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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000532-MR

STEVEN N. FITZGERALD — APPELLANT

v.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE TIMOTHY E. FEELEY, JUDGE
ACTION NO. 09-CI-01211

KIMBERLY D. FITZGERALD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND VANMETER, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Oldham Family Court. Based upon the following, we affirm the decision of the family court.

BACKGROUND INFORMATION

Steven and Kimberly Fitzgerald were married on July 1, 1995, and filed for a divorce on December 10, 2009. The parties have two minor children. At the time of their separation, Steven resided in the marital residence in

Carrollton, Kentucky, while Kimberly and their two children resided in a patio home the couple had purchased in 2007, 2041 Eagles Landing Drive, LaGrange, Kentucky.

Kimberly is a counselor at Oldham County High School and earns $69,896.00 and Steven is employed with Dow Corning in Carrollton, earning $101,726.00. After a hearing, the circuit court issued Findings of Fact and Conclusions of Law regarding the distribution of the marital property as well as financial support of the children. Steven now brings this appeal arguing that the circuit court erred in its findings and conclusions.

STANDARD OF REVIEW

Kentucky Rule of Civil Procedure 52.01 provides that "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Findings are considered to be clearly erroneous if they are manifestly against the weight of the evidence. *Frances v. Frances*, 266 S.W.3d 754, 756 (Ky. 2008); *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967).

In reviewing a court's division of property in a divorce action as well as calculation of child support, an appellate court must defer to the discretion of the trial court. *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978). The test for abuse of discretion is "whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). With this standard in mind, we examine the issues before us.

DISCUSSION

Steven first argues that the trial court erred in assigning the parties' nonmarital and marital interest in the proceeds from the sale of the parties' marital home in Carrollton. He contends that he purchased Goldolphin Farm in Henry County on June 3, 1994, prior to the parties' marriage. The Farm property consisted of 269 acres of unimproved land which was divided into five tracts for separate sales. The purchase price for the property was $236,000.00, of which, Steven made a down payment of $66,000.00 and mortgaged $170,000.00. This property was partially sold off which resulted in $48,574.00 of income reported on the 1996 joint tax returns.

In 1997, Steven placed the remaining property in his and Kimberly's joint names prior to construction beginning on their Carrollton County property, which became the marital residence. In August of 1996, the couple sold cattle to pay off the remaining balance of the mortgage on the property.

The Carrollton house was built by the couple under a construction contract in the amount of $236,000.00. Kimberly's father, Billy Strausbaugh, gave the couple a gift of serving as the co-builder on the residence and saved the parties $21,000.00. The circuit court found that this benefitted both parties.

On March 23, 1998, the parties sold two of the Henry County tracts and paid their mortgage down by $137,020.59. They refinanced the property in March of 1999, and the remaining balance on the mortgage at the time the parties sold the property in November of 2012 was $72,497.00.

The circuit court noted that:

> [Steve] introduced evidence of the cost of certain improvements to the Carrollton property. He introduced no evidence as to what the fair market value of the property would have been without the improvements versus the value with the improvements. The value obviously being $315,900.00 because that was the sales price.

In determining the marital and nonmarital value of the property, the circuit court found as follows:

> Under *Brandenburg v. Brandenburg*, 617 S.W.2d 871 (Ky. App. 1981), then, the Petitioner has a nonmarital contribution toward the equity in the Carrollton property of $5,800.00 representing her nonmarital contribution toward the purchase price of a lot. The Respondent has a $22,112.00 nonmarital contribution toward the purchase price of the lot. That nonmarital contribution is calculated from $4,200.00 of the down payment, as well as $17,912.00 payment on the $30,000.00 note directly attributed from the sale of farm tract 1A, which was purchased by Mr. Fitzgerald prior to his marriage to Ms. Fitzgerald and sold prior to the transfer of the remaining farm property to Ms. Fitzgerald. The marital contribution is $200,516.00. The equity is $227,458.00… Utilizing the *Brandenburg* formula … indicates that of the $227,458.00…that the Petitioner will be restored her nonmarital property of $5,775.00 and one-half of the marital interest of $99,832.50 for a total of $105,607.05 and the Respondent should be restored to his nonmarital interest of $22,018.00 plus one-half of the marital interest of $99,832.50 for a total of $121,850.50.

