

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000750-MR

MICKEY DAVID CRISWELL

APPELLANT

v. APPEAL FROM CARTER FAMILY COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
CIVIL ACTION NO. 03-CI-00254

DIANA CRISWELL (NOW EVERMAN)

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR JUDGE.¹

MINTON, JUDGE: In this dissolution of marriage case, Mickey David Criswell contends that the family court erred in dividing the marital property and in awarding maintenance to his ex-wife, Diana Criswell (now Everman). We agree with Mickey, and we

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

vacate the family court's judgment and remand for further proceedings consistent with this opinion.

Mickey and Diana's twenty-year marriage was dissolved by decree entered in 2003. At that time, they also settled the issues of custody, support, and visitation of their minor son, Justin. But they failed to agree on property division and maintenance. Much later, the family court issued findings of fact, conclusions of law, and a judgment resolving the remaining property distribution and maintenance issues.

In the judgment, the family court awarded a certificate of deposit worth approximately \$8,000.00, a marital asset, to Justin. The judgment also awarded the marital residence to Diana subject to Mickey's nonmarital and marital interest. The family court ruled that Diana could live in the marital residence rent-free until August 1 following Justin's graduation from high school. After Justin's graduation, the judgment required Diana to pay Mickey \$20,000.00 for his nonmarital interest in the residence and \$52,000.00, representing Mickey's share of the marital value of the residence.

The family court also attempted to divide the parties' retirement funds. We find that attempted division is problematic. The family court's findings on division of the retirement funds are as follows:

Respondent [Diana] has a pension through the County Employee Retirement System with a value as of December 31, 2003[,] of \$10,682.00. This pension is not subject to division pursuant to statute. However, it is and should be considered in the overall division of marital property. Petitioner [Mickey] has an annuity through his employment with a value as of December 31, 2003[,] of \$55,554.07. This annuity is entirely marital property as is Respondent's retirement benefit. Petitioner further has a pension with a value as of June 2004 of \$128,448.02. This pension has both marital and non-marital components although no evidence was presented as to the relative value of each. The court concludes that Respondent's retirement benefit, with a valuation date as of entry of the decree of dissolution of marriage, should be divided in half and with that figure representing one[-]half of the total to be deducted from Petitioner's annuity again with a valuation date as of entry of the decree of dissolution of marriage. After offsetting the amount as indicated[,] the remaining balance of the annuity should be equally divided between the parties. The court further concludes that the marital component of Petitioner's pension should be divided equally between the parties.

After the family court denied his motion to alter, amend, or vacate, Mickey filed this appeal.

Mickey first argues that the family court erred by awarding the certificate of deposit to Justin instead of finding it to be a marital asset and dividing it in just proportions. We agree. In his deposition, Mickey testified that the certificate of deposit was acquired with marital funds. Similarly, Diana testified that the certificate was purchased

with marital funds but that Justin's name was placed on it for tax purposes because Justin "could draw so much interest and we [Diana and Mickey] wouldn't have to claim it." Diana also testified that she believed that she and Mickey would "just split" the certificate. Thus, it is evident that neither Mickey nor Diana intended for Justin to be the true owner of the certificate since both of them agreed that the certificate was a marital asset. KRS 403.190 requires a court to divide a marital asset in just proportions. The judgment does not cite, nor have we independently located, any authority permitting a court to award a marital asset to a third party. Thus, the trial court abused its discretion when it awarded the certificate of deposit to Justin.² On remand, the certificate must be treated as a marital asset and divided between Mickey and Diana in just proportions.

A more difficult issue raised by Mickey is the family court's attempted division of the various retirement funds. Mickey contends that the family court erred by awarding Diana a disproportionate share of the retirement funds. We cannot reach the merits of Mickey's contention, however, because the trial court did not make sufficient factual findings on this issue.

² Davis v. Davis, 777 S.W.2d 230, 233 (Ky. 1989) (holding that the trial courts have wide discretion in dividing property, and an appellate court reviews that division for abuse of discretion).

