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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001661-MR

WILLIAM WADE TAGER

APPELLANT

v.

APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 03-CI-00441

CHARLENE TAGER
(NOW SAMPLES)

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: William Tager appeals from post-decree orders of the Meade

Circuit Court equally dividing the marital portion of his retirement plan and

entering a Qualified Domestic Relations Order (QDRO) directing the plan

administrator to divide the benefits based upon the value as of the date of the

dissolution decree. He argues that the marital portion of the plan should be valued

based upon the much later order providing for an equal division of the marital portion of his retirement plan. Although the facts of this case are unusual, William fails to show that he is unfairly prejudiced by the trial court's use of the dissolution date to value his retirement plan. Hence, we affirm.

The relevant facts of this matter are not in dispute. William and Charlene Tager were married in 1982 and separated in December 2002. On December 11, 2003, William filed a petition for dissolution of the marriage. On May 6, 2004, the trial court entered a limited decree of dissolution. The court previously referred the disputed issues relating to child support and custody, maintenance, and division of marital property to the Domestic Relations Commissioner (DRC).

On May 13, 2004, the DRC issued his report. In pertinent part, the DRC noted that William was serving as a member of the United States Army and had qualified for military retirement benefits. The DRC further noted that "[t]he parties stipulated that the retirement is partially marital in nature, having been married twenty of William's twenty-three [years'] length of service." At the time of the DRC's report, William was still serving in the Army and had not yet begun to draw retirement benefits. Neither party filed exceptions to this portion of the DRC's report, and the trial court adopted the report by order entered on November

20, 2006. However, that order did not provide for any division of William's retirement plan.

The record reflects that the parties continued to litigate other matters through February 26, 2008. No other matters appear in the record until February 2017, when Charlene moved to restore the case to the court's active docket to address the division of William's military retirement. The court granted that motion on March 23, 2017. On November 29, 2017, the trial court found that William's retirement was subject to division and referred the matter to the DRC for the purpose of drafting a QDRO.

Following those proceedings, the trial court entered the QDRO on July 18, 2018. The QDRO provided that Charlene's interest in the retirement plan "shall be one half of 20 years of marriage over 23 years of service or 1/2 of 20/23 of, benefits, payments and/or all other assets in the Participant's account balance or inuring to him under the Plan as of the Valuation Date." The QDRO further provided for a valuation date as of November 29, 2017.

Thereafter, Charlene filed a motion to alter, amend or vacate pursuant to CR¹ 59.05, arguing that the retirement plan should be valued as of the date of dissolution, May 6, 2004, rather than November 29, 2017. In response, William argued that Charlene was estopped from claiming the earlier valuation date due to

¹ Kentucky Rules of Civil Procedure.

her long delay in seeking a formal division of the retirement plan. On October 11, 2018, the trial court granted Charlene's motion and entered an amended QDRO providing for a valuation date of May 6, 2004. The amended QDRO was entered and sent to the Plan Administrator on November 9, 2018.

On appeal, William concedes that his retirement benefits were subject to division as marital property to the extent that they were earned during the marriage. *Holman v. Holman*, 84 S.W.3d 903, 907 (Ky. 2002). He does not object to the trial court's equal division of the marital portion of his retirement plan. He also concedes that, as a general rule, a divisible retirement plan must be valued as of the date of the decree of dissolution. *Perry v. Perry*, 143 S.W.3d 632, 633 (Ky. App. 2004) (citing *Foster v. Foster*, 589 S.W.2d 223, 225 (Ky. App. 1979)).

Nevertheless, he argues that Charlene was not entitled to receive any portion of his military retirement until the trial court entered a formal order dividing the plan. The DRC's report did not provide for any particular division of the plan, nor did the trial court's order of November 20, 2006, provide for any division of the plan. Consequently, William maintains that his military retirement can only be valued as of November 29, 2017, since that was the first date Charlene had any right to claim a portion of his benefits.

We disagree. The current case presents an unusual situation because the trial court did not enter an order formally dividing William's military

retirement for more than eleven years after it adopted the DRC's report. Neither party brought the oversight to the trial court's attention in a timely manner.

However, the parties clearly stipulated that the marital portion of the retirement plan was subject to division as of the date of the decree. Since William had not yet retired at the time the court adopted the DRC's report, the trial court could use the delayed division method to allocate the benefits from the military retirement plan.

See Young v. Young, 314 S.W.3d 306, 309 (Ky. App. 2010).

William continues to argue that Charlene should be estopped from relying on the date of the dissolution decree as the valuation date due to her long delay in seeking a formal order dividing the retirement benefits. A party asserting equitable estoppel must show the following elements:

- (1) Conduct, including acts, language and silence, amounting to a representation or concealment of material facts; (2) the estopped party is aware of these facts; (3) these facts are unknown to the other party; (4) the estopped party must act with the intention or expectation his conduct will be acted upon; and (5) the other party in fact relied on this conduct to his detriment.

Hinshaw v. Hinshaw, 237 S.W.3d 170, 173 (Ky. 2007) (quoting *J. Branham*

Erecting & Steel Serv. Co., Inc. v. Kentucky Unemployment Insur. Comm'n, 880

S.W.2d 896, 898 (Ky. App. 1994), and *Gray v. Jackson Prod. Credit Assoc.*, 691

S.W.2d 904, 906 (Ky. App. 1985)).

In this case, William does not argue that he relied on Charlene's silence to conclude that she was no longer making a claim to his military retirement. Furthermore, he does not argue that he is unfairly prejudiced by the delay in obtaining a formal order of division. Specifically, William does not assert that he made withdrawals from his military retirement in reliance on the lack of a formal order of division. Nor does he claim that Charlene will obtain a greater benefit than she would have been entitled if the trial court had entered a formal order of division in 2006 or 2007. Under these circumstances, we cannot find that the trial court erred by directing William's military retirement be valued as of the date of the decree of dissolution.

Accordingly, we affirm the order of the Meade Circuit Court.

ALL CONCUR.

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