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NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2006-CA-001312-MR

CHRISTOPHER D. MILLS — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 05-CI-502249

ANGELA V. MILLS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Christopher D. Mills (Chris) appeals the May 23, 2006, post-decree order and judgment dividing his pension equally between him and the appellant, Angela V. Mills (Angela). We affirm.

[1] Senior Judge William L. Knopf 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.

Chris and Angela were married October 16, 1993, and have two children. They were divorced by a decree of dissolution entered on December 2, 2005, but the decree reserved the marital property and debt issues. To resolve the outstanding property issues plus custody and visitation issues, the parties participated in mediation on January 16, 2006. As a result of the mediation, the parties reached an agreement that addressed child support, maintenance, custody, visitation, unreimbursed medical expenses, marital debts, and division of "tangible" personal property.[2]

Although Chris's pension and 401(k) savings plan (plan) was listed on both parties' mandatory case disclosures, it was not mentioned in the mediation agreement. Chris had provided information that, as of June 30, 2005, the plan was valued at $22,106.74. On February 13, 2006, Angela made a motion for the court to divide the plan or order them back into mediation so that they could address the division of the plan. A hearing was held on April 19, 2006, and after the hearing, the family court entered a May 23, 2006, order dividing the value of the plan equally between the parties.

Subsequently, on May 31, 2006, Chris moved, pursuant to Kentucky Rules of Civil Procedure (CR) 52.04, for additional findings of fact, but the family court denied his motion on June 13, 2006. Chris specifically wanted the court to find whether or not Chris's retirement plan had been disclosed to the parties prior to the marital settlement agreement [the mediation]. This appeal followed.

[2] There was no amended or supplemental decree incorporating the mediation agreement for any jurisdiction issue.

Chris claims that the division of the plan was contemplated during the mediation, and Angela counters that the plan was omitted from division during the mediation session. Neither party disputes that the retirement plan is marital property. The family court determined in its order that the mediated agreement did not include the division of the plan, that the retirement plan was marital property, and as such, subject to division. Thereupon, the family court awarded each party one-half the funds held in the account as of June 30, 2005.

The division of marital property is within the sound discretion of the trial court and will not be disturbed unless we find an abuse of discretion. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). In dividing marital property, appurtenant to divorce, the trial court is guided by KRS 403.190(1), which requires that division be accomplished in "just proportions." Keeping in mind that findings of fact shall not be set aside unless clearly erroneous and that due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses and the evidence, we find no abuse of discretion in the court's finding that the mediated agreement omitted any consideration of the plan and the court's subsequent division of the retirement plan.

Furthermore, we find no abuse of discretion by the court in its response to Chris's CR 52.04[3] motion asking for a specific finding about the disclosure of the plan by Chris to Angela prior to the execution of the mediated

[3] Chris's motion was styled as one pursuant to CR 54.04 but since CR 52.04 addresses findings on essential issues of fact and CR 54.04 addresses allocation of costs, the record is sufficiently clear that Chris's motion was brought under CR 52.

settlement agreement. The family court held that it had made such a finding because, in its original order, it stated the plan was disclosed by both parties on their mandatory case disclosure forms. Clearly, a finding of fact is not clearly erroneous if supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

Chris also contends in his brief that the family court failed to respond to his CR 52.04 motion because it did not address the relevant factors found in KRS 403.190 that are to be used in dividing marital property. A perusal of Chris's CR 52.04 motion for additional findings of fact, however, contains no such request. Therefore, in light of the mandatory nature of CR 52.04, it was not necessary for the family court to do so. And KRS 403.190 gives the court wide discretion in its division of marital property so long as it is "in just proportions." Here, we find no abuse of discretion.

Furthermore, Chris argues that the parties' intent to mediate property issues indicates that the retirement plan was addressed by the mediated agreement, and that contract principles demonstrate an abuse of discretion by the court. We disagree.

Our analysis of the facts indicates that the parties had many issues to consider within the tight time constraints of the mediation session and simply omitted dealing with the retirement plan. Furthermore, the mediated agreement, on its face, deals with the parties' property only when it references an attached document, which lists "tangible" property given to Angela. The attached

document contains items that range from a car to a purple flower arrangement. Simply put, the list is labeled in the agreement as "tangible" property and everything on the list meets the definition of tangible property. But, as the court observed in its order, a retirement plan is not characterized as a tangible piece of property. Additionally, nothing in the agreement states that the mediated agreement purports that this mediation agreement covers every possible issue and/or there will be no future discussion about the issues covered in the agreement.

Regardless of our analysis, decisions of the family court concerning the division of marital property are within the discretion of that court, and we will not disturb those decisions except for an abuse of that discretion. *Davis v. Davis*, 777 S.W.2d 230 (Ky. 1989). Moreover, the appellate courts of the Commonwealth have repeatedly held that "domestic cases require a greater degree of deference to the determinations made by trial courts." *Marcum v. Marcum*, 779 S.W.2d 209, 212 (Ky. 1989); *see also Combs v. Combs*, 787 S.W.2d 260, 262 (Ky. 1990). Therefore, we are not authorized to substitute our own judgment for that of the trial court when the trial court's decision is sound and supported by the record.

For the foregoing reasons, the May 23, 2006, order and judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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