68,015

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

CASE NO. 84-1213

IN RE: THE MARRIAGE OF

JAMES R. BOGARD,

Appellant,

vs.

JUDITH J. BOGARD,

Appellee,

FILED
SID J. WHITE
DEC 2 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

INITIAL BRIEF OF APPELLANT

ORIGINAL

FILED
OCT 26 1984
FRANK J. HABERSHAW
CLERK, 5th DISTRICT COURT OF APPEAL

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FIFTH DISTRICT

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STATEMENT OF THE CASE AND OF THE FACTS

This dissolution of marriage action was filed by the wife, Mrs. Judith Bogard, in the Circuit Court for Orange County in October, 1983. The issues were alimony, husband's special equity in the home and division of the property. Child support was not an issue because all the Bogard children are grown. Final Judgment was entered by the lower court on July 25, 1984 (A-1). Notice appealing the final order was filed August 21, 1984.

The Bogards were married in 1956. Mrs. Bogard is 47 years of age. Mr. Bogard is 50.

Mr. Bogard has worked as an engineer at Martin Marietta in Orlando for 25 years. Mrs. Bogard worked for a year prior to the marriage. Mrs. Bogard operated a ceramic shop for seven years until about three years ago when she closed her shop and attended Valencia Community College. At VCC she took general classes including two (2) accounting courses and three (3) computer courses. She got her A.A. degree in August, 1983, with a 3.75 grade point average. Mrs. Bogard did not work while the divorce case was pending primarily due to the stress of the court action. Mrs. Bogard is capable of working.

After filing for the divorce Mrs. Bogard stored assets from the ceramic shop with her friends and placed her jewelry in a safe deposit box. The value of these items was estimated

to be about $25,000.00 (A-8).

The trial court awarded Mrs. Bogard $193.50 per week as permanent alimony, a 50% share of the husband's interest in Martin's profit sharing plan and treated the husband's future retirement income as a present asset by awarding the wife an undivided 50% interest in the husband's future retirement income (determined as of the time of the divorce) in addition to the alimony (A-3). Although this retiremnt income, if and when received by Mr. Bogard, will be fully taxable to him, the court did not provide for any of the taxes to be paid by the wife from the 50% of the gross retirement pay awarded to her.

The above retirement pay will come from a fund set up by the Martin Co. Mr. Bogard has not contributed anything to the fund (A-10) and will not receive any retirement pay until he is at least 55 years old and then only if he terminates his employment (A-10,17). Whenever Mr. Bogard dies this retirement pay will cease (A-10,17). Mr. Bogard's interest in this retirement fund has no present cash value (A-10).

The court found Mr. Bogard had a special equity in the marital home and this equity was set by the court to be $5,000.00 (A-2).

ISSUES ON APPEAL

THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF THE APPELLANT'S SPECIAL EQUITY IN THE MARITAL HOME.

THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT'S FUTURE RETIREMENT PAY IS A PRESENT MARITAL ASSET.

THE TRIAL COURT ERRED IN NOT CHARGING WIFE'S INTEREST IN RETIREMENT PAY WITH INCOME TAXES.

SPECIAL EQUITY IN MARITAL HOME

The trial court erred in determining the amount of the Appellant's special equity in the marital home.

At the hearing before the trial court the appellant claimed a special equity in the marital home. The lower court agreed with the appellant and ruled that he had a special equity of $5,000.00 in the marital home of the parties (A-2).

The appellant disagrees with the lower court as to the amount of the special equity. This portion of the appeal deals with that question.

The lower court's finding that the appellant's special equity amounts to $5,000.00 cannot be reconciled with this court's rulings in McClung v. McClung, 427 So.2d 350 (Fla. 5th DCA 1983) and Landay v. Landay, 429 So.2d 1197 (Fla. 5th DCA 1983).

During their married life the Bogards owned two homes. We are concerned with the equity in the second home.

The appellant inherited U.S. Savings Bonds and some farm land from his father in 1954 (A-9), two years prior to the marriage. In 1959 the appellant, Mr. Bogard, used $2,500 of his inheritance to purchase the building lot for the parties first home and an additional $5,300.00 from the inheritance to help pay for the construction costs (A-12). The balance of the

costs was financed by a $18,700.00 mortgage. The first house was traded in on the second home in 1965.

The Bogards were credited with $3,984 toward the purchase of the second home (A-13). Mr. Bogard had to pay an additional $2,708.00 to complete the purchase of the second home (A-13). This $2,708.00 came from his 1954 inheritance. Both the bonds and the title to the farm land remained in Mr. Bogard's name until the said assets were converted to cash to finance the two homes. The purchase price of the second home was $32,000.00 (A-13).

