IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CHARLES J. KVINTA AND MARY G. KVINTA,

Appellants/Cross-Appellees,

v. Case No. 5D17-1348

ANITA J. KVINTA, DELOITTE & TOUCHE, LLP. AND CHARLES SCHWAB & CO., INC.,

Appellees/Cross-Appellants.
_____/

Opinion filed June 28, 2019

Appeal from the Circuit Court
for Brevard County,
Jennifer Opel Taylor, Judge.

John N. Bogdanoff and Earle W. Peterson, of The Carlyle Appellate Law Firm, Orlando, for Appellants/Cross-Appellees.

James R. Dressler and Donna Dressler, Merritt Island, for Appellee/Cross-Appellant Anita Kvinta.

No Appearance for other Appellees/Cross-Appellants.

EDWARDS, J.

Charles J. Kvinta ("Former Husband") and third-party respondent, Mary G. Kvinta ("Current Wife"), appeal the amended final judgment entered by the trial court on Anita Kvinta's ("Former Wife") petition that sought equitable distribution of marital assets,

spousal support, costs, and legal fees. Former Wife cross-appeals. We will review the relevant facts as we discuss the issues raised on appeal to explain why we affirm in part and reverse in part.

BACKGROUND FACTS AND PRIOR OUT-OF-STATE LITIGATION

Former Wife and Former Husband first married in Ohio in 1966 and divorced thirteen years later, but resumed living together in Kansas in the early 1980s under circumstances that led to their common law marriage status. In 1992, the parties separated once more: Former Wife returned to Ohio and Former Husband moved overseas. In 1995, Former Wife filed for legal separation in Ohio, but that suit was ultimately dismissed because she was unable to perfect service of process on Former Husband. Former Wife filed another suit in Ohio seeking a separation and distribution of certain assets, proceeding via in rem jurisdiction based upon the presence in Ohio of assets allegedly belonging to Former Husband or both parties. The Ohio trial court granted legal separation and awarded Former Wife the parties' Ohio home, and this ruling was affirmed on appeal in Ohio in 2003.

On December 8, 2004, Former Wife filed for divorce in Ohio, naming Former Husband and Current Wife as defendants. In 2008, the Ohio trial court entered its final judgment divorcing Former Wife and Former Husband. As part of the Ohio court's judgment in that case, Former Wife received $351,585, which was half the value of a Charles Schwab account (#2582) that Former Husband had fraudulently transferred to Current Wife. The Ohio trial court found that it lacked jurisdiction to award Former Wife any interest in Former Husband's Deloitte & Touche pension or other retirement accounts. The Ohio divorce and partial property division judgment was affirmed on appeal in 2008.

FLORIDA PROCEEDINGS

In 2009, Former Wife petitioned a Florida court to determine and distribute marital assets and to award her spousal support. Trial took place in 2016; however, no transcript of the trial was filed with this court. The Florida trial court determined that coincidental with the filing of the 1995 suit for separation in Ohio, the Former Husband and Former Wife truly separated as they stopped all communication, ceased filing joint tax returns, had no shared interests or enterprises, and owned no real property together. Thus, the trial court announced that it would use January 1995 as the valuation date for the equitable distribution of marital assets.

With that background, we will begin to address the issues raised by the parties.

DELOITTE & TOUCHE PENSION PLAN

The parties agreed that Former Husband's pension plan, provided through his former employer, Deloitte & Touche, was a marital asset subject to equitable distribution in its entirety since the full amount was earned during the parties' marriage. *See Heldmyer v. Heldmyer*, 555 So. 2d 1324, 1325 (Fla. 5th DCA 1990) ("[P]ensions earned by one spouse during marriage are marital assets."). Upon his retirement Former Husband elected the option to receive what was termed a "survivor's annuity" that would pay him $686 per month for the rest of his life, and upon his death would pay $686 per month to Current Wife for the remainder of her life. Had he chosen the "life only annuity" option, the monthly benefit payment would have been $914 per month, which would terminate upon his death. The trial court found that Former Husband's annuity choice benefitted Current Wife, but unfairly shortchanged Former Wife based on the survivor

benefit being $228 per month less than the life only benefit. Accordingly, the trial court distributed the Deloitte & Touche pension plan as though Former Husband had elected the life only annuity option. Thus, the trial court awarded Former Wife a lump sum payment of $59,220, representing her half of the pension benefits paid since Former Husband retired, plus interest, and entered an order directing payment of monthly benefits to Former Wife in the amount of $457, half of what would have been the life only monthly benefit. *Scott v. Scott*, 888 So. 2d 81, 83 (Fla. 1st DCA 2004) ("In distributing the value of a retirement pension fund upon dissolution of marriage, the party not in ownership of the fund is entitled to an equitable distribution of that portion attributable to the marital contributions.") We find no abuse of discretion in the trial court's making this equitable distribution other than as to its failure to consider the tax consequences to Former Husband, which is discussed next.

