

RENDERED: DECEMBER 12, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001604-MR

DAVID K. WADE

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY T. BURDETTE, JUDGE
ACTION NO. 04-CI-00119

DEBORAH LAWLESS WADE

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CAPERTON, TAYLOR AND WINE, JUDGES.

WINE, JUDGE: The underlying facts of this action are not in dispute. David Kim Wade (David) and Deborah Lawless Wade (Deborah) were married in 1971 and separated on December 17, 2003. Deborah filed a petition for dissolution of the marriage on January 30, 2004. Following three years of litigation, the trial court entered findings of fact, conclusions of law and a decree of dissolution of the

marriage on March 14, 2007. David now appeals from the trial court's division of the parties' pension benefits. Finding no error or abuse of discretion, we affirm.

During the course of the marriage both David and Deborah accumulated pension benefits with the Kentucky Retirement Systems. David is retired from his employment as an engineer with the Kentucky Department of Transportation. From his state pension, he receives gross retirement income of \$4,362.72 per month, or a net retirement income of \$3,664.16 per month. He is also entitled to a minimum social security benefit of \$1,229.00 per month upon eligibility. Deborah is a retired school teacher. She receives net income of \$1,953.00 per month from the Kentucky Retirement Systems. She also receives \$1,249.00 per month in social security disability income, giving her a total monthly income of \$3,202.00.

The trial court, citing Kentucky Revised Statutes (KRS) 61.690(2), first held that retirement or disability benefits "shall not be classified as marital property or as an economic circumstance . . . in an action for dissolution of marriage." However, the quoted language is not from KRS 61.690(2), but from KRS 161.700(2). Furthermore, the exemption under this section applies to retirement or disability benefits accrued under the Kentucky Teacher's Retirement System. On the other hand, neither party disputes the application of the exemption, and the record indicates that Deborah spent at least part of her career as a school teacher. Therefore, we shall assume, as did the trial court, that the exemption applies in this case.

The trial court further noted that this exemption for pension benefits is limited by KRS 403.190(4), which provides:

If 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 the spouse with the greater retirement benefit shall not exceed the level of exception provided to the other spouse.

Based on the application of this statute, the trial court found that David's pension is exempt from division as marital property only up to the value of Deborah's pension. The trial court valued David's pension at \$912,935.38 and Deborah's pension at \$525,472.97. Consequently, the court concluded that the value of David's pension in excess of \$525,472.97 is not exempt. Thus, the court found \$387,462.41 of David's pension to be marital and subject to division. The Court then directed the parties to submit a Qualified Domestic Relations Order (QDRO) to divide the marital portion of David's pension.

David raises two issues with respect to the trial court's valuation and division of the pension plans. He first argues that the trial court should have valued the plans as of the date of the dissolution decree. The trial court based its valuation of the pension plans on the deposition testimony of Charles Estes (Estes), CPA, an expert retained by David. Estes calculated the values of the parties' pension plans in 2005, which was after David retired but before he began drawing benefits.

David argues that the trial court should have reopened the proof to obtain the values of the pension plans as of the date of the decree. As a general rule, we agree with David that pension and profit-sharing plans should be valued on the date of the divorce decree. *Armstrong v. Armstrong*, 34 S.W.3d 83, 86 (Ky. App. 2000), *citing Clark v. Clark*, 782 S.W.2d 56, 62 (Ky. App. 1990). However, this rule must be applied in light of the practicalities of submitting evidence in a dissolution proceeding. As the trial court noted, it relied on the values assigned to the pension plans by David's own expert.

Moreover, David has never indicated exactly how he was prejudiced by the court's use of the 2005 figures. As the trial court pointed out in its order denying David's motion to alter, amend or vacate, Deborah was already drawing benefits as of the date of Estes's deposition, and clearly her pension plan would not have increased in value after that time. Furthermore, David admitted that he retired on August 15, 2005, the same day that Estes calculated the value of his pension plan. David never moved to reopen the proof prior to the entry of the decree, and he concedes that there is no proof that the values of the parties' pension plans were any different as of the date of the decree. In the absence of any contrary evidence, the trial court did not clearly err by relying on the values offered by David's expert in 2005.

The central issue in this case concerns the trial court's method of valuing the parties' respective pension plans. In *Armstrong, supra*, this Court

described three methods for dividing marital pensions: the net present value method, the deferred distribution method, and the reserved 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.

Armstrong, 34 S.W.3d at 85-86 (citations and footnotes omitted).

In this case, the trial court applied the deferred distribution method. After allowing for the KRS 403.190(4) exemption, the court divided the remainder of David’s pension in half, and then directed the parties to submit a QDRO for the disbursement of the funds. David argues that the deferred distribution method was inappropriate because this method requires an approximation of the value of the benefits based on the parties’ life expectancies. Rather, he contends that the plans could be more accurately valued using the net present value method, and the trial

court should have used that method to offset the value of his pension plan against other marital property.

We cannot find that the trial court abused its discretion by applying the deferred distribution method. First, Estes was unable to offer an exact valuation of the present net value of Deborah's pension. David makes no showing that he lacked an opportunity to obtain this information prior to submission of the case to the court. Without a present net value for both pensions, the trial court could not divide the pensions using this method.

Furthermore, the trial court found that using the net present value method was inappropriate in this case.

The net present value method is generally used when the pension can be valued accurately and the marital estate includes enough assets to offset the award of the pension plan to the employed spouse. . . . In the case at bar, [David] and [Deborah] had a net worth in real and personal property that was vastly inferior to the nearly \$400,000 of pension funds. Rather than set up monthly payments for the remainder due to [Deborah], this Court, using its discretion, chose instead to defer the payments from the pension fund in a Qualified Domestic Relations Order.

The trial court has considerable discretion to select a method of valuing pensions when making a just division of the parties' marital and non-marital property. *See Overstreet v. Overstreet*, 144 S.W.3d 834 (Ky. App. 2003), and *Poe v. Poe*, 711 S.W.2d 849 (Ky. App. 1986). While the present net value method may have been an appropriate method for valuing the pensions, the trial court had insufficient evidence to accurately value both pensions under that

method. Considering the limited amount of other marital property, we cannot say the trial court abused its discretion by using the deferred distribution method.

Finally, David argues that the deferred distribution method is inappropriate because the Kentucky Retirement Systems will not recognize a QDRO under these circumstances. In support of this argument, David cites *Moore v. Bradley-Moore*, No. 2004-CA-000693-MR, 2006 WL 1716798 (Ky. App. 2006), an unpublished opinion by this Court. In *Moore*, the parties agreed to divide their pensions using the deferred distribution system. However, the husband later moved to modify the agreement after the Kentucky Retirement Systems refused to accept the QDRO. The trial court in *Moore* granted the Kentucky Rules of Civil Procedure (CR) 60.02 motion and then went on to value and divide the pensions using the present net value method. This Court affirmed, finding that the trial court did not abuse its discretion by changing the division method.

Unlike in *Moore*, however, there is no evidence in this case that the Kentucky Retirement Systems will not accept a QDRO under these circumstances. If such is the case, then David may move to modify the judgment pursuant to CR 60.02, as did the parties in *Moore*. Since David did not raise this issue before the trial court, he is not entitled to present it for the first time on appeal. *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989).

Accordingly, the judgment of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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