In all, Mr. Bogard used $10,500.00 of his separate funds derived from his father's estate in the ultimate purchase of the parties marital home. According to the formula set out in the Landay case (1/2 the ratio which the spouse's contribution bears to the entire contribution), Mr. Bogard's equity in the home would be either 16.4% or 10.5% depending on whether or not his contribution to the first home should be reduced to the trade-in allowance on same when the second home was purchased.

The computation of Mr. Bogard's equity is as follows: a) house lot ($2,500) + cash in first house ($5,300) + cash in second house ($2,700) divided by purchase price of second house ($32,000) divided by 2 = 16.4% or b) trade-in allowance ($4,000) + cash in second house ($2,700) divided by purchase price of second house ($32,000) divided by 2 = 10.5%.

The above formula from the Landay case is, as the court

said, fair and provides for both appreciation and depreciation. Appreciation is important in this case because the second home increased in value due to inflation from its original purchase price of $32,000 in 1965 to $110,000 in 1984 (A-18-19).

The lower court's finding of an absolute figure of $5,000 as Mr. Bogard's equity does not have any evidential basis and does not allow Mr. Bogard any appreciation as provided for in the Landay case.

The lower court erred when it failed to follow the formula set out in the Landay case.

RETIREMENT INCOME

The trial court erred in determining that the appellant's future retirement pay is a present marital asset

The Martin Co. has both a profit sharing plan and a retirement plan for its employees. Both the company and the employee contribute to the profit sharing plan and this plan has a present cash value to the employee. The lower court divided the cash out value of Mr. Bogard's profit sharing plan equally between the parties. Here we are not concerned with the profit sharing plan, but only the retirement plan.

As part of the property settlement, separtate from alimony, the lower court awarded the wife a 50% interest in Mr. Bogard's future retirement pay ($8,942.00 per year) whenever he starts to receive it.(The court limited the wife's interest to that amount of retirement pay computed as of June 1, 1984 based on retirement at age 55.) (A-3)

The Martin Co. contributes all the funds to its retirement plan (A-10). In this case none of Mr. Bogard's earning are sheltered in this plan. This is not an income tax savings device like some retirement plans. The money is paid to an employee only after the employee reaches the age of 55 (or 65 or 70) (A-17) and terminates his employment with the Martin Co. The retirement pay terminates upon the death of the employee

(A-17). This retirement benefit has no cash value (A-10). As to Mr. Bogard, it may be said that the retirement plan is vested from the stand point that he has worked the required number of years to be eligible to receive future benefits. He does not, however, have any vested property interest but instead has only a contingent future interest conditioned on his continued survival. Wilson v. Wilson, 409 NE2d 1169, page 1177 (Ind. 1st DCA 1980) Goodwill v. Goodwill, 382 NE2d 720, page 723 (Ind. 1978).

In addition to the above Indiana cases, Alabama, Arkansas, Colorado, Missouri, Nebraska and a New Jersey appellate court have ruled that future retirement pay under circumstances similar to the Bogard case is not a marital asset subject to division by the court but may be taken into consideration in determining alimony when recieved. Pedigo v. Pedigo, 413 So.2d 1154 (Ala. Civ. App. 1981); Knopf v. Knopf, 576 SW2d 193 (Ark. 1979); In Re: Marriage of Camarata, 602 P2d 907 (Colo. App. 1979); Delay v. Delay, 612 SW2d 391 (Mo. App. 1981); Marriage of Faulkner, 582 SW2d 292 (Mo. App. 1979); Witcig v. Witcig, 292 NW2d 788 (Neb. 1980); Mueller v. Mueller, 400 A2d 136 (N.J. Sup. Ch. Div. 1979).

When one first starts to research this point it appears that many states hold that a retirement pension is a marital asset; however, a careful reading of these cases reveals that most of them are based on community property laws, state

statute, the fact that the employee had contributed money into the retirement fund, the fund was a combination retirement and profit sharing plan, the fund had some present cash value or for various other reasons. The rationale of these cases is that the right to the pension was earned during the marriage. They ignore the function of a pension, its contingent nature and its speculative value.

The only Florida case that appears to touch upon this subject is Clarke v. Clarke, 443 So.2d 486 (Fla. 2d DCA 1984). It appears that in the Clarke case the value of the pension was used in determining the equitable distribution. There was some evidence in that case that the plan had a present value. It was testified in this case that Mr. Bogard retirement pay had no present value.

