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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002304-MR

MILTON ALDRIDGE APPELLANT

v.

APPEAL FROM HENRY FAMILY COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 04-CI-00325

MARGO ALDRIDGE APPELLEE

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING IN PART

** ** ** ** **

BEFORE: MOORE AND STUMBO, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

MOORE, JUDGE: Milton Aldridge appeals the Henry Family Court's order denying his CR 59.05 motion to alter, amend, or vacate the court's Findings of Fact and Conclusions of Law concerning the division of property in this divorce action. After a careful review of the record, we affirm in part and vacate and remand in part for further proceedings.

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[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

I. FACTUAL AND PROCEDURAL BACKGROUND

Milton, a Sergeant and Dispatcher for the Kentucky State Police, filed for divorce from his wife of 31 years, Margo Aldridge, who works for the Commonwealth of Kentucky's Justice Cabinet. However, at some point while the divorce action was pending, Milton apparently stopped communicating with his attorney and ceased his involvement in the action by not responding to discovery requests, particularly, a second set of interrogatories. Trial was scheduled in the action, and at the beginning of the trial, which Milton failed to attend, his attorney moved to withdraw as counsel on the ground that he was no longer in contact with Milton. The court denied counsel's motion to withdraw because the trial had been scheduled for more than two months and because Milton's legal rights could be better protected if he was represented by counsel. At the conclusion of trial, the family court decided that Milton's answers to the second set of interrogatories propounded by Margo were needed before the court could enter a final decision in the case. The court ordered Milton to answer the second set of interrogatories by December 16, 2005.

That date passed, and Milton still had not responded to the interrogatories. Margo then moved to have Milton held in contempt, and the court granted the motion. Specifically, the court held Milton in contempt and imposed a sanction requiring Milton to appear in court on January 10, 2006, for purposes of showing cause why he did not

comply with the court's previous order. The court stated in its order that if Milton failed to appear in court on that date, a contempt bench warrant would be issued.

Milton failed to appear in court on January 10, 2006, so a bench warrant for his arrest was issued. The court also ordered that the time for the parties to submit their recapitulation of the evidence and requested dispositions would be extended to thirty days after the date Milton filed his responses to Margo's second set of interrogatories.

Milton was subsequently arrested and posted bail. The court entered an order directing him to fully respond to the interrogatories no later than February 17, 2006. If he failed to comply, he would be sent to jail again until he did fully respond. Milton complied with the court order and filed his responses to the interrogatories on February 17, 2006. The court entered an order on February 21, 2006, noting that Milton had filed his responses to the interrogatories and that Milton had "advised the court through counsel that he will comply with all further orders of the court and cooperate with counsel."

Subsequently, the family court entered an order directing the parties to each file their recapitulation of evidence and requested dispositions simultaneously on April 14, 2006. Margo filed her recapitulation of the evidence and requested dispositions, but Milton did not. Instead, on June 2, 2006, Milton moved the court to permit him to submit his recapitulation of the evidence and requested dispositions at that time based on his allegation that he had "been and [was] suffering from mental and emotional problems, most likely severe depression, which ha[d] rendered him unable to adequately provide

information to his counsel and to actively participate in this proceeding." Milton further claimed that "[t]his allegation [was] supported by a statement and information from Ronald Dobbs, LCSW [Licensed Clinical Social Worker] of Solutions Health Services, LLC who had been treating [Milton] for these problems. . . ." Milton asserted that his failure to appear at trial and to comply with the court's prior orders was a result of his mental or emotional problems, and he noted that when the case was referred to mediation, the mediation "was suspended because the mediator felt that [Milton] was depressed and could not participate in said mediation in any meaningful manner." Milton attached to this motion a letter from the LCSW dated June 2, 2006, in which the LCSW stated that Milton received therapy from him from May 12, 2005, through August 3, 2005, and that Milton had seen the staff psychiatrist during one of those visits and had been prescribed 20 mg of Lexapro to treat his depression. The LCSW opined in his letter that "Milton suffers moderate depression and at times the depression incapacitates him." However, the LCSW noted that he had "not seen or evaluated" Milton since August 3, 2005.

The family court noted that Milton's motion was a motion to allow him an extended period of time to file a recapitulation of the evidence and requested dispositions. The court denied Milton's motion for two reasons:

> First, the letter in support of [Milton's] motion regarding his mental condition was from a Licensed Clinical Social Worker who had not seen or evaluated [Milton] since August 3, 2005. Secondly, the Court's Order of February 21, which clearly recognizes [Milton's] agreement to comply with all orders of the Court, negates this Court's rationale to extend the time period.

In a separate order, the family court entered its findings of fact and conclusions of law, in which the court reiterated the fact that Milton had not participated in many of the court proceedings, including the trial. The court stated: "Lacking any substantial evidence to the contrary and after this Court's thorough review of the testimony and documents presented before it, the Court adopts the following property division proposal and equalization chart as prepared by [Margo's] counsel." The court continued, setting forth the specific property that each party would receive, as well as how the debts would be divided.[2] Then, the family court held, *inter alia*, that "[i]n lieu of spousal maintenance, which certainly would be warranted in this 31 year marriage, the Court orders that one-half (1/2) of [Milton's] police and dispatch retirement payments be transferred directly each month from [Milton's] direct deposit bank account to a bank account in [Margo's] name."

