

RENDERED: JUNE 23, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000693-MR

KAVIN MOORE, SR.

APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT  
v. HONORABLE JOAN L. BYER, JUDGE  
ACTION NO. 02-CI-504086

ROCHELE BRADLEY-MOORE

APPELLEE

OPINION  
AFFIRMING

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BEFORE: JOHNSON AND TAYLOR, JUDGES; BUCKINGHAM, SENIOR JUDGE.<sup>1</sup>  
JOHNSON, JUDGE: Kavin Moore, Sr. has appealed from an order of the Jefferson Family Court entered on February 10, 2004, which ordered that his ex-wife, Rochele Bradley-Moore,<sup>2</sup> be paid her portion of his retirement accounts by lump-sum payment and awarded Rochele's attorney \$500.00 in attorney's fees. Having

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> We note that since no appellee brief has been filed in this matter, we may accept Kavin's statement of the facts. Kentucky Rules of Civil Procedure (CR) 76.12(8)(c)(i).

concluded that the family court did not abuse its discretion, we affirm.

Kavin and Rochele were married on November 11, 1989. Both parties were employed with the Louisville and Jefferson County Metropolitan Sewer District (MSD) during the marriage. Rochele initiated divorce proceedings by filing a petition on October 8, 2002. The parties were divorced by decree of dissolution of marriage entered in the Jefferson Family Court on January 8, 2003. That decree incorporated a property settlement agreement, previously signed by the parties and filed on January 8, 2003, which provided for a division of each parties' retirement plans with MSD. The agreement states as follows:

A. Parties acknowledge that during the marriage Rochele was employed by Humana Corp. and by MSD and as a result of her employment at MSD Rochele has certain pension and other benefits valued at approximately \$1,100.00. Parties agree that said MSD pension shall be divided equitably by QDRO, to be drafted by Kavin's counsel.

B. Parties acknowledge that during the marriage Kavin was employed by MSD and as a result thereof Kavin has certain pension and other benefits projected to be worth no less than \$1,995.00 per month for life, beginning August 1, 2013. Parties agree that Kavin's employment at MSD began before the marriage, in April, 1986, and therefore said MSD pension may include a non-marital component, and it will be equitably divided by QDRO, to be drafted by Rochele's counsel.

In April 2003 Rochele contacted the Kentucky Employees Retirement System (KERS), the plan administrator for MSD, in order to obtain all materials necessary to prepare the QDROs. She was subsequently informed that KERS no longer divided its retirement accounts by QDRO because "it was too complicated and time-consuming."<sup>3</sup> On June 11, 2003, Rochelle filed a motion seeking guidance from the family court on how to proceed with the division of the parties' retirement accounts. The family court then entered an order on June 17, 2003, setting a hearing date of August 27, 2003, "to determine how to equitably perform the provisions of the parties' Property Settlement Agreement that requires distribution of retirement benefits by [QDRO]".

After the hearing, the family court entered an order on August 29, 2003, stating that "the parties [are] to provide current statements of values of all accounts immediately" and that Kavin should "determine how he will provide for the distribution of a sum of money equal to [Rochele's] share of the retirement accounts." A status hearing on this issue was scheduled for September 29, 2003. On August 29, 2003, Rochele filed a notice of the balance of her retirement account showing a total of \$2,868.95 as of July 31, 2003. However, Kavin never

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<sup>3</sup> The KERS representative cited Kentucky Revised Statutes (KRS) 61.690 as authority for the change and stated that this new provision went into effect July 15, 2002. KRS 61.690 is titled, "Exemption of retirement allowances; taxability after December 31, 1997; domestic relations and child support orders[.]"

complied with the family court's August 29, 2003, order. Instead, Kavin's attorney filed a motion and affidavit on September 25, 2003, asking to withdraw from the case because "[Kavin] advised that he would no longer be able to afford [attorney] services and that [Kavin] wished to act as his own counsel at the [status] [h]earing, and at other stages in this matter." Kavin's attorney was allowed to withdraw by order entered on September 30, 2003.<sup>4</sup>

On October 13, 2003, the family court gave Kavin one week to file a written memorandum as to his position on Rochele's June 11, 2003, motion.<sup>5</sup> On October 21, 2003, Kavin filed a motion requesting additional time to comply with the family court's August 29, 2003, order because he had not received the information he had requested from KERS.<sup>6</sup> By order entered on October 30, 2003, the family court ordered the parties to appear to discuss Kavin's requested extension at its November 3, 2003 motion hour. On October 31, 2003, Kavin filed notice that the balance in his retirement account was \$29,668.57

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<sup>4</sup> It is apparent from the record that Kavin retained new counsel following the status hearing, but his new counsel never filed an entry of appearance with the family court.