We find the circuit court's findings and conclusions to be correct on the division of the marital residence. The circuit court acknowledged the nonmarital interest that both parties had in the property and awarded appropriate amounts based upon the Brandenburg formula. Thus, we affirm the circuit court's decision on this issue.

Steven next argues that the circuit court erred in requiring Kimberly's Teacher Retirement Plan and the Respondent's Dow Corning Defined Benefit Plan be divided by Qualified Domestic Relations Orders (QDROs), which is contrary to the facts of the case, is based on assumptions not in evidence, does not constitute a just division of this portion of the parties' marital estate and, therefore, constitutes an abuse of discretion. We disagree.

The parties called a joint witness, Mary Vanderhaar, to address the issues of the four retirement plans held by the parties. Two of the plans were deferred compensation/401K plans. The other two were Kimberly's Kentucky Teacher Retirement Plan (KTRP) and Steven's Dow Corning plan. Of the 182 months that Kimberly was a member of the KTRP, she was married for 171 of those months. Kimberly's 457 plan had a net value of $12,127.40 at the time of their divorce.

Steven participated in a 401K plan which had a net value of $19,547.00 at the beginning of the marriage. At the date of the decree, Steven's 401K was worth $267,921.88. Upon Steven's service of the divorce petition, he withdrew a loan of $11,328.73. The net value of his plan as of the date of the decree was $241,282.08. Steven also has 264 months of total service with his Dow Corning Retirement Plan, of which 178 months were during the time of his marriage.

In making its decision regarding the distribution of retirement funds, the trial court took into consideration the fact that teachers do not pay into the Social Security Fund and are not, therefore, eligible for benefits. Dow Corning's Defined Benefit Plan is funded by Dow Corning. While Kimberly's retirement plan is

subject to a cost of living increase, Steven's is not. As stated before, Kimberly is not eligible for additional Social Security benefits while Steven is. Kimberly requested that the plans be divided pursuant to a QDRO. Steven disagreed and sought that the plans be divided by the immediate offset method.

The trial court also took into consideration Ms. Vanderhaar's letter to Counsel of December 20, 2010, which provided as follows:

> The weakness of this method lies in the fact that the calculated value is based on assumptions rather than absolute fact. The present value is determined using actuarial assumptions relative of the pension holder's projected life span. These actuarial assumptions measure the probability that the pension holder will reach retirement age, thus entitling him/her to benefits, and the length of time beyond his/her retirement date that benefits are expected to be received. These projections are based upon probabilities. Therefore, the present value of the benefits will be correct based the average case. However, no case is exactly average. In the event that the pension holder would die prematurely before he/she reaches retirement age, the spouse would have received his/her interest in retirement benefits at the time of divorce, which due to the death of the pension holder, were never actually received by the pension holder. Therefore, one party received an interest in assets which never flourished for the other party. Due to this pitfall, some Court's have decided that the Immediate Offset Method places an uneven amount of risks on the pension holder as compared to the spouse. The pension holder ends up having to trade current dollars for future dollars which bear the risk of never being received.

Based upon this letter and the evidence of the amounts accrued as well as the possibility of the party's ability to receive Social Security benefits, the trial court held as follows regarding retirement distribution:

> Pursuant to Qualified Domestic Relations Order with the parties to equally share the cost of Mary Vanderhaar's service, and the date of division being the date that the Limited Decree of Dissolution of Marriage was entered, the Respondent shall receive 47% of Petitioner's Kentucky Teacher Retirement Plan Benefits and the Petitioner shall receive 33.7% of the Respondent's Dow Corning Pension.
>
> The Petitioner is awarded her 457 Deferred Comp Plan free and clear of any claim of the Respondent. Taking into consideration the value of the Petitioner's 457 Deferred Comp Plan, the Petitioner shall receive $104,804 (one-half of $209,608.00) from the Respondent's 401K Plan, plus gain or loss thereon from the date of Decree until segregation. At the parties' equal expense, Mary Vanderhaar shall handle that Qualified Domestic Relations Order preparation to divide Respondent's 401K Plan.