The judgment does not identify the law relied upon to exempt Diana's county employee retirement funds from division; but we presume that the family court relied upon KRS 61.690(1), which exempts, among other things, county employee retirement funds from "execution, attachment, garnishment, or any other process[.]" And although he takes issue with other aspects of the trial court's division of the retirement funds, Mickey does not argue that Diana's retirement should be subject to division. So we express no opinion as to whether the trial court erred in finding Diana's retirement to be exempt from division.³

But we do find that the trial court erred by not offsetting the value at dissolution of Diana's exempt retirement account against the value at dissolution of Mickey's retirement accounts, as is required by KRS 403.190(4). That subsection provides in relevant part that "[i]f 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

³ Curiously, Professor Graham and Justice Keller's learned treatise on domestic relations seems to state that a spouse's county employee retirement funds are exempt from division only if the other spouse's funds are also exempt from division. See GRAHAM & J. KELLER, KENTUCKY PRACTICE, DOMESTIC RELATIONS LAW § 15.21 (2nd ed. West Group 1997). However, we see no textual support in KRS 61.690 for that proposition.

the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse." Thus, the family court should have exempted an amount from Mickey's retirement equal to the amount exempted from Diana's retirement. On remand, the family court must correct this oversight.

Another area of concern with the trial court's attempted division of the retirement funds is that it does not find the value of the retirement accounts as of December 8, 2003, the date of the dissolution of marriage.⁴ The trial court's order mentions the various funds' values as of December 31, 2003, and June 2004; but those dates are not legally significant. On remand, the parties must provide the family court with evidence upon which the court may rely to establish the value of their separate retirement accounts as of December 8, 2003.

Most importantly, the family court attempted to divide the marital portion of Mickey's retirement fund, despite the fact that, by its own admission, it had no evidence in the record upon which to base a finding of the nonmarital and the marital components of Mickey's retirement account. An order like this one that purports to divide half of an unknown sum is in error here because neither the parties to the dissolution,

⁴ See, e.g., Armstrong v. Armstrong, 34 S.W.3d 83, 86 (Ky.App. 2000) ("[i]t is clear, however, that pension and profit sharing plans should be valued on the date of the divorce decree.").

nor the account custodians who may be involved in the actual division of the funds, can determine how much money is due to either Mickey or Diana.⁵ Thus, on remand, the trial court must find the value of Mickey's retirement fund as of December 8, 2003, and then provide clear direction to the parties and others for the proportional division of the retirement funds.

Knowing the precise amount of Diana's marital share of Mickey's retirement fund is also crucial because an award of maintenance is premised upon a finding that the spouse receiving maintenance does not have sufficient property to meet his or her reasonable needs.⁶ In the case before us, the family court awarded Diana maintenance. Obviously, the amount Diana receives from Mickey's retirement fund will have a bearing on whether she is entitled to maintenance and, if so, in what amount. Additionally, the amount she receives from the certificate of deposit could have a bearing on whether Diana has sufficient property to meet her reasonable needs. So we cannot review the merits of Mickey's argument that the trial court erred by awarding Diana maintenance until we know with certainty the

⁵ See, e.g., 16B Am.Jur.2d *Constitutional Law* § 920 (2005) (providing that the void for vagueness doctrine applies to court orders, as well as statutes).

⁶ KRS 403.200(1).

value of the property she will receive.⁷ On remand, once the value of the parties' assigned nonmarital assets and the divided marital assets is finally determined, the trial court must revisit the issue of maintenance anew.

For the foregoing reasons, the judgment is vacated as to the certificate of deposit, the division of the retirement funds, and the award of maintenance to Diana; and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mary Hall Sergent
Ashland, Kentucky

BRIEF FOR APPELLEE:

W. Jeffrey Scott
Grayson, Kentucky

⁷ See GRAHAM & J. KELLER, KENTUCKY PRACTICE, DOMESTIC RELATIONS LAW § 16.3 (2nd ed. West Group 1997) ("[m]aintenance awards must be made after nonmarital property is assigned and marital property is divided. KRS 403.200(1)(a) evaluates a spouse's needs for maintenance by requiring the spouse seeking maintenance to demonstrate a lack of sufficient property, including marital property apportioned to him or her, to provide for his or her reasonable needs. *Because the maintenance statute depends on a prior allocation of marital property, no maintenance award made prior to an equitable division can be upheld.*") (emphasis added).