<sup>5</sup> There is no written order to this effect, but this fact is set out in Kavin's October 21, 2003, motion.

<sup>6</sup> According to the exhibits attached to Kavin's motion, he sent letters of request for these account balances on October 14, 2003.

as of July 31, 2003.<sup>7</sup> The record is unclear as to whether Kavin appeared at the hearing on November 3, 2003, but the record indicates attorneys for both parties appeared before the family court on November 10, 2004, to argue Kavin's delay. The family court instructed Rochele's attorney to draft an order setting forth the relief she requested for Kavin's multiple delays. She did so and on November 14, 2003, five months after Rochele filed her motion, the family court entered an order stating as follows:

IT IS HEREBY ORDERED that [Kavin's] motion to delay filing of a memorandum setting forth [his] proposal to pay [Rochele] a cash offset representing [Rochele's] interest in [Kavin's] MSD pension and 457 plans is GRANTED;

IT IS FURTHER ORDERED that [Kavin's] memorandum shall be filed on or before November 17, 2003[,] and no further delay shall be granted under any circumstances;

IT IS FURTHER ORDERED that [Kavin] shall file statements no later than November 17, 2003[,] revealing the marital balance in his MSD pension and 457 plans;

IT IS FURTHER ORDERED that the cash offset payment shall be determined according to the following formula:

Marital balance of [Kavin's] 457 plan  
\$3,561.86 plus  
Marital balance of [Kavin's]MSD pension to  
be determined by 11/17/03  
minus

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<sup>7</sup> This balance was documented as of June 30, 2003. Rochele filed a second notice on November 7, 2003, stating that the balance in her retirement account as of January 31, 2003, was \$2,117.03.

Marital balance of [Rochele's]  
MSD pension \$2,117.03

Total of above calculation to be divided by  
two to determine offset payment;

IT IS FURTHER ORDERED that interest shall accrue on the unpaid balance of the offset payment at the rate of 12% per annum beginning on November 17, 2003[,] and continuing until the entire balance has been paid to [Rochele];

IT IS FURTHER ORDERED that any and all payments made by [Kavin] representing [Rochele's] interest in [Kavin's] MSD pension and 457 plans shall be made by certified check, cashier's check or money order and shall be made jointly payable to "Rochele Bradley-Moore and Gailor Law Office";

IT IS FURTHER ORDERED that [Kavin] shall pay all legal costs incurred by [Rochele] in pursuing resolution of this matter including and since August 27, 2003, including a reasonable fee for [Rochele's] attorney. [Rochele's] attorney is to submit a fee affidavit within ten (10) days of the entry of this Order.<sup>8</sup>

This is a final and appealable order, there being no just cause for delay.

Thus, while the family court granted Kavin additional time to propose a payment plan, the family court also ruled on Rochele's motion to determine the amount that Kavin owed her based on their agreed upon division of the retirement accounts. The family court instructed the parties to use the cash offset

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<sup>8</sup> On November 24, 2003, Rochele's attorney tendered a notice of filing and affidavit stating the attorney's fees incurred by Rochele from August 27, 2003, through November 21, 2003.

payment method, or net present value method, to immediately divide the marital portion of their retirement accounts.

Instead of filing a memorandum as required by the November 14, 2003, order, Kavin filed a motion, pursuant to CR 60.02(e) and (f),<sup>9</sup> requesting the family court modify the property settlement agreement because he objected to the distribution of the marital portion of the parties' retirement accounts by the "cash offset payment" method since the parties had originally agreed to delay receipt of those benefits until they retired.<sup>10</sup> He also filed on November 20, 2003, a motion pursuant to CR 59.05 to alter, amend, or vacate the family court's order. On November 24, 2003, Rochele filed a motion asking the family court to divide the parties' retirement benefits as ordered on November 14, 2003, or to require Kavin to retain an expert to calculate division of the retirement accounts by the coverture fraction method.<sup>11</sup> She also filed a

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<sup>9</sup> Kavin argues that pursuant to the proposed order that was entered November 14, 2003, he was granted up to November 17, 2003, to file a memorandum. The family court entered the order on November 14, 2003, three days before the deadline. However, we find no error in this order because it only determined the amount owed, not how it would be paid. Regardless, the family court's November 14, 2003, order specifically gave Kavin a deadline of November 17, 2003, to file his memorandum and this motion was not filed until November 18, 2003. An affidavit was filed by Kavin during this time, but there is no stamp by the circuit clerk to indicate when it was filed.

