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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2005-CA-000912-MR

DONNA K. SHIELDS

APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE REED RHORER, JUDGE
ACTION NO. 04-CI-00033

WAYNE H. SHIELDS

APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI AND SCHRODER, JUDGES; MILLER, SENIOR JUDGE.¹

MILLER, SENIOR JUDGE: Donna Shields appeals from the Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage of the Franklin Family Court seeking a review of that court's decision with respect to its division and valuation of the parties' respective retirement plans, its maintenance award,

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute 21.580.

and its failure to award her attorney fees. For the reasons stated below, we affirm in part, vacate in part, and remand.

The parties were married on April 20, 1968. They had two children during the marriage, both of whom are now adults. On January 12, 2004, Donna filed a petition for dissolution of marriage.

On September 17, 2004, the parties reached a Partial Settlement Agreement agreeing to the division of furniture, furnishings, tools, condominium timeshares, burial lots, and motor vehicles. An evidentiary hearing on the remaining issues was held on October 21, 2004. On April 4, 2005, the family court entered its Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage. This appeal followed.

We begin with a general statement of our standard of review. Under Kentucky Rules of Civil Procedure (CR) 52.01, in an action tried without a jury, "[f]indings 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. A factual finding is not clearly erroneous if it is supported by substantial evidence." Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 414 (Ky. 1998); Uninsured Employers' Fund v. Garland, 805 S.W.2d 116, 117 (Ky. 1991). Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative

value to induce conviction in the mind of a reasonable person. Golightly, 976 S.W.2d at 414; Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky.App. 2002). An appellate court, however, reviews legal issues de novo. See, e.g., Carroll v. Meredith, 59 S.W.3d 484, 489 (Ky.App. 2001); Hunter v. Hunter, 127 S.W.3d 656 (Ky.App. 2003).

First, Donna contends that the family court erred in its valuation of Donna's Kentucky Employees Retirement System Pension Plan and Wayne's Toyota Motor Manufacturing Company Pension Plan and Toyota 401K Retirement Plan.

Donna is a retiree from Kentucky State Government and has a Kentucky Employees Retirement Plan which the family court valued at \$353,313.00. In addition Donna has a traditional Individual Retirement Account valued at \$246.13. Wayne is an employee of Toyota Motor Manufacturing and has a Toyota Pension Plan which the family court valued at \$73,606.01 and a Toyota 401K Retirement Savings Plan which the family court valued at \$153,710.64. Wayne also has a Roth IRA valued at \$4,547.45.

Donna disputes the family court's valuation of her Kentucky Employment Retirement Plan, Wayne's Toyota Pension Plan, and Wayne's 401K Plan.² As evidence concerning the valuation of the plans, Donna provided the expert testimony and calculations of Carrell Eakle, CPA. On his behalf, Wayne

² Donna does not dispute the valuation of her traditional IRA or Wayne's Roth IRA.

provided the expert testimony and calculations of Calvin D. Cranfill, CPA/ABV.

Eakle valued Donna's Kentucky Retirement Plan at \$288,323.00, whereas Cranfill valued the plan at \$353,313.00. Donna's Kentucky Retirement Plan is a Defined Benefit Plan, in pay status, which is currently paying \$1,596.08 per month. Both experts agreed that the Plan should be valued based upon the present value of the future monthly payments for Donna's remaining life expectancy. The difference in the two valuations is a result of Cranfill using a discount rate of 3.25% and taking into consideration future cost of living adjustments (COLAs), whereas Eakle used a discount rate of 5% and did not factor in future COLAs.

Donna does not address the discount rate differential or why the 5% rate used by Cranfill is erroneous, and we find no basis to conclude that the family court's use of a 5% discount rate is erroneous. With respect to Cranfill's use of a cost of living adjustment in his calculation, Donna states "Mr. Cranfill stated [that a] COLA was a Cost of living Adjustment that would possibly be added to future payments. Mr. Eakle testified that this was inappropriate because the Court is attempting to value the present entitlements utilizing the value of today's dollars and not a hypothetical, future cost of living index."

Eakle and Cranfill agree that the proper method of valuing Donna's Retirement Plan is to discount the future income stream of monthly payments to today's dollars based upon her remaining life expectancy. Should future cost of living adjustments be taken into consideration? Donna does not cite us to any authority which holds that COLAs should not be factored into the present value calculation. However, in Laurenzano v. Blue Cross and Blue Shield of Massachusetts, Inc. Retirement Income Trust, 134 F.Supp.2d 189 (D.Mass. 2001), a case concerning a class action lawsuit brought on behalf of former participants in a Defined Benefit Pension Plan who received a lump sum distribution from the plan, the District Court held that under a Defined Benefit Pension Plan which normally provided retirement benefits in the form of a life annuity that included a COLA, a lump sum distribution in lieu of the annuity was required to include the present value of the projected COLA payments.

The propriety of including COLAs in the calculation was supported by Wayne's expert witness, and his testimony is substantial evidence supporting the family court's valuation of Donna's Kentucky Retirement Plan. This method is further supported by the holding in Laurenzano. The family court's factoring of COLAs into the present value calculation of Donna's

Defined Benefits Plan is accordingly not clearly erroneous. CR 52.01.

Eakle, on behalf of Donna, valued Wayne's Pension Plan at \$130,915.00 and his 401K plan at \$278,157.00, for a total valuation of \$409,072.00. In contrast, Cranfill valued Wayne's Pension Plan at \$73,606.01 and his 401K at \$153,710.64, for a total valuation of \$227,316.65.