FAILURE TO CONSIDER TAX CONSEQUENCES

The trial court was obliged to, but apparently did not, consider the taxes incurred by Former Husband related to the Deloitte & Touche pension payments when making this equitable distribution. This Court held in *Miller v. Miller* that "[c]onsideration of the consequences of income tax laws on the distribution of marital assets and alimony is required and failure to do so is ordinarily reversible error." 625 So. 2d 1320, 1321 (Fla. 5th DCA 1993). In *Diaz v. Diaz*, the fourth district found that "the trial court erred in failing to consider the tax consequences to [the former husband's] pension and DROP account when dividing the parties' assets." 970 So. 2d 429, 432 (Fla. 4th DCA 2007). The purpose of considering tax consequences is to ensure that one party is not "charged with the full value of an asset that is burdened with an inevitable payment of taxes." *Vaccaro*

v. Vaccaro, 677 So. 2d 918, 922 (Fla. 5th DCA 1996). Accordingly, we reverse on this point for the trial court to consider the tax consequences to Former Husband based upon the evidence presented at trial, such as the text of the pension plan, which included withholding amounts, Former Husband's affidavits regarding net pension benefits after payment of taxes, and his tax returns. If an evidentiary hearing is required to fully accomplish this analysis, then the trial court must conduct such a hearing.[1]

The trial court also ordered equitable distribution of Former Husband's Vanguard IRA account. It is unclear from the final judgment whether the trial court considered the tax consequences to the parties in making that distribution. Thus, on remand, the trial court must give proper consideration to those tax consequences, taking evidence if necessary.

LIFE INSURANCE POLICY

The trial court awarded no spousal support or alimony to Former Wife, finding that any presumption of permanent periodic support was rebutted by factors related to the length of their marriage, health, earning capacities, and equitable distributions of lump sum and periodic payments from pension and IRA accounts. Despite that finding, the trial court nevertheless required Former Husband to maintain life insurance in the amount of $100,000, naming Former Wife as beneficiary. The trial court announced that "special circumstances" existed to support the life insurance requirement, as spousal support had

[1] The need to consider tax consequences applies only to past disbursements to Former Husband that the trial court ordered are to be equally shared with Former Wife, and to future disbursements not subject to a QDRO ordering the custodian of the funds to pay the parties directly. In short, a QDRO ordering the custodians of the funds to make disbursements to the parties directly avoids the need to adjust for the tax consequences of future disbursements.

not been awarded, in part, because of the $457 monthly Deloitte & Touche pension payments Former Wife received, but those payments would cease upon Former Husband's death.

Section 61.08(3), Florida Statutes (2016), allows a trial court to "order any party who is ordered to pay alimony to purchase or maintain a life insurance policy." But the award of a life insurance policy "is justified only if there is a demonstrated need to protect [an] alimony recipient." *Lapham v. Lapham*, 778 So. 2d 487, 489 (Fla. 5th DCA 2001) (quoting *Hedendal v. Hedendal*, 695 So. 2d 391, 392 (Fla. 4th DCA 1997)). Although "circumstances which demonstrate such a need are not defined in the statute," "[t]his court has held that such circumstances exist where [one spouse] would be left in dire economic straits upon the death of the [other], but has not held that other circumstances would not demonstrate such need." *Id.* (internal citation omitted). Generally, a life insurance award should be ordered only when "the recipient spouse is disabled, elderly, or has such limited employment skills that the death of the former spouse would cause the survivor to depend upon welfare or the generosity of others." *Id.* (quoting *Kearley v. Kearley*, 745 So. 2d 987, 990 (Fla. 2d DCA 1999) (Altenbernd, A.C.J., concurring)). When ordering a life insurance award, a trial court must make findings "as to the cost of insurance, the amount being required, and any special circumstances justifying the need for a former spouse to maintain the policy." *Brunsman v. Brunsman*, 232 So. 3d 1175, 1177 (Fla. 5th DCA 2017). A trial court's failure to make these findings is reversible error. *Packo v. Packo*, 120 So. 3d 232, 234 (Fla. 5th DCA 2013).

Under the plain language of section 61.08(3), and the caselaw interpreting it, the trial court abused its discretion in ordering Former Husband to maintain a life insurance

policy naming Former Wife as the beneficiary. First, the trial court never awarded alimony, and the purpose of such a policy is expressly to protect an award of alimony. *See Lapham*, 778 So. 2d at 489. Second, the trial court never made the required findings on special circumstances: that without the policy Former Wife would "be left in dire economic straits," that she would be required "to depend upon welfare or the generosity of others," or that she was disabled or elderly. *See id.* (quoting *Kearley*, 745 So. 2d at 990 (Altenbernd, A.C.J., concurring)). Instead, the trial court found that Former Wife had "a need for a life insurance policy in the amount of $100,000.00" to make up for the termination of pension payments upon Former Husband's death. The trial court also noted that the award of life insurance was related to its decision *not* to grant alimony. Third, the trial court failed to make findings on cost or the amount of insurance ordered. This was reversible error, and we set aside that award. *See Packo*, 120 So. 3d at 234. On remand, the trial court shall refrain from ordering a life insurance policy unless, in light of the modified equitable distribution ordered by this court, it awards spousal support to Former Wife and makes the special findings that justify providing such financial protection, together with findings regarding the availability, cost, and Former Husband's ability to pay for an award of life insurance.