<sup>10</sup> Kavin also claimed that other marital debt existed for which payment was not provided in the property settlement agreement. However, this issue is not a part of this appeal.

<sup>11</sup> Rochele also filed an attachment of a letter dated November 20, 2003, from Kentucky Retirement Systems showing Kavin had a total account balance of \$27,855.50 as of January 31, 2003.

response opposing Kavin's motions, stating that Kavin had never advised the family court how he planned to provide for distribution of Rochele's share of his retirement accounts, offset by the marital value of Rochele's retirement account, as he was instructed by the family court in its August 29, 2003, order. On November 25, 2003, Kavin filed a supplemental motion showing the marital interest in his retirement accounts to which Rochele was entitled was \$13,672.86. He also stated that he was "totally unable" to pay Rochele the lump sum of \$13,672.86.

On January 7, 2004, the family court entered an order, which on its face is very similar to its November 14, 2003, order, except it placed the agreed upon dollar value of Kavin's retirement accounts into the formula set out in the November 14, 2003, order.<sup>12</sup> The family court entered a common law judgment by which Kavin was ordered to pay Rochele the lump sum of \$13,672.86, as her portion of the his retirement accounts, with accruing interest of 12% per annum; however, this interest would not begin to accrue until January 7, 2004. Kavin was also

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<sup>12</sup> While signed by the family court on January 7, 2004, this order was never stamped by the circuit clerk as entered; however, it is a part of the record certified to this Court. There were no motions or appeals filed regarding this order, even though the order clearly states that it is final and appealable. For a reason unapparent in the record, the family court entered an order which set forth essentially the same rulings as the January 7, 2004, order on February 10, 2004. It is from this order that Kavin appeals. While we are inclined to find a preservation issue in this appeal because Kavin failed to timely appeal the January 7, 2004, order, this has not been raised by Rochele, who filed no brief in this action. Further, because we find that the family court did not abuse its discretion in this case, we will not address the potential preservation issue in any further detail.



ordered to pay "costs incurred by [Rochele] for any and all attempts made in the future to collect this amount, including a reasonable attorney's fee."<sup>13</sup> This order contained finality language.

On February 10, 2004, the family court entered an order which had the same effect as the order it entered on January 1, 2004, with the exception of further explanation on how it reached its decision, and it changed the start date of the accrual of interest on the judgment to November 17, 2003. As of that date, the family court noted that Kavin had not advised the family court how he would "provide for the distribution of a sum of money equal to [Rochele's] share of the retirement accounts," nor did he file a memorandum pursuant to the family court's November 14, 2004, order. Kavin filed a motion on February 19, 2004, pursuant to CR 59.05, requesting that the trial court alter, amend, or vacate its judgment and supplemented his motion on February 24, 2004. Rochele filed a response on February 25, 2004. Kavin filed a reply on March 2, 2004. Kavin's motion was denied by the family court in an order entered on March 5, 2004. This appeal followed.<sup>14</sup>

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<sup>13</sup> The family court ordered Kavin to pay a portion of Rochele's attorney's fees to her attorney in the amount of \$500.00.

<sup>14</sup> There is another order in the record that was entered on May 10, 2004, in which the family court denies Kavin's CR 60.02 and CR 59.05 motions. This order is not the subject of the appeal, nor is this Court sure why the order was entered, as final and appealable orders had been entered on all motions at the time the notice of appeal was filed on April 5, 2004.

Kavin argues in this appeal that the family court abused its discretion (1) when it ordered Kavin to pay Rochele a lump sum for her portion of the marital interest in his retirement accounts; and (2) when it ordered Kavin to pay \$500.00 to Rochele's attorney as part of her attorney's fees. Finding no abuse of discretion as to either issue, we affirm.

Kavin argues to this Court that the family court's modification of the parties' property settlement agreement, requiring him to pay a lump sum to Rochele for her marital interest in his retirement accounts, rather than pay by the previously agreed upon deferred distribution method, rendered the property settlement agreement "unconscionable." Kavin relies on Shraberg v. Shraberg,<sup>15</sup> which states that "'a separation agreement is unconscionable and must be set aside if the [family] court determines that it is manifestly unfair and unreasonable.'"<sup>16</sup> We agree that this is a true statement of the law; however, it is important to note that in Shraberg, the validity of the property settlement agreement was challenged before the circuit court had adjudicated the issue of fairness and prior to its entry of the final decree of dissolution that incorporated the agreement.<sup>17</sup> By contrast, Kavin's challenge

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<sup>15</sup> 939 S.W.2d 330 (Ky. 1997).

