RENDERED: AUGUST 23, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001023-MR

DENNIS E. BAKER APPELLANT

v.

APPEAL FROM KENTON FAMILY COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 94-CI-02046

MARY PATRICIA BAKER APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MAZE, AND TAYLOR, JUDGES.

LAMBERT, JUDGE: In this post-dissolution appeal, Dennis E. Baker has sought review of the June 11, 2018, judgment of the Kenton Family Court ordering him to pay his former wife, Mary Patricia Baker (Patty), the sum of $6,519.12 as her share of his past retirement benefits. We affirm.

Dennis and Patty were married in Kenton County, Kentucky, on March 16, 1985, and they separated on December 5, 1994. Patty filed a petition to dissolve the marriage less than two weeks later in which she sought an equitable distribution of the parties' property. She was employed at Celestial Restaurant, and Dennis worked for CSX Transportation. The parties entered into a separation agreement in April 1996, which the court adopted in its findings of facts and conclusions of law and in the decree dissolving the marriage that were entered May 8, 1996. Pursuant to the terms of the settlement agreement, Patty was to receive:

> An equal percentage of the Husband's railroad retirement account as it is determined to be by the plan administrator from the date of the parties [sic] marriage on March 16, 1985 until the entry of the Decree of Dissolution of Marriage by this Court[.]

The agreement went on to provide:

> Both Parties agree that in the event any document, legal instrument, or other writing is necessary to effect the terms and provisions of this agreement, each party will produce, execute, and/or sign such document in order to effect the intent and purposes of this agreement.

Two decades later, on June 28, 2016, Patty filed a motion regarding her interest in Dennis's railroad retirement benefits, noting that Dennis had begun drawing his retirement within the last year. She requested a hearing date to determine what her monthly amount due would be and to order the Railroad Retirement Plan Administrator to begin paying her the proportionate amount to which was entitled under the separation agreement. The family court entered a qualified domestic relations Oorder (QDRO) on July 17, 2017, in which the court found that Dennis's non-tier I benefits under the Railroad Retirement Act were marital property and subject to allocation. The court awarded and directed the Railroad Retirement Board to pay Patty an interest in Dennis's benefits based upon the appropriate computation. Patty began receiving $271.63 per month as her portion of Dennis's railroad retirement benefits on August 1, 2017.

On December 20, 2017, Patty, represented by new counsel, filed a motion to obtain the two years of retirement benefits she did not receive because Dennis failed to notify her that he had retired or to notify the Railroad Retirement Board that the amount was required to be divided as marital property. Because the Railroad Retirement Board did not have the authority to pay past due benefits to her, as the benefits were paid directly to Dennis, Patty moved the court to order Dennis to pay her the amount due to her from the date of his retirement until she began receiving benefits.

The family court held a hearing on Patty's motion on May 24, 2018. Dennis informed the court that he had retired July 1, 2015, and that he was currently receiving approximately $3,800 per month in railroad retirement benefits. Patty stated that she had not received any benefits until the QDRO was filed in July 2017 and wanted back due benefits from the date of Dennis's retirement two years prior to that. The parties did not dispute that the amount she was receiving was $271.63 per month.

Patty testified about the separation agreement, specifically, that she was to receive a portion of Dennis's railroad retirement benefits. She stated that it was not until December 2015 that she found out from mutual friends – not Dennis – that he had retired. Patty first tried to obtain her benefits from the Railroad Retirement Board on her own. That did not work, and she hired an attorney who later passed away. Dennis had received the full amount of benefits from the time of his retirement, which included the amount to which she was entitled under the separation agreement. Patty stated the delay was caused by her trying to handle the matter on her own and then the death of her first attorney. Patty admitted that she did not attempt to file a QDRO between the date of their divorce and December 2015, although she had the information in the separation agreement necessary to do so. She said Dennis had tried to resolve this with her one time, when they went to the Railroad Retirement Board in Cincinnati. She had spoken with the Railroad Retirement Board five times, either in person or over the telephone.

Dennis testified that he understood Patty was to receive a portion of his railroad retirement benefits and that his monthly benefit went down by the amount Patty was receiving when she began receiving her portion of the benefits. He went on to describe the steps he had taken to resolve the issue, which included taking Patty to the Cincinnati office six months to a year after he had retired when he found out she had been going to the wrong office in Cleveland. Dennis did not believe Patty was entitled to any retroactive benefits. On cross-examination, Dennis said that he had not notified Patty when he retired but that Patty called a couple of times to ask him when he was planning to do so. He had told her he was not sure. Once he decided when he was going to retire, Dennis did not do anything to let Patty know he had made that decision. He had given the Railroad Retirement Board his dissolution decree and separation agreement when they divorced in 1996.

Once the testimony was concluded, Dennis argued that Patty should only be able to collect her portion of the benefits after she filed the QDRO. The court asked why the failure to get a QDRO cut Patty off from obtaining benefits. Dennis stated that Patty could have obtained one earlier, to which the court responded that Dennis could have done so as the separate agreement placed the parties under a mutual obligation to complete documents to effectuate their agreement. Patty was not specifically obligated to complete documents. The court suggested looking at the issue from an equity theory. Dennis argued that if both parties were to blame, it would not be equitable for Patty to recover all of the funds she sought. If she were to prevail, all of the blame would be put on Dennis, which would allow Patty to benefit from their mistake. On the other hand, Patty argued that she had done everything in her power to seek the information that would permit her to file a QDRO to collect her portion of Dennis's retirement benefits.

Dennis did not tell her when he retired, and she asserted that Dennis was aware that she was seeking information about his retirement and that she was not receiving her portion of his benefits.