We find this division of the retirement plans and deferred compensation plans held by the individuals to be equitable. Steven argues that his original, premarital interest in his 401K should be decided based upon value which that original investment increased over the years and not just by subtracting the amount from the total net at the time of the decree. However, pursuant to Kentucky Revised Statute 403.190(3), the burden rests on Steven to prove the amount. *See Travis v. Travis*, 59 S.W.3d 904, 912 (Ky. 2001). Thus, we will affirm the circuit court's decision as to the Kentucky Teachers' Retirement Plan and the Dow Corning Retirement Plan as well as affirm the trial court's decision in regards to the premarital amounts in the 457 and 401K accounts.

Next, Steven argues that the circuit court's conclusion that Kimberly's withdrawal of $41,341.00 from her 403b Plan and a $10,000.00 loan from her 457

Plan were used for marital purposes and therefore not divisible as marital property is contrary to the law and facts of the case and constitutes an abuse of discretion.

Kimberly was a participant in a 403b Plan through the Kemper Investor's Life Insurance Company. The circuit court found that the account had a high valuation in March of 2007 of $63,000.00. In June of 2009, it was valued at $41,341.00, which the circuit court found was a result of the fluctuation in the stock market. In June of 2009, Kimberly cashed in this fund and received the amount of $32,678.38, which was the full amount less the ten percent penalty incurred due to the withdrawal. The circuit court found that Kimberly's withdrawal was due to the debts that the parties had accumulated during their marriage mainly as a result of two residences. We find the circuit court did not abuse its discretion on this issue. Kimberly provided evidence of her use of the funds through her check registry. Thus, we affirm the decision.

Steven next argues that the circuit court's conclusion that his withdrawal of $11,328.73 (which was used to prepare the marital residence for sale) from his 401K plan to be a partial distribution of the marital estate is contrary to the law and facts of the case, constitutes a division of the same property twice, and constitutes an abuse of discretion. He contends that he borrowed $25,000.00 to purchase the patio home and that after the parties' separation in June 2009, he moved to the marital residence and made substantial improvements from the $11,328.73 he borrowed from his 401K.

The trial court found that Steven withdrew this amount when he was served with the divorce petition. The trial court found that this amount was withdrawn and not for marital purposes. We agree. As set forth above, deference is given to the trial court in judging the credibility of the witnesses and the evidence. In this case, there was evidence that Steven withdrew the money shortly after receiving service of the divorce petition. We, therefore, affirm the decision of the circuit court on this issue.

Steven also asserts that the circuit court erred in concluding that he was responsible for half of Kimberly's $17,280.67 Bank of America Visa. The circuit court found this to be a marital debt. Steven asserts that Kimberly cashed out her 403b Account in June 2009, borrowed $10,000.00 from her 457 plan on October 26, 2009, and charged her credit cards to the maximum in an effort to dissipate the marital assets under the guise of marital expenditures and in an attempt to diminish his interest in the final division of marital property.

In *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 523 (Ky. 2001), the Kentucky Supreme Court set forth the following analogies a court should go through in determining whether debt incurred by the party is marital debt:

> [R]eceipt of benefits and extent of participation, whether the debt was incurred to purchase assets designated as marital property. . . whether the debt was necessary to provide for the maintenance and support of the family . . . [and] the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness.

Id.

The circuit court heard evidence regarding Kimberly's expenditures and ruled the debt was marital. We find no abuse of discretion.

Steven next argues that the trial court erred in concluding that Kimberly received a $4,000.00 loan from her parents erroneously finding it to be a loan and a marital debt equally divisible between the parties. However, the court did not assign this debt as marital debt. Therefore this argument is without merit.

Finally, Steven's last two arguments are that the trial court erred regarding the payment of certain obligations. Steven argues that the trial court wrongly concluded that he should pay $1,677.85 to Kimberly for half of the city and county real estate taxes on the patio home and $150.00 per month for half of the patio home insurance until the property is sold. Division of the marital estate and any obligations are within the discretion of the trial court. *Gaskill v. Robbins*, 282 S.W.3d 306, 317 (Ky. 2009). Here, the circuit court determined that the patio home would be sold and the proceeds divided equally. Thus, the division of the obligations associated with the property was not in error. The court also ordered that Steven pay $2,960.00 for one-half of the children's past and current extracurricular and school fees. This is a marital debt, not a child support obligation, as Steven argues. There was no error made by the trial court. We, therefore, affirm the findings and conclusions entered by the Oldham Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

John K. Carter
LaGrange, Kentucky

BRIEF FOR APPELLEE:

James L. Theiss
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