

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-002317-MR

DAVID WINSTEAD

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 08-CI-00039

HOLLY WINSTEAD

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND NICKELL, JUDGES; LAMBERT,¹ SENIOR JUDGE.

NICKELL, JUDGE: This appeal arises from the Kenton Circuit Court's October 31, 2008, order valuing and dividing the parties' retirement/pension plans. The sole issue presented for resolution is whether the trial court properly valued Holly Winstead's Kentucky Teacher's Retirement System (KTRS)-Defined Benefit Plan

¹ Senior Judge Joseph E. Lambert 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.

using only the amount of her personal contributions. After a careful review of the record, we affirm.

David and Holly Winstead were married in 1992. On January 4, 2008, Holly filed a petition to dissolve the marriage. The parties entered into an agreement settling all property and parenting issues except the proper valuation and treatment of their respective pensions. During the marriage, Holly contributed to a KTRS-Defined Benefit Plan in conjunction with her employment as an elementary school teacher, and David was a salesman who maintained a 401(k) retirement plan through his employer. The entire value of these accounts accrued during coverture.

In determining the values for these accounts for division purposes, the trial court found the current cash value of each plan was the appropriate measure, rather than an actuarial valuation of Holly's account as urged by David. Using information provided by the plan administrators of the parties' retirement plans, the trial court set the value of Holly's account at \$47,998.41,² and David's account at \$64,491.61, as of the date of entry of the divorce decree. The trial court found Holly's contributions were exempt from distribution pursuant to KRS 161.700. The court further granted David an exemption equal to the amount of Holly's protected funds pursuant to the guidance contained in *Shown v. Shown*, 233 S.W.3d 718 (Ky. 2007). The trial court then awarded Holly \$8,246.60 of David's 401(k). This appeal followed.

² This amount represented only the contributions Holly had made to her retirement plan and did not include any employer contributions or other additions to the account.

David contends the trial court erred in failing to use the actuarial value of Holly's retirement account in determining the proper distribution of the parties' retirement accounts. He contends the trial court's use of only Holly's direct contributions in its calculations resulted in an inequity that was contrary to the law of this Commonwealth.

It is undisputed that participants in the KTRS-Defined Benefit Plan are afforded special treatment in that their retirement plans are protected from division in dissolution actions. *See* KRS 161.700(2) (KTRS accounts are not to be classified as marital property and "shall not be considered as economic circumstances during the division of marital property.") KRS 403.190(4) further provides that if one party's retirement benefits

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.

Thus, as the trial court correctly found—and the parties agree—Holly's KTRS account was exempt from distribution, and David was entitled to an exemption from division of his 401(k) of an equal value. As noted by each of the parties in their briefs before this Court, the sole issue to be decided on appeal is whether the trial court erred in its choice of method for valuing Holly's KTRS account for the purpose of off-setting the value against David's 401(k).

Trial courts in Kentucky are authorized to utilize one of three methods of dividing pension plans in divorce proceedings—net present value, deferred distribution, or reserve jurisdiction. *Armstrong v. Armstrong*, 34 S.W.3d 83, 85 (Ky. App. 2000) (citing *In re the Marriage of Hunt*, 909 P.2d 525, 530-31 (Colo. 1995)). There is no requirement that a trial court use a particular method under any certain set of circumstances. In addition, Kentucky courts make no distinction between contributory and noncontributory pensions for the purpose of dividing retirement accounts in divorce proceedings. *Foster v. Foster*, 589 S.W.2d 223, 294 (Ky. 1979). David contends the trial court's use of only Holly's personal contributions to her account was erroneous as it failed to take into account any amounts contributed by Holly's employer. Holly counters that the trial court's calculation was reasonable, fair, and an accurate method of comparing the values of the parties' accounts as of the date of their divorce. The test on appeal is not whether we would have decided the matter differently, but whether the trial court's findings were clearly erroneous or that it abused its discretion. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted).

The trial court here chose to use the net present value method, and, upon analyzing the evidence before it, specifically found the actual cash value of the accounts—that is, the amounts available for immediate withdrawal from each account—to be the proper values to consider for division purposes. Although such a valuation allows Holly to maintain her entire pension free of any claim by David and requires him to divide his own retirement account, we are unable to conclude

the trial court erred in making this determination. The trial court analyzed the data presented to it by joint stipulation and found the actuarial value David argued should be used was too speculative to represent an accurate current value of the KTRS plan.

“We recognize that ‘a trial court retains broad discretion in valuing pension rights and dividing them between parties in a divorce proceeding, so long as it does not abuse its discretion in so doing in the sense that the evidence supports its findings and they thus are not clearly erroneous.’” *Armstrong*, 34 S.W.3d at 87 (quoting *Duncan v. Duncan*, 724 S.W.2d 231, 234-35 (Ky. App. 1987)). *See also Overstreet v. Overstreet*, 144 S.W.3d 834 (Ky. App. 2003).

Based on the record before us, we are unable to conclude the trial court abused its discretion as there was substantial evidence supporting its ruling. The values used were provided by the parties, the facts and circumstances surrounding the parties’ employment status were considered, both statutory and case law guidance were evaluated, and the court concluded the actuarial value was too speculative to be accurate and useful. Thus, it determined the lump-sum cash value was the appropriate measure to utilize in making its calculations. The decision was not clearly erroneous and we can see no abuse of discretion.

Therefore, for the foregoing reasons, the judgment of the Kenton Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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