<sup>16</sup> Id. at 333 (quoting McGowan v. McGowan, 663 S.W.2d 219 (Ky.App. 1983)).

<sup>17</sup> Id. at 331.

regarding the unconscionability of the agreement is after the fact.

Kavin's argument, that the change in method of payment to Rochele of her marital share of Kavin's retirement accounts makes the agreement unconscionable, is misplaced. "[I]t is the pension, not the benefits, which is the marital asset which is divided by the [family] court'" [citations omitted].<sup>18</sup> Kavin neither offered proof that the portion of his retirement accounts that Rochele was to receive, nor the ultimate dollar amount placed on the marital portion of the pension was unfair. Thus, these issues are not before us for review. Kavin's only argument is as to when Rochele would receive her portion of his retirement accounts and how it would be paid. "We recognize 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.'"<sup>19</sup>

In the case before us, the parties agreed to divide Kavin's retirement accounts by a QDRO and at that time neither the parties, nor their attorneys, knew that, pursuant to statute, this division method was prohibited. Logically, the

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<sup>18</sup> Armstrong v. Armstrong, 34 S.W.3d 83, 86 (Ky.App. 2000).

<sup>19</sup> Armstrong, 34 S.W.3d at 87 (quoting Duncan v. Duncan, 724 S.W.2d 231, 234-35 (Ky.App. 1987)).

parties had to come up with a different method for its division. Pursuant to its August 29, 2003, order, the family court gave the parties an opportunity to decide how the division was to be made, since a QDRO was not an available option. After five months of delay, the family court intervened and, within the proper limits of its discretion, it applied the rule of Armstrong and chose a method to divide the retirement accounts.<sup>20</sup>

Kavin argues that the family court abused its discretion in changing the division method from deferred compensation to the net present value method. However, there is no proof of record that Kavin in any way responded to the family court's August 29, 2003, mandate to propose a method other than

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<sup>20</sup> This Court in Armstrong, 34 S.W.3d at 85-6, stated as follows:

The three methods used by courts in dividing pension plans in a divorce case are the net present value method, the deferred distribution method, and the reserve jurisdiction method. . . . The net present value method results in the non-employee spouse receiving a lump sum to be distributed immediately. . . . It has also been referred to as the 'immediate offset' method because the lump sum may be offset by the value of other marital property. . . . This method is frequently used when the value of the pension is low because the employee spouse has worked for his or her employer for only a few years or because the job is a low paying one. . . .

In the deferred distribution method, the court predetermines the percentage of the pension income that the non-employee spouse will be eligible to receive once the pension is vested and matured. . . . The marital interest of the non-employee spouse is distributed in accordance with that percentage at a later date. In the reserve jurisdiction method, the percentage of the pension income to be received by the non-employee spouse is determined later when the pension has vested and matured. . . [footnote omitted] .

a QDRO to divide the plan. Further, he argues that he was never given a hearing to present his case, when there is proof in the record of the numerous dates set for hearings before the family court issued its final ruling. The family court had discretion to divide the retirement accounts in accordance with the facts before it and we do not find its method to be an abuse of discretion but rather in-line with prevailing precedent.

Pursuant to the November 14, 2003, order, Kavin was ordered to pay a reasonable fee for Rochele's attorney. "[A]n allocation of court costs and an award of an attorney's fee are entirely within the discretion of the [family] court" [citation omitted].<sup>21</sup> The family court, upon reviewing the expenses submitted by Rochele's attorney, ordered Kavin on February 10, 2004, to "contribute \$500.00 to [Rochele's] attorney['s] fees and costs by paying that amount to her counsel, Gwendolyn L. Snodgrass, who shall be permitted to collect that amount in her own name."

Kavin has appealed this award; however, he did not name Snodgrass as a party to this appeal. "Under KRS 403.220, the trial judge does not set either party's attorney's fee, but 'from time to time . . . may order a party to pay a reasonable amount . . . for attorney's fees.' If the 'reasonable amount' is ordered paid directly to the attorney, the attorney 'may

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<sup>21</sup> Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001).

enforce the order in his own name' and, thus, is the real party in interest and a necessary and indispensable party to any appeal from that order."<sup>22</sup> The family court made it clear that the award of fees was to be paid directly to Snodgrass, leaving no doubt that Kavin's failure to name her as a party to this appeal prohibits our review of this issue. Thus, we do not address this issue on the merits.

For the foregoing reasons, we affirm the order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darryl T. Owens  
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.

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<sup>22</sup> Neidlinger, 52 S.W.3d at 519.