CREDIT IN FLORIDA FOR OHIO COURT'S DISTRIBUTION

When equitably distributing the marital assets, the trial court gave Former Husband a credit of $351,585 based upon the Ohio court's distribution of the Charles Schwab account (#2582). Former Husband claims the trial court erred by not adding prejudgment interest to this credit, while Former Wife's cross-appeal claims that no such credit was legally or factually justified. In previous litigation between these same parties, the Ohio

trial court found that there had been a Charles Schwab account since 1981 containing funds that were completely marital assets. However, the Ohio court found that Former Husband had fraudulently and unilaterally transferred those marital funds to a new Charles Schwab account (#2582) solely in the name of Current Wife. To remedy that fraud, the Ohio court exercised its in rem jurisdiction and awarded one-half of the value of that account to Former Wife, and that award was affirmed on appeal in Ohio. Former Husband incorrectly focused on whether that specific account existed in 1995, rather than considering whether the marital funds deposited with Charles Schwab that were fraudulently transferred existed in 1995. Because those funds were dealt with only in the Ohio action, the Florida trial court erroneously gave Former Husband the credit. Moreover, by giving Former Husband a credit in the Florida litigation for what the Ohio court had previously ordered him to pay Former Wife from that account, the Florida trial court improperly ignored the Ohio court's final judgment, which resulted in awarding one hundred percent of that particular Charles Schwab account to Former Husband. We reverse that award as it is not supported by competent, substantial evidence, and the conclusion that it was not marital property is both factually and legally incorrect. On remand, the trial court must recalculate the equitable distribution of marital property without allowing Former Husband a credit of $351,585.[2]

VALUATION OF SABA & CO.

On cross-appeal, Former Wife argues that the trial court abused its discretion in valuing Former Husband's interest in a business. While Former Husband was overseas,

[2] Because Former Husband was not entitled to the $351,585 credit, he likewise was not entitled to prejudgment interest on that amount.

he obtained an ownership interest in a business named Saba & Co. He obtained his ownership interest in 1991 and sold it in 2006 for $2,381,265. The financial experts for both sides were tasked with valuing Former Husband's ownership interest as of the 1995 valuation cut-off date; however, both experts said that it was very difficult to give accurate estimates of that interim value because normal financial records were unavailable, as the business was operated in the Middle East, and because so much time had passed.

Former Husband's expert apparently testified that under the circumstances, the only viable way to value the business interest as of January 10, 1995, was using a coverture fraction method: the numerator being the duration that the assets were marital—42 months—and the denominator being the total length of ownership—180 months. This resulted in a coverture fraction of 23.3428 percent, which was then applied to the 2006 sales price, producing a total 1995 marital value of $555,853, with Former Wife's share amounting to $244,673 (when her share of taxes paid by Former Husband on the sale was considered). The trial court adopted the methodology employed by Former Husband's expert as reasonable under the circumstances, and found that it provided an equitable means to determine the value.

Former Wife argues on cross-appeal that the trial court should have adopted her expert's valuation opinions, despite the fact that her expert was a CPA with no business valuation credentials who used an income method to value Saba & Co. despite having essentially no financial documents reflecting the cash flow, liabilities, assets, and so forth of the company. According to the trial court, Former Husband's expert was experienced in valuing businesses and offered a reasonable approach to valuing Saba & Co. despite having little financial data beyond the ultimate price for which Former Husband sold his

interest. When "there is no transcript of the testimony presented to the trial judge," an appellate court should "give utmost credence to his fact findings, and assume there was the best imaginable evidence adduced to support them." *Hudson Pest Control Inc. v. Westford Asset Mgmt., Inc*., 622 So. 2d 546, 547 (Fla. 5th DCA 1993). Given the absence of a trial transcript, and provided with a reasonable explanation of how the trial court arrived at its valuation of Saba & Co., we find no abuse of the trial court's discretion on this point and affirm. We reject Former Wife's argument that the court awarded her too little prejudgment interest. We affirm the amount of prejudgment interest awarded to Former Wife on her share of the sale of Former Husband's interest in Saba & Co. because it exceeds the statutory interest rates for the time periods involved and there was no appellate challenge by Former Husband to that overpayment.

CLASSIFICATION DATE OF MARITAL ASSETS

Finally, we affirm the trial court's use of January 10, 1995, as the classification date for determining whether assets were individual or marital, because in its final judgment the trial court found that the parties at trial had stipulated that all assets acquired after that date would be nonmarital.

Accordingly, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS.

ORFINGER and EISNAUGLE, JJ., concur.