

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT NASHVILLE

CHARLES GEORGE PETTY,)
)
Plaintiff/Appellant,) Hickman Chancery No. 9310254
)
)
VS.) Appeal No. 01A01-9508-CH-00349
)
SUSAN FLORINTINE PETTY,)
)
Defendant/Appellee.)

APPEAL FROM THE CHANCERY COURT OF HICKMAN COUNTY
AT CENTERVILLE, TENNESSEE
THE HONORABLE CORNELIA A. CLARK, CHANCELLOR

DICK CLARK
CLARK, BALTIMORE AND REEVES
Nashville, Tennessee
Attorney for Appellant

DOUGLAS THOMPSON BATES, III
Centerville, Tennessee
Attorney for Appellee

AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

FILED

February 28, 1996

Cecil W. Crowson
Appellate Court Clerk

This appeal raises several questions concerning the lower court's division of marital property pursuant to a final decree of divorce. Plaintiff-Appellant, Charles George Petty ("Husband"), appeals the trial court's award of certain real property to Defendant-Appellee, Susan Florintine Petty ("Wife"), as well as the lower court's valuation of Husband's pension.

Husband and Wife were married for over 32 years. Husband filed for divorce on the ground of adultery, pursuant to T.C.A. § 36-4-101(3) (Michie 1991). The parties stipulated that Husband was entitled to divorce on this ground. The parties had no minor children at the time of the divorce, and no alimony was awarded.

Husband's first issue on appeal is as follows:

Did the trial court err in awarding a tract of land to Defendant Wife that Plaintiff Husband needs for his cattle grazing operation when Defendant Wife has no use for the land and a more equitable division of the marital estate could easily be made?

Since this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. T.R.A.P. 13(d) (Michie 1995).

Trial courts have broad discretion in the division of marital assets. Fisher v. Fisher, 648 S.W.2d 244, 246 (Tenn. 1983). This Court places great weight on the lower court's decisions, and will not generally disturb those decisions unless the division results in an error of law or a misapplication of statutory requirements. Thompson v. Thompson, 797 S.W.2d 599, 604 (Tenn. App. 1990); Edwards v. Edwards, 501 S.W.2d 283, 288 (Tenn. App. 1973).

In the case at bar, the parties acquired a sizeable amount of real property during the marriage. After the lower court filed its proposed Order of Judgment dividing the parties'

assets, Husband filed a Motion to Alter or Amend pursuant to Tenn. R. Civ. P. 59.04 (Michie 1995). The Motion did not dispute the trial court's division of the property generally; rather, Husband argued that the lower court should have awarded him a specific 17 acre tract of land called Garner's Creek or the Breece Property. According to Husband, this land, which lies between two of Husband's pasture tracts, is necessary for the successful operation of Husband's cattle operation. Without the Garner's Creek property, Husband states that he will be forced to periodically load his cattle in trucks and drive them to another tract to graze and get water. Husband, who is retired, receives supplemental income from the cattle operation. Husband offered to pay Wife \$25,000, the agreed value of the property, in exchange for the Garner's Creek tract.

Wife testified that she wanted the land at Garner's Creek because there are natural boundary lines between the Garner's Creek property and other property awarded to Husband.

We are not unmindful of the difficulties that may be created for Husband due to Wife's ownership of the Garner's Creek property; however, we find no evidence that the lower court misapplied the law or statutes in its division of the parties' assets. We agree with the statement made by the trial court, in reference to its decision not to change the original order awarding Wife the Garner's Creek property:

This is one of those cases where both parties want the same piece(s) of real property and where some inconvenience will occur to one of the parties notwithstanding what distribution is made. This is inherent in the division of assets which occurs after any divorce, particularly where the marriage has been lengthy and the parties have acquired substantial property.

Husband's second issue on appeal is whether the trial court erred in its valuation of Husband's pension by charging the value of the pension against Husband's share of the marital estate.

Husband worked at Ford Glass Company for approximately thirty-two years. Husband retired in September 1992. Since that time, Husband has received a defined

benefit of \$1,832 per month.¹ Husband argues that his pension should be treated as an income stream. He argues that the pension has no calculable value because it terminates upon his death. Wife contends that the pension is a marital asset which is subject to equitable distribution.

The parties agreed to use the mortality tables contained in T.C.A. v. 13, at 1035-36 (Michie 1995) to determine the value of Husband's pension. The court multiplied the amount of the monthly payment times the number of monthly payments Husband would receive (using an actuarial table). The court concluded that Husband's pension was worth \$221,532.

It is well established that the value of a vested pension is included in the marital estate, Thompson v. Thompson, 797 S.W.2d at 604, and subject to distribution. T. C. A. § 36-4-121 (b)(1); Batson v. Batson, 769 S.W.2d 849, 857 (Tenn. App. 1988). In Batson, the court stated:

[Retirement] benefits to be paid in the future represent delayed compensation for work performed over the years of employment. To the extent earned during the marriage, the benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution.

Id. (citing 3 Family Law & Practice § 37.07[1], at 37-81 (1988); I. Baxter, Marital Property § 11:2 (Cum. Supp. 1988)).

In Sharp v. Sharp, No. 01-A-A-01-9403-CH-00090, 1994 WL 581478 (Tenn. App. Oct. 21, 1994), the court considered a similar question regarding valuation of a defined pension plan. In that case, the husband argued that the most accurate way to value his pension was the "cash out" method; that is, the amount of money he would receive if he withdrew from the retirement system at the date of the divorce. The wife argued that the

¹A defined benefit plan may be explained as follows: "A defined benefit plan is a plan established and maintained by an employer primarily to provide systematically for the payment of definitely determinable benefits to employees or employers over a period of years, usually for life, after retirement." 60A Am.Jur.2d Pension and Retirement Funds § 14 (1988). A defined contribution plan, by contrast, entitles the retiree to the full amount of contribution attributable to him, regardless of the retiree's date of death. Id. at § 15.

value of the pension could be determined by multiplying the amount of the monthly check husband would receive upon retirement times the total number of checks he would receive, as derived from actuarial tables. In adopting the method proposed by wife, the Sharp court stated:

While this method is less precise than that proposed by . . . [husband], since it depends on the happening of events in the future that cannot be known with certainty, it is perhaps more accurate . . . and it is clear that such a resignation [from the retirement plan] would have resulted in a substantial reduction in the value of his pension rights.

Id. at *8.

We are in accord with the rationale employed in Sharp. Although not completely precise, Wife's proposed method of valuing Husband's pension is the best means which has been presented to this Court to ascertain the pension's value. Although Husband's counsel did not object at trial to Wife's counsel using the mortality tables contained in T.C.A. to value Husband's pension, counsel maintained that Husband's pension had no value.

We find Husband's suggestion that the pension has no value, because the length of time he will receive payments cannot be ascertained, to be without merit. There are few income-stream producing assets the value of which, at various points in the future, is certain. Such assets nonetheless form part of the marital estate and are subject to distribution upon divorce. We hold that the trial court did not err in its method of valuing Husband's pension.

Wife asks this Court to find that Husband has presented a frivolous appeal pursuant to T.C.A. § 27-1-122 (Michie 1980). We decline so to hold.

For the reasons stated herein, the decision of the trial court is affirmed. Costs on

appeal are taxed to Husband for which execution may issue, if necessary.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.