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TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2021-CA-0667-MR

LESLIE GERALDS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE LORI GOODWIN, JUDGE
ACTION NO. 10-CI-502979

JANICE GERALDS

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: CETRULO, GOODWINE, AND L. THOMPSON, JUDGES.

THOMPSON, L., JUDGE: Leslie Geraldts appeals from an order of the Jefferson Family Court which reopened a divorce settlement agreement and awarded Janice Geraldts additional money. Appellant argues that the trial court erred in reopening the case, that the award of additional money was erroneous, and that Appellee was not entitled to attorney fees. We conclude that the trial court did not abuse its

discretion in reopening the case, but that it erred in awarding Appellee additional money; therefore, we affirm in part, reverse in part, and remand. On remand, the trial court will also have to determine anew whether Appellee is entitled to any attorney fees.

FACTS AND PROCEDURAL HISTORY

The parties were married on September 28, 1984. In 2010, the parties separated and entered into a collaborative divorce process. A collaborative divorce is not the same as the usual adversarial divorce process. In a collaborative divorce, each party has a lawyer, but there is no formal discovery. The parties also utilize a neutral financial advisor who helps collect and analyze the parties' financial affairs. The parties ultimately negotiate a settlement agreement. The cornerstone of a collaborative process is that the parties are forthright with each other and do not mislead the other party or hide assets. The parties in this case executed a property settlement agreement on November 23, 2010, and a decree of dissolution was entered on February 9, 2011. That decree incorporated the settlement agreement.

The issue in this case revolves around a long-term incentive plan (LTIP) which was available to Appellant. Appellant began working for the Rogers Group in 1978. In 2007 he rose to the position of Vice President. When he achieved this executive position, he began participating in the LTIP. The LTIP

provides a payment to certain executive employees based on the overall performance of the company. In other words, if the company performs better than the year before, the executive receives an LTIP bonus.

Upon Appellant's retirement in 2017, he was asked to sign a noncompetition agreement. In exchange for signing this agreement, he would receive two more years' worth of LTIP payments. This amount was in addition to his Rogers Group retirement plan. As part of the settlement agreement in this case, Appellee was to receive 40.62% of Appellant's retirement plan from the Rogers Group. On January 23, 2019, Appellee learned that Appellant received additional LTIP payments when he retired. Believing these were part of his retirement package, she moved to reopen the case pursuant to Kentucky Rules of Civil Procedure (CR) 60.02(d)¹ and (f).² Appellee claimed that Appellant did not disclose these additional LTIP payments during the collaborative divorce proceedings and she was entitled to a portion of them.

A hearing was held on the issue on July 14, 2020. Multiple people testified during this two-hour hearing, including experts for both parties. Appellant argued that Appellee was not entitled to any portion of the LTIP payments he received upon his retirement. He claimed that these LTIP payments were not part

¹ Fraud affecting the proceedings.

² Any other reason of an extraordinary nature.

of his retirement package, but new income received in exchange for signing the noncompetition agreement. Appellee argued that the LTIP payments he received after his retirement were part of his retirement package; therefore, she was entitled to a percentage. Appellee also requested attorney fees.

The trial court ultimately held that Appellee was entitled to reopen this case pursuant to CR 60.02(d) as Appellant's failure to notify Appellee of the post-retirement LTIP payments amounted to fraud affecting the proceedings. The court also found that CR 60.02(f) also applied because the parties utilized a collaborative divorce process and that requires accurate and full disclosure of income information. The court concluded that the LTIP payments Appellant received after his retirement were part of his retirement package and that Appellee was entitled to \$67,510 of said payments. The court also awarded Appellee \$17,840 in attorney fees.³ This appeal followed.

ANALYSIS

Appellant's first argument is that the trial court erred in granting Appellee's CR 60.02 motion. Appellant alleges that there were no grounds for reopening the settlement agreement pursuant to CR 60.02. We review issues

³ The parties' settlement agreement included a clause that awarded attorney fees if any party intentionally failed to disclose assets.

regarding CR 60.02 for abuse of discretion. *Age v. Age*, 340 S.W.3d 88, 94 (Ky. App. 2011).

CR 60.02 states:

On motion a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

As previously stated, the trial court found that CR 60.02(d) and (f) were applicable.

We will only address CR 60.02(d) as we agree it was applicable to the case at hand.

The trial court found that Appellant failed to disclose the LTIP payments during the collaborative divorce process. In addition, at an unrelated hearing held in 2018, after Appellant retired, he was asked what money he was receiving in retirement. Appellant did not inform the court or Appellee of the

LTIP payments. The court held that Appellant intentionally failed to disclose this asset. Failing to disclose assets to the court and Appellee can be considered fraud affecting the proceedings. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 818 (Ky. 2002). The trial court’s finding that there was a fraud perpetrated that affected the proceedings was not unreasonable; therefore, we find no error in the court’s conclusion that CR 60.02(d) was applicable.

Appellant’s second argument on appeal is that the trial court erred by finding the post-retirement LTIP payments were part of Appellant’s retirement package and that Appellee was entitled to a portion. We agree with Appellant as to this issue.

“Generally, anything accrued and acquired during a marriage is marital property. KRS^[4] 403.190(2). A pension is a form of deferred compensation which is earned during each day of . . . work. . . . The value of a pension, if any[,] should therefore be marital property for the portion accrued during [marriage].” *Light v. Light*, 599 S.W.2d 476, 478 (Ky. App. 1980). Here, Appellee was entitled to a portion of Appellant’s retirement package earned during the marriage. Appellee received 40.62% of Appellant’s retirement.⁵

⁴ Kentucky Revised Statutes.

⁵ This was presumably her marital portion of the retirement package and not a random amount she negotiated to receive. The record is not clear.

We review court rulings regarding the classification of marital property under the *de novo* standard. *Cobane v. Cobane*, 544 S.W.3d 672, 676 (Ky. App. 2018). The trial court found that Appellee was entitled to a portion of the post-retirement LTIP payments because these payments were being received during his retirement; therefore, they were part of his retirement package. We disagree. Appellant received the additional years of LTIP payments in exchange for executing a noncompetition agreement. Had he not executed the agreement, he would not have received these additional funds. This was confirmed by Appellant's testimony; the testimony of John Carpenter, III, the Vice President of Human Resources at the Rogers Group; and documentation entered into the record. This was new income earned after the parties' divorce. The fact that he received this money after he retired does not mean it is part of his retirement package. This was compensation received for executing the noncompetition agreement and earned after the parties divorced; therefore, it is not marital property. The trial court erred in concluding that Appellee was entitled to a portion of the LTIP payments Appellant received once he retired.

The third and final argument on appeal is that the trial court erred in awarding Appellee attorney fees. We must reverse and remand as to this issue. While we have concluded that Appellee was unsuccessful in her CR 60.02 motion, the trial court did find that Appellant intentionally misled her regarding his LTIP

income. On remand, the trial court should consider whether Appellee is still entitled to attorney fees based on the attorney fee clause in the settlement agreement.

CONCLUSION

Based on the foregoing, we affirm in part, reverse in part, and remand. We affirm the court's judgment that Appellee was justified in reopening the divorce proceedings pursuant to CR 60.02(d). We reverse the court's judgment that Appellee was entitled to a portion of Appellant's post-retirement LTIP payments. We also reverse the award of attorney fees. On remand, the trial court shall determine whether Appellee is still entitled to attorney fees.

ALL CONCUR.

BRIEFS FOR APPELLANT:

William D. Tingley
Hillary A. Hunt
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BRIEF FOR APPELLEE:

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