The court reasoned that Dennis could not keep the fact of his retirement secret from Patty and focused on the fact that the settlement agreement contained a requirement that both he and Patty were mutually responsible to produce and sign any document necessary to effectuate the terms of the agreement. The court found both parties to be equally at fault in failing to file the QDRO. However, the court found that Dennis was unjustly enriched by receiving Patty's portion of the retirement benefits and that this was inequitable. And while the failure to file the QDRO appeared to be a mutual mistake, the court recognized that Patty had asked Dennis about his retirement plans and that Dennis knew she was supposed to get a portion of his benefits. The court determined that Dennis was holding Patty's money and stated its intention to enter a judgment in her favor.

The court ultimately entered its findings of fact, conclusions of law, and judgment on June 11, 2018, awarding Patty $6,519.12, representing $271.63 per month for 24 months, plus interest. The court concluded as follows:

> 2. Upon his retirement, [Dennis] had a duty to take actions necessary to ensure that [Patty] would receive her share of the benefits, including the preparation of the QDRO. He failed to comply with his duty by failing to inform [Patty,] failing to inform the railroad retirement plan administrator, and failing to prepare a QDRO.

> 3. [Patty] also had a duty to take actions to enforce the settlement agreement and prepare the QDRO. She complied with her duty by inquiring about [Dennis's] retirement.
>
> 4. [Dennis] argues that he is not required to pay [Patty] this amount because of a mistake. This argument is not well-taken. The fact that [Patty] did not receive her benefits for a period of 24 months is not due to a mutual mistake of the parties. Rather, it is due to [Dennis's] failure to fulfill his duty to take necessary action. In Kentucky, the law of equity regards as done that which ought to be done. *Munday v. Munday*, 687 S.W.2d 143 (Ky. 1985). In this case, the court therefore concludes that [Patty] ought to have received timely notice of [Dennis's] retirement and the benefits due to her pursuant to the Decree.

This appeal now follows.

On appeal, Dennis, now proceeding *pro se*, argues that we should reverse the family court's ruling, asserting that Patty had the duty to submit the appropriate paperwork to receive her portion of his retirement benefits pursuant to the applicable federal regulations and instructional brochures, his attorney did not understand his pension plan and therefore did not adequately establish that Patty had the responsibility and duty to obtain her benefits, that no mistake had been made, that *Munday*, *supra*, did not support the family court's order, and that he should not have been penalized by Patty's failure to file the necessary paperwork until two years after he retired. Patty, on the other hand, contends that the family court did not commit any error in its ruling and that it would be unjust if the court permitted Dennis to keep her benefits.

Whether Patty is entitled to equitable relief is a question of law, which we shall review *de novo*. *See Javier Steel Corp. v. Central Bridge Co., LLC*, 353 S.W.3d 356, 359 (Ky. App. 2011) ("Legal conclusions, however, are subject to *de novo* appellate review. 'Questions of law are reviewed anew by this Court.' *Daniels v. CDB Bell, LLC*, 300 S.W.3d 204, 210 (Ky. App. 2009). The theory of unjust enrichment is an equitable doctrine, *Dodson v. Key*, 508 S.W.2d 586 (Ky.1974), and the application of an equitable doctrine to the facts of a case is a question of law. *Daniels*, 300 S.W.3d at 210. Therefore, the question as to whether Javier was unjustly enriched will be 'reviewed anew by this Court.' *Id*. at 209.").

What Dennis's arguments boil down to is his belief that Patty did not seek her portion of his retirement benefits in a timely fashion and that he should not bear the burden of her delay by having to pay her two years of past due benefits. We disagree with his argument that it was Patty's responsibility alone to file the proper paperwork pursuant to the federal regulations. The parties' separation agreement specifically required both parties to produce or sign any documents needed to effectuate the terms of the agreement, which included Patty's right to collect a portion of Dennis's retirement benefits. Therefore, Dennis also had a responsibility in this matter. We also agree with Patty and the family court that she had fulfilled her duty by filing the QDRO and asking Dennis about his retirement plans. Dennis, however, failed in his obligation to effectuate the terms of the agreement by not telling Patty when he retired, despite having been asked previously. As a result, Patty lost two years of benefits she should have been receiving pursuant to the settlement agreement.

The family court considered it a matter of equity that Patty should recover her past due retirement benefits from Dennis. It appropriately relied upon the Supreme Court of Kentucky's holding in *Munday, supra*, to support its decision that Dennis should have told Patty when he retired, which would have allowed her to begin collecting her benefits two years earlier: "The expressed desire of the parties to the joint will prevails over what would ordinarily be devolution by operation of law. The disposition we reach is what the parties intended. We apply an ancient Maxim of Equity. Equity regards as done that which ought to be done." 687 S.W.2d at 144 (footnote omitted). Furthermore, other Kentucky case law cited by Patty supports the court's decision, including *Bailey v. Bailey*, 399 S.W.3d 797, 803 (Ky. App. 2013) (equity will not permit the behavior of one spouse to impoverish the other spouse), and *Haeberle v. St. Paul Fire and Marine Ins. Co.*, 769 S.W.2d 64, 67 (Ky. App. 1989) (the equitable doctrine of unjust enrichment "is applicable as a basis of restitution to prevent one person from keeping money or benefits belonging to another."). To permit Dennis to retain two years of his retirement benefits that would have been paid to Patty had he informed her of his retirement date certainly constitutes unjust enrichment. The circuit court did not err as a matter of law in its ruling that Dennis owed Patty the past due benefits.

For the foregoing reasons, the judgment of the Kenton Family Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Dennis E. Baker, *pro se*
Independence, Kentucky

BRIEF FOR APPELLEE:

Jennifer B. Landry
Covington, Kentucky