the marriage. Prior to the parties' separation he retired and began receiving monthly benefits from the retirement fund in the amount of \$3,111.74. The trial court divided the pension funds equally between the parties. Paragraphs 13 and 14 of the decree addresses the division of the pension as follows:

13. The Court finds that Wife is entitled to equally share in Husband's service retirement annuity through the Lexington Fayette Urban County Government which is currently in pay status. Wife shall be entitled to receive one-half (50%) of the gross monthly retirement annuity, including any future adjustments, less any required tax withholdings from her proportionate share, for the duration of Husband's life. Furthermore, the Court finds that Husband's

entire years of service as a police officer occurred during the marriage; that all of the service retirement benefits were acquired during the marriage; and that the service retirement annuity began pay status during the marriage. Accordingly, the Court finds that Wife should be deemed to be the surviving spouse for purposes of survivorship benefits. In that the survivorship annual benefit is 60% of his final annuity, which may exceed Wife's marital share, Wife shall be entitled to receive survivorship annuity benefits equal to the monthly gross amount received by Wife immediately prior to Husband's final annuity payment. A Qualified Domestic Relations Order shall be entered in accordance with these findings.

14. In that this matter was originally scheduled for trial on April 3, 2003 and Wife reasonably anticipated receiving her one-half share of Husband's Lexington Fayette Urban County Government Retirement Annuity effective April, 2003, the Court finds that Wife is entitled to receive her one-half share of Husband's retirement annuity effective April, 2003. Husband shall pay to Wife her one-half share of the Retirement Annuity payments for April and May within thirty (30) days of the entry of the Decree herein. In addition, effective June, 2003, Husband shall pay to Wife her one-half share directly to her until such time as a Qualified Domestic Relations Order takes effect and Wife receives direct payments from the Plan Administrator.

Deanne contends that based upon the testimony of Andrea Weddle, corporate counsel for LFUCG, there is no guarantee that Deanne will receive her court-ordered benefits if Robert pre-deceases her. This situation may occur, according to Ms. Weddle, because the pension fund may not honor a court order

designating an ex-spouse's right to survivor benefits. Ms. Weddle indicated that this issue had no yet been addressed by the retirement administrator and may require additional adjudication before the pension fund would release survivor funds to an ex-spouse. Based upon this potential problem, Deanne argues the following in her appellate brief at pages 13-15:

The appeal herein is based in equity as to the Trial Court's failure to provide readily available equitable relief for Deanne through life insurance. The Trial Court's error and abuse of discretion arises when it was uncontroverted that the parties' major marital asset, the LFUCG retirement fund, would provide Robert with undisputed, unconditional financial security for his lifetime but Deanne's rights to receive benefits for her lifetime are both disputed and conditional.

If Robert dies tomorrow, Deanne gets nothing. Deanne would lose her ½ monthly annuity income and, in light of Ms. Weddle's testimony, her status as a surviving spouse, as ordered by the Trial Court, would be disputed and litigated by the LFUCG Pension Board.

. . . .

The Trial Court did have readily available equitable means to provide Deanne with some form of limited financial protection in the event that she was denied survivorship benefits by LFUCG, but chose not to employ any of them. As set forth in Appellant's Statement of facts hereinabove, Counsel requested the Trial Court to require Robert to maintain Deanne as the beneficiary under his life insurance policy, subject to

the reasonable contingency that she would only receive life insurance proceeds if she were denied survivorship benefits.

. . . .

Under these particular factual circumstances, Appellant submits that the Trial Court committed clear error and/or abused its discretion in the division and allocation of marital property.

Robert contends that the trial court did not abuse its discretion, that it divided the pension in just proportions and that Deanne's contentions are speculative and may never come to fruition. He further contends that KRS 67A.492(1) is controlling in that it provides that a pension's contingent recipient must have been married to the beneficiary at least one year prior to his death or six months prior to the beneficiary's retirement in order to be eligible for surviving spouse benefits. In this case the parties were married for six months prior to Robert's retirement and thus, Deanne qualifies for surviving spouse benefits.

Although Deanne argues that "the trial court committed clear error and/or abused its discretion in the division and allocation of marital property," we must disagree. Findings of fact shall not be set aside unless clearly erroneous with due regard given to the opportunity of the trial judge to view the credibility of the witnesses. CR 52.01. Reichle v. Reichle, Ky., 719 S.W.2d 442, 444 (1986). First, it should be noted that

neither party argues that the trial court's findings are erroneous. The trial court found the pension to be marital property subject to distribution as a marital asset.

As to Deanne's abuse of discretion contention, the Supreme Court of Kentucky has held "[t]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." Sexton v. Sexton, Ky., 125 S.W.3d 258, 272 (2004) citing Commonwealth v. English, Ky., 993 S.W.2d 941 (1999). Under the facts of this case the court divided the pension equitably giving each party a one-half interest in the benefits. In Brosick v. Brosick, Ky.App., 974 S.W.2d 498, 503 (1998), this Court held, "it is the pension, not the benefits, which is the marital asset which is divided by the court." The court divided the asset and Deanne has no argument with the manner in which it was assigned. Her argument is that some future contingency may occur which may prevent her from realizing the entire benefit she was assigned. We believe her argument to be too speculative to reach the level of an abuse of discretion. A trial court in any proceeding, but especially a dissolution action, must consider numerous and various consequences as to the impact of his decision. But we do not believe he must attempt to make contingency provisions for every possibility that may or may not

occur in the future. To find otherwise would have a disastrous effect on the orderly disposition of cases in the trial court.

As such, we find no abuse of discretion in this case concerning the Fayette Circuit Court's refusal to require Robert to maintain a life insurance policy for the benefit of Deanne to protect a contingency which may never come to fruition. Thus, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Debra Ann Doss
Lexington, KY

BRIEF FOR APPELLEE:

Martha A. Rosenberg
Lexington, KY