

RENDERED: March 11, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-002231-MR

KENNETH RAY AUDAS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 92-FD-001568

VIVIAN FAYE AUDAS

APPELLEE

OPINION

VACATING AND REMANDING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an order entered by the Jefferson Circuit Court relating to a Qualified Domestic Relations Order (QDRO). For the reasons stated hereafter, we vacate the court's order and remand this matter for further proceedings.

The parties married in 1966 and divorced in 1993. Throughout the marriage Kenneth was employed by a trucking company, while Vivian primarily was a homemaker. When the

parties divorced the trial court signed a QDRO providing for the equal division of Kenneth's pension, which at that time was valued at \$700 per month. In May 1996 the court entered an amended QDRO providing that Vivian was "entitled to benefit from" 50% of the "benefit from said Pension Fund which accrued" during the time of the parties' marriage, to be paid either on the date and manner of her choosing, or on the date when Kenneth began receiving benefits. The amended QDRO was not appealed.

Vivian elected to delay receiving her share of the pension until Kenneth retired and began drawing pension benefits at the end of 1998. The pension fund's value substantially increased between 1993 and 1998, largely due to union negotiations. As a result, Kenneth began drawing a pension of some \$2,500 per month when he retired at the end of 1998. Although Vivian received \$350 per month based on the earlier valuation of the pension fund, she asserted that she was entitled to more. She therefore filed a motion in 1999 seeking an adjustment of the QDRO, claiming that the amount of her monthly benefits should reflect the increase in the pension fund's value.

Multiple motions and orders regarding the QDRO followed, only some of which are pertinent to this appeal. On August 16, 2000, the trial court denied Vivian's motion to amend the QDRO but directed that the value of her share of the

benefits should be recalculated. Acknowledging that a pension must be valued as of the date of dissolution, the court held that Vivian

is entitled to the amount in the pension that accrued during the parties' twenty-seven (27) year marriage. The effect of this valuation, in essence, is to conceptually separate [Vivian's] portion from [Kenneth's] portion without actually removing [Vivian's] property. The language of the QDRO provides that [Vivian] is entitled to fifty percent (50%) of [Kenneth's] benefits that had vested between the date of marriage and the date of divorce. It further provides that [Vivian] has the option to elect payout at anytime [Vivian] deems appropriate or [Vivian] may elect to receive her share of the pension when [Kenneth] begins to draw on the fund. After divorce [Vivian's] share remained in the pension. [Vivian] declined to elect an immediate payout. The fact that she did not make such an election seems to indicate that she believed that if left in the pension it would accrue more value with the passage of time. This conclusion is a reasonable one.

The court distinguished the situation before it from *Brosick v. Brosick*,¹ which involved a postdissolution increase in a pension fund's value as a result of the pension participant's "post-decree efforts and contributions." Here, by contrast,

there was an increase in the pension's value that was not the result of [Kenneth's] post-decree efforts. A substantial part of the increase in the pension's value resulted from the collective bargaining contracts entered into by the Teamsters not from the efforts of [Kenneth]. [Vivian] is entitled

¹ 974 S.W.2d 498 (Ky.App. 1998).

to the increase in her share of the pension that was determined at the time of divorce that resulted from the collective bargaining. [Vivian] is not entitled to any increase in value that resulted from the efforts of [Kenneth].

The court declined to amend the QDRO but determined that Vivian was entitled to increased benefits under the terms of the existing QDRO. The parties were directed to "have the plan administrator determine the amount of the pension to which [Vivian] was entitled to as of the date of the divorce and the subsequent increase in the value of that amount resulting from factors not related to [Kenneth's] post-decree efforts," and to adjust Vivian's monthly benefits accordingly.

Although the August 16 order initially was made final, on September 11, 2000, the court sustained Vivian's motion to delete the order's finality language. Multiple motions and proceedings followed, including the entry and subsequent setting aside of a QDRO in July 2003. On September 23, 2003, the court both entered an amended QDRO and again finalized the August 16, 2000, order denying an amended QDRO but addressing how the existing QDRO should be applied. Kenneth challenged the internal inconsistency of the court's order, and he asserted that the court lacked jurisdiction to enter the amended QDRO absent allegations that Vivian was entitled to relief pursuant to CR 60.02. On Kenneth's motion, "pending further adjudication

on this matter," the court set aside the September 23 order on October 3, 2003.

Kenneth appealed from the September 23 order on October 21, 2003, despite the fact that the September 23 order already had been made nonfinal on his own motion. On November 29, 2004, this court directed the parties to show cause why the appeal should not be dismissed as having been taken from a nonfinal order. The parties filed a joint response stating that after the court entered the October 3 order, they and the court

acknowledged that the September 23, 2003, Order was not subject to suspension. It now appears that the Record of the trial court does not reflect the finality of the September 23, 2003, Order. Accordingly, the trial court entered an Order correcting the impression left by the Record[.]

After considering the response, this court ordered that the appeal should not be dismissed and that the record on appeal should be supplemented "to include the record of any proceedings or documents filed" after the certification of the record on appeal. That supplemental record included the trial court's nunc pro tunc order of December 17, 2004, vacating the October 3 order and

leaving the Order of Court entered September 23, 2003, as the final and appealable Order of the Court. Entry of this Order renders the September 23, 2003, Order as the pleading from which any appeal filed by [Kenneth] must have proceeded and removes any question as to its interlocutory nature.

Thus, we arrive at this point on appeal. As Vivian did not file a brief, we do not have the benefit of her responses to Kenneth's contentions.

A pension constitutes a divisible marital asset which should be valued as of the date of a marital dissolution.² The terms of such a property division may not be modified unless the trial court finds that conditions exist to justify the reopening of the judgment under Kentucky law. KRS 403.250(1).

Here, the trial court did not address the issue of how it retained or acquired jurisdiction to enter a new or amended QDRO in September 2003 after the previous amended QDRO became final in 1996. See CR 59. Although a trial court is authorized by KRS 403.250(1) to modify or revoke a QDRO pursuant to CR 60.02, here several years had passed between the entry of the 1996 QDRO and the attempts to modify that QDRO. Thus, under CR 60.02 Vivian could obtain relief only after showing

(d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (f) any other reason of an extraordinary nature justifying relief.

² *Brosick*, 974 S.W.2d at 504; *Clark v. Clark*, 782 S.W.2d 56 (Ky.App. 1990). See also KRS 403.190.

Vivian did not specifically refer to CR 60.02 in her motions below, and there is nothing in the record to show that the trial court addressed jurisdiction and Vivian's ability to seek CR 60.02 relief. In the absence of any findings addressing the issue of jurisdiction below, this court cannot review whether the trial court properly exercised jurisdiction to amend or clarify the existing QDRO. Thus, the order of September 23, 2003, as well as the nunc pro tunc order of December 17, 2004, must be vacated and remanded for further proceedings pertaining to the issue of jurisdiction. Although this outcome eliminates the need to resolve the apparent internal inconsistencies of the September 2003 order, which both amends and denies amendment of the 1996 QDRO but addresses how that QDRO should be applied, on remand the trial court should take steps to avoid any further ambiguities pertaining to the parties' QDRO.

The court's order is vacated and this matter is remanded for further proceedings consistent with the views set out in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

James E. Vonsick
Louisville, Kentucky

BRIEF FOR APPELLEE:

No Brief Filed