Milton moved to alter, amend, or vacate the family court's findings of fact and conclusions of law, pursuant to CR 59.05. Specifically, Milton argued, in part, that regarding "spousal maintenance, there is no indication . . . that the Court considered the mandatory requirements of KRS 403.200(2). The only factor listed as considered by the Court in regard to this issue was the length of the marriage." Milton further asserted that the court arbitrarily denied his motion for additional time to file his recapitulation of the evidence and requested disposition, and that the court should have held a hearing to

[2] Milton does not contest the property division other than his retirement benefits.

determine whether Milton's failure to comply with the court's prior orders was due to his mental problems.

The family court denied Milton's CR 59.05 motion to alter, amend, or vacate the court's findings of fact and conclusions of law. The court noted that a hearing was held on Milton's CR 59.05 motion, and that the hearing "was the first time [Milton] himself appeared in Court despite numerous hearings in this matter, as well as a full trial held in December, 2005 with proper notice to all parties." The court continued, stating that it had

> entered its Findings of Fact and Conclusions of law based on all evidence presented to it after proper notice to all parties, and had delayed entry of its Findings of Fact for a significant period of time to allow [Milton] and his prior counsel to submit matters for the record.

Milton now appeals from the denial of his CR 59.05 motion, raising the following claims: (1) the family court erred when it divided his retirement accounts "in lieu of maintenance" without making the requisite findings under KRS 403.200; and (2) the court erred when it denied his motion for additional time to file his recapitulation of the evidence and requested disposition.

II. STANDARD OF REVIEW

We review the denial of a CR 59.05 motion for an abuse of discretion. *Batts v. Illinois Central Railroad Co.*, 217 S.W.3d 881, 883 (Ky. App. 2007).

III. ANALYSIS

A. CLAIM CONCERNING THE RETIREMENT ACCOUNTS

This Court has repeatedly held that, upon divorce, retirement benefits that were earned during the marriage and have vested are to be divided as marital property. *See Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003); *Foster v. Foster*, 589 S.W.2d 223, 224 (Ky. App. 1979). In fact, Milton admits in his opening brief to this Court that "the retirement accounts at issue here could properly be classified as mar[it]al property as they were earned during the marriage." (Milton's Br. at p. 6).

The family court in this case held that "[i]n lieu of spousal maintenance, which certainly would be warranted in this 31 year marriage, the Court orders that one-half (1/2) of [Milton's] police and dispatch retirement payments be" paid each month to Margo. The court subsequently denied Milton's CR 59.05 motion, in which he claimed that the family court improperly divided his retirement accounts "in lieu of maintenance" without making the requisite findings under KRS 403.200. We agree with Milton that the family court indirectly awarded maintenance via the division of the retirement benefits. However, a court cannot award maintenance, even indirectly, without first analyzing the statutory factors set forth in KRS 403.200. *See Newman v. Newman*, 597 S.W.2d 137, 138 (Ky. 1980).

Alternatively, even if the family court was making a division of marital property of Milton's retirement benefits, the court apparently did not consider the value of the asset. Milton alleges he chose a retirement plan option "that reduced his current

benefit in favor of a survivorship benefit."[3] (Milton's Br. at p. 7). Therefore, because the family court neither analyzed the statutory factors set forth in KRS 403.200 for a maintenance award, nor alternatively valued the retirement benefits as reduced for survivorship benefits, we rule that the family court abused its discretion when it denied CR 59.05 relief based on this issue and we therefore remand.

B. CLAIM CONCERNING MOTION FOR ADDITIONAL TIME

Milton's second claim alleges that the court erred when it denied his motion for additional time to file his recapitulation of the evidence and requested dispositions. However, Milton had previously ignored various filing deadlines set by the court, as well as previous court orders, to the extent that the court had to issue a bench warrant and have him arrested so that he would comply with court orders. Additionally, the deadline for filing his recapitulation of the evidence and requested dispositions had previously been extended, and Milton did not file this motion for additional time to file the document until the deadline for filing it had been expired for approximately one and a half months.

Moreover, although Milton argues that the family court should have held a hearing to determine to what extent his alleged mental problems affected his participation, or lack thereof, in the family court proceedings, he cites no case law in support of this argument. Rather, as support for this argument, Milton merely cites the

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[3] Margo points out in a footnote that Milton named his daughter as the beneficiary of the survivorship benefits in defiance of the family court's order not to do. This is the subject of a contempt hearing that was scheduled for August 16, 2007.

statements concerning his depression that were made in the LCSW's letter. However, as noted by the family court, the LCSW acknowledged in his letter that he had not seen or evaluated Milton in ten months. Therefore, the LCSW's opinion of Milton was not current at the time that the letter was drafted, and Milton has not shown that the family court erred in failing to hold a hearing based on the LCSW's outdated opinions.

Consequently, we hold that the family court did not abuse its discretion in denying relief for Milton's claim that the court should have granted his motion for additional time to file his recapitulation of the evidence and requested dispositions. *See Jones v. Jones*, 467 S.W.2d 352, 353 (Ky. 1971).

Accordingly, the order of the Henry Family Court is affirmed in part with regard to the claim involving Milton's motion for additional time, and the order is vacated and remanded in part with regard to Milton's claim concerning the retirement accounts.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert A. Riley
LaGrange, Kentucky

BRIEF FOR APPELLEE:

James L. Theiss
LaGrange, Kentucky