The family court accepted Cranfill's valuation of Wayne's retirement accounts. In contrast to Donna's Kentucky Retirement Plan, which is a Defined Benefit Plan, Wayne's Toyota Pension Plan and Toyota 401K Plan are Defined Contribution Plans.³

The reason for the differential in the valuation of Wayne's retirement plans by the two experts is that Cranfill valued the plans based upon the current account balances in the plans, whereas Eakle valued the plans based upon the present value of the future income streams to be produced during Wayne's life expectancy - the same methodology used to calculate the value of Donna's plan.

³ A Defined Benefits Plan pays a retiring employee a benefit calculated on the basis of their years of service multiplied by a percentage of the average salary they received during, for example, the last five years of employment. In contrast, under a Defined Contribution Plan, an employee's benefits are determined on the basis of the pension fund's assets at the time when the benefit is paid. Snair v. City of Clearwater, 787 F.Supp. 1401, 1404 (M.D.Fla. 1992).

Cranfill testified that in his experience as an accountant and expert witness, he had always valued Defined Contribution Plans in accordance with the account balance on the valuation date. Cranfill also testified that he was aware of no reason to value the plans in any other way than based upon the account balance upon the date of dissolution. Donna does not cite us to any authority which supports using the present value of the future income stream method for valuing a defined contribution plan.

"It is axiomatic that a trial court retains broad discretion in valuing pension rights and dividing them between parties in a divorce proceeding, so long as it does not abuse its discretion in so doing in the sense that the evidence supports its findings and they thus are not clearly erroneous."

Duncan v. Duncan, 724 S.W.2d 231, 234-35 (Ky.App. 1987).

Cranfill's expert testimony is substantial evidence in support of the family court's valuation of Wayne's retirement plans. We accordingly find no error in the family court's valuation. CR 52.01.

Next, Donna contends that the family court erred in failing to award her \$2,500.00 per month in maintenance until her death, remarriage, or cohabitation with a person providing her support. KRS 403.200 provides as follows:

(1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

- (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
- (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:

- (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs

while meeting those of the spouse seeking maintenance.

Under this statute, the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion. Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

The family court's April 4, 2005, Findings of Fact, Conclusions of Law, and Decree of Dissolution of Marriage addressed the maintenance issue as follows:

FINDINGS OF FACT

. . . .

16. The Court finds that the marriage between the parties is one of long duration and that there is a substantial disparity in the income and resources available to the parties and that Mr. Shields should pay Ms. Shields maintenance in the sum of \$1,000.00 per month until her death, remarriage or cohabitation with any person who provides her primary support and maintenance.

. . . .

CONCLUSIONS OF LAW

. . . .

5. The Court concludes that Ms. Shields is entitled to maintenance under the evidence received by this Court and after considering the provisions of KRS 403.200 in the amount of \$2,500.00 monthly until her death, remarriage or cohabitation with a person providing her support.

. . . .

DECREE OF DISSOLUTION OF MARRIAGE

. . . .

This matter having come before the Court for a Final Evidentiary Hearing and the Court having considered testimony of the parties and their witnesses and having made Findings of Fact and Conclusions of Law which are incorporated herein by reference and the Court being otherwise advised, now Orders and Decrees as follow[s]:

. . . .

8. IT IS ORDERED that Mr. Shields shall pay Ms. Shields maintenance in the sum of \$1,000.00 per month for a period of four (4) years or until her death, remarriage or cohabitation with any person who provides her primary support and maintenance.

The findings of fact paragraph, conclusions of law paragraph, and ordering paragraph of the family court's April 4, 2005, order are in conflict and irreconcilable both as to the amount and duration of maintenance. As a result, we are unable to undertake a meaningful review of this issue. We accordingly vacate the maintenance award and remand this issue to the family court for clarification. Upon remand, the family court should

clarify its award, and make findings of fact addressing the factors contained in KRS 402.200.

Finally, Donna contends that the family court erred in failing to award her any attorney fees, court costs, or expert witness fees. KRS 403.220 provides, in relevant part, as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. . . .

In a dissolution proceeding, the allocation of attorney's fees is "entirely within the discretion" of the family court. Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001). Even if a disparity in financial resources exists, whether to make such an assignment and, if so, the amount to be assigned is within the discretion of the trial judge. Id. As the family court is in the best position to observe the conduct and tactics of the parties, broad discretion shall be given to the family court's allocation of attorney's fees. Id. A reviewing court will not disturb the family court's refusal to award attorney's fees absent an abuse of discretion. See Giacalone v. Giacalone, 876 S.W.2d 616, 620-21 (Ky.App. 1994)

(citing Gentry v. Gentry, 798 S.W.2d 928 (Ky. 1990); and Wilhoit v. Wilhoit, 521 S.W.2d 512 (Ky. 1975)).

Donna argues that based upon the family court's distribution of property and the disparity in income of the parties, it was an abuse of discretion for the family court to fail to award her attorney fees. We disagree.

First, Donna fails to identify the amount of fees and costs she is requesting, making a meaningful review of this issue difficult to undertake. Second, pursuant to the decree, Donna will receive approximately \$22,000.00 as her share of the sale of the marital residence. Donna has retirement plan income of \$1,502.00 monthly and, at minimum, \$1,000.00 per month in maintenance. Further, there is evidence that she has the ability to earn additional income through employment. While we acknowledge that Wayne will obtain, as a result of his equalization credit, significantly more proceeds from his share of the sale of the marital residence (approximately \$121,659.00) than Donna, we cannot conclude that the family court abused its discretion by denying Donna attorney fees and other fees and costs.

For the foregoing reasons the judgment of the Franklin Family Court is affirmed in part, vacated in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT:

Michael L. Judy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Valerie S. Kershaw
Sandra Mendez Dawahare
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