The lower court, in awarding the wife 50% of Mr. Bogard's retirment pay (computed as of June 1, 1984 and as of age 55), is attempting to create an asset out of an expection, is going against the normal plans of the parties and is setting the ground work for some absurd situations.

First, retirement pay is expected to be future income to a person when they cease to work. It is income in lieu of the regular pay check, not in addition to it. If the Bogards had stayed married they may have had this future income to meet future living expenses. This is a future monthly income, not a lump sum nest egg. To the parties the retirement pay was an

expection, a hope for the future, an income to be received if one lived long enough, not a present asset.

Ironically, the lower court held this to be a asset because it is not yet in existence. If Mr. Bogard was receiving his retirement pay at the time of divorce, the pay would be income and used to determine alimony and would not be considered a marital asset.

By holding this future income as a present asset, the lower court has fixed the rights of the parties in granite. The parties future expection has been converted into a absolute right on behalf of the wife. No matter what the future financial situation of the parties may be this 50% of the retirement pay must be paid, it cannot be modified, Miller v. Miller, (2d Dist. Docket Nos. 83-1410, filed July 27, 1984).

Likewise, since this will be considered a property right, the wife may convey her interest in Mr. Bogard's retirement pay or she could will it if she so desires. Imagine if you will the situation where the wife remarries, bequeaths this interest to her second husband and he gives the interest to his grandchildren or his children by a prior marriage. Mr. Bogard could then find himself paying almost $400.00 per month of his retirement pay to total strangers. To top if off, this money would be taxable to Mr. Bogard since it is income to him but not taxable to the strangers (or the wife) because to them it is a distribution of an asset.

The lower court's decision on this matter will have a chilling effect on early retirement and tend to encourage the empolyees to stay on the job even though their health would indicate that they should retire. This would be especially true if the wife has remarried and is no longer entitled to alimony or she has passed the right to 50% of the retirement pay along to someone else.

The evidence at the trial below was that this retirement pay had no present value. The only time this retirement pay will have value is when it is received and then only so long as Mr. Bogard lives to receive it. Unless Mr. Bogard loses his job, he won't see any of this retirement pay for another 15 years when he is 65. No one will know what the situation will be at that time.

It is far better, fairer and equitable for the court to treat this retirement pay for what it is, future income, now and let the trial judge in 1999 decide how best to divide funds between the parties as part of alimony.

INCOME TAXES

The trial court erred in not charging wife's interest in retirement pay with income taxes

If this court finds that the trial erred in awarding the wife an absolute right to 50% of the husband's limited retirement pay, then this section is mute. Otherwise this section is relevent.

The order of the lower court does not make any provision for the income taxes that will have to be paid on the retirement pay when and if it is received. Since the retirement pay is funded entirely by Martin Co., Mr. Bogard will have to pay income taxes on the entire amount received by him. Mr. Bogard, however, is ordered to pay 50% of the gross retirement pay to the wife. The effect of this is that while the wife will receive 50% of the retirement pay the husband could receive 30% or less of the gross amount.

The husband will not be able to deduct any of the payments to the wife on his taxes because they will be a distribution of an asset to the ex-wife and not alimony.

If the wife or someone in her stead is going to receive 50% of the money, they should be required to pay their share of the taxes attributable to the money and both parties should net the same from that part of the retirement pay found to be a

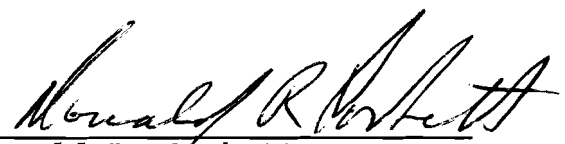
marital asset.

Conclusion

This Court decision regarding the treatment of future retirement pay will have great influence across our state. Careful consideration should be given to effects of declaring future income to be a present asset. The Court is urged to let this retirement pay remain just what the parties intended it to be, future income. If the benefits are ever paid, the courts at that time can decide how best to divide them among the parties.

This Court has already ruled on the special equity issue and the lower court's finding of a absolute $5,000.00 is contrary to said ruling. We request that the formula set out in the Landay case be followed and the appellant's special equity be set at 16.4%.

If this Court rules against the appellant on the retirement pay issue, then we request the Court to charge the amount to be received by the ex-wife or her assigns with their share of the taxes.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to FRANK A. TAYLOR, 320 N. Magnolia Ave., Orlando, Florida 32801, on this 25th day of October, 1984.

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