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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000249-MR

MARGARET A. PITMAN APPELLANT

v. APPEAL FROM FRANKLIN FAMILY COURT
HONORABLE SQUIRE N. WILLIAMS, III, JUDGE
ACTION NO. 09-CI-00901

KEITH L. PITMAN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MAZE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Margaret A. Pitman appeals from that portion of a dissolution judgment awarding Keith L. Pitman the entirety of his marital retirement account.

In 1995, Keith and Margaret began a relationship in New York and their son, Mitchell, was born that year. They lived together until 1996 or 1997, when Margaret moved with Mitchell to North Carolina and then to Kentucky.

Keith and Margaret married in 2002, but did not live together on a regular basis. Margaret remained living in Kentucky and Keith remained in New York. On May 29, 2009, Margaret filed for divorce.

During the marriage, Margaret ran a business called Fabulous Hats. Keith, Margaret and Mitchell met during periods when Margaret was selling her hats before the Kentucky Derby and the Saratoga Meet in New York, with Keith helping with the events and caring for Mitchell. While Margaret stayed in New York selling hats for the Saratoga Meet, Keith brought Mitchell to Kentucky and remained with him, so Mitchell could begin school in the fall.

Fabulous Hats earned as much as $100,000 gross income during one of these events, but Margaret testified the business typically made much less money, however the business was sufficiently successful to enable her to maintain a regular retail location. Although previously requested, Margaret did not submit any documents to establish the income or valuation of the business.

The division of personal property, custody and child support was resolved before trial. However, the parties disagreed as to the division of Keith's marital retirement account with a value of approximately $25,000 and whether Keith should have an interest in Margaret's business. Margaret requested 50% of the account and Keith requested the total account. During his testimony, Keith stated he would disclaim any interest in Margaret's business if she would disclaim any interest in his retirement account and thought such an arrangement would be equitable.

The family court considered how Keith's retirement account should be distributed in light of the "contribution of each spouse to acquisition of the marital property, including contribution of a spouse as a homemaker" as provided by KRS 403.190(1)(a) and awarded the entire account to Keith, reasoning as follows:

> [Keith], alone, contributed to the acquisition of this retirement account. In addition, because of the unique circumstances of this marriage, there was never a communal marriage effort. Both parties worked and provided primarily for their own respective living needs separate and apart from one-another throughout the marriage. The "homemaker consideration" simply does not apply to this case.

The family court further determined that "[i]n light of the court's ruling on [Keith's] retirement, the court finds that it is just that [Margaret] maintain sole ownership of her business, Fabulous Hats."

Margaret appealed the family court judgment awarding Keith's marital retirement account solely to Keith. She argues she contributed to Keith's ability to earn a living by caring for Mitchell and they had a communal marital effort despite living separately.

"What constitutes a just division [of marital property] lies within the sound discretion of the family court and will not be disturbed absent an abuse of discretion." *Hempel v. Hempel*, 380 S.W.3d 549, 553 (Ky.App. 2012).

Family courts are directed to "divide the marital property . . . in just proportions considering all relevant factors . . . including contribution of a spouse

as homemaker[.]" KRS 403.190(1). The contribution of a spouse as homemaker can include assisting the other spouse even when they are separated "by caring for his children, thus continuing to enhance to some degree his ability to earn a living." *Shively v. Shively*, 233 S.W.3d 738, 740 (Ky.App. 2007) (quoting *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980)).

There is no presumption that marital property must be divided equally, so long as it is divided in "just proportions" after consideration of the KRS 403.190(1) factors. *Gaskill v. Robbins*, 282 S.W.3d 306, 316 (Ky. 2009); *Croft v. Croft*, 240 S.W.3d 651, 655 (Ky.App. 2007). An unequal award of marital retirement benefits is proper if needed to make the overall division of marital property in "just proportions." *See Snodgrass v. Snodgrass*, 297 S.W.3d 878, 888 (Ky.App. 2009); *Smith v. Smith*, 235 S.W.3d 1, 17 (Ky.App. 2006); *Overstreet v. Overstreet*, 144 S.W.3d 834, 839 (Ky.App. 2003).

We determine the family court did not abuse its discretion in awarding the retirement account to Keith and the business to Margaret. While the family court could consider Margaret's contribution in caring for Mitchell to Keith's ability to work and earn the retirement account, Keith also contributed to Margaret's ability to earn income by providing care for Mitchell during Margaret's busiest business periods. Under the facts, any marital effort towards each spouse's accumulation was minimal. The family court did not abuse its discretion by determining that such a division was in just proportions.

Accordingly, we affirm the Franklin Family Court's property division.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marie Brannon
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack W. Flynn
Frankfort, Kentucky