68,015

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

CASE NO. CI 84-1213

IN RE: The Marriage Of

JAMES R. BOGARD,

Appellant,

vs.

JUDITH J. BOGARD,

Appellee.

INITIAL BRIEF OF APPELLEE

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ANSWER TO STATEMENT OF THE CASE AND OF THE FACTS

The Appellee concurs in the statement of the case as set forth in the first paragraph of the Appellant's brief.

The Bogards were married in 1956 and were divorced July 25, 1984, making this a 28 year marriage.

The Appellee shortly prior to the separation of the parties hereto had an operation and was still under the care of a physician during the proceedings of this case and did not work during the marriage with the exception of a period of 6 or 7 years just prior to the parties' separation wherein she operated a ceramics shop. According to her testimony, the shop only made money during a 2 year period out of the 6 or 7 years that it was in operation and that was during the first and second years it was in operation. The Appellant estimated the Appellee's jewelery and assets remaining from the ceramics shop at on or about $25,000.00 whereas the Appellee estimated their value at approximately $10,000.00.

The trial court did award to the Appellee permanent alimony in the sum of $193.50 per week while the Appellant, according to his Financial Affidavit had a net income from his employment in the sum of $774.00 per week and, from his testimony, he had land which he had inherited together with other properties in a state other than the State of Florida. The Appellee was further granted a 50% share of the Appellant's interest in Martin's profit sharing plan which shows by the evidence that he had withdrawn $5,000.00 therefrom shortly prior to the trial of the above entitled cause; and further granted to the Appellee a 1/2 interest in the Appellant's retirement income based upon what the Appellant would draw if he should retire at the age of 55 years and further limited its value as of June 1, 1984.

The Court further found that the Appellant had a special equity in the marital home and this said equity was limited by the Court to the sum of $5,000.00.

ISSUES ON APPEAL

THE APPELLEE CONTENDS THAT THE COURT DID NOT ERR IN DETERMINING THE AMOUNT OF THE APPELLANT'S SPECIAL EQUITY IN THE MARITAL HOME.

THE APPELLEE CONTENDS THAT THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE APPELLANT'S FUTURE RETIREMENT PAY IS A PRESENT MARITAL ASSETT.

THE APPELLEE CONTENDS THAT THE TRIAL COURT DID NOT ERR IN NOT CHARGING WIFE'S INTEREST IN RETIREMENT PAY WITH INCOME TAXES.

ANSWER TO SPECIAL EQUITY IN MARITAL HOME

The Appellee contends that the trial court did not err in determining the amount of Appellant's special equity in the marital home.

The facts of the case show that some years prior to the marriage of the parties hereto, the Appellant inherited some land and bonds from his father's estate, the exact amount and value of the land and bonds were never specificly established at the trial of this case, the Appellant testifying that his mother needed the land and bonds to live on.

There was no testimony at the trial which showed that funds which were the Appellant's prior to marriage did not constitute a gift by the Appellant to the Appellee at the time he purportedly used some $2,500.00 from his inheritance to purchase the building lot of the parties' first home and an additional $5,300.00 to help pay for construction costs. Nor was there any evidence to show that an additional $2,708.00 of his individual assets used by the Appellant to complete the purchase of the second home was not of a gift of Appellant to Appellee.

In determining the funds used by the Appellant, let us examine the facts as they were related in the Appellant's brief, to-wit: That he used $7,800.00 of his inheritance in the purchasing of the first home which stood in the joint names of the parties hereto and, when same was disposed of to acquire the second home, he received an equity towards the second home of only $3,984.00, which is a loss on the first home of his individual funds in the sum of $3,816.00. Adding the credit from his first home towards the second home of $3,984.00 plus the amount he testified that he placed in the second home, cash, $2,708.00, makes his total investment in the second home or the marital home in question of the sum of $6,692.00.

The Appellee testified that the Appellant had used some of his funds from an inheritance in the purchasing and building of the first home owned by the parties hereto; however, she denied that he used any of his inherited funds in the acquisition of the marital domicile in question. Therefore, taking the testimony of the wife rather than the testimony of the husband, the Appellant only had in the home in question the total sum of $3,984.00 of inherited funds.

It is easy to determine that the Court, in limiting Appellant's special equity to $5,000.00, did not consider the formula set forth in McClung v. McClung or Landay v. Landay and evidently applied the theories set forth in Lyons v. Lyons, 436 So 2d 156, wherein the Court set forth that, at divorce, each spouse must be tre ted in such a manner as to be given fair consideration in what has been accumulated during the marriage. The Court evidently found, in its wise discretion, that the Appellant was entitled to the sum of only $5,000.00 as and for special equity he might have had in and to the said marital domicile. The Court further evidently found that there had been no showing that a gift was not intended at the time that the original funds of the Appellant were used in helping to procure the first home of the parties hereto. The Court further evidently found that Landay v. Landay did not apply in this instance since there has been no case in Florida to the knowledge of the undersigned wherein funds can be followed through several pieces of property to make a determination of percentages. There was no testimony from the Appellant that he did not intend to make a gift to the Appellee of any funds originally used in the purchase of any of said properties that were placed in the joint names of the parties hereto.

Therefore, the lower court did not err in failing to follow the formula set down in the Landay case.

RETIREMENT INCOME

The trial court did not err in determining that the Appellant's future retirement pay is a present marital asset.

The retirement plan in question has a present cash value, as testified to by Henrietta Rudd, Benefits Supervisor for said company, in the following questions and answers: (R-112)

Q. Now, I herewith hand you a retirement income plan for salaried employees in reference to Mr. Bogard. Can you tell me what retirement benefits he has as of the present time when he reaches age 55 if he should quit today?

A. Okay, if Mr. Bogard should terminate from the company as of today, at age 55 he would be able to receive for his lifetime an annual benefit in the amount of $8,942.

Q. And this is accumulated at this time?

A. That's accumulated at this time.

Since this retirement fund was in its entirely accumulated during the marriage of the parties hereto and since this is a vested right at this time subject only to the Appellant living to the age of 55 years, the Court, in its wise discretion, and in equitable distribution, granted to the Appellee the interest which she has in this vested right. Clarke vs. Clarke, 443 So.2nd 486, 9FLW 180 (DCA 1/13/84).

Therefore, the Court did not err in determining that the Appellant's future retirement pay is a present marital asset.

INCOME TAXES

The trial court did not err in not charging the wife's interest in retirement pay with income taxes.

The lower court did not make any provision for payment of income taxes that will have to be paid by someone on the retirement pay when and if it is received.

The lower court made no said provision since it would be strictly the present court's opinion as to what the federal income tax laws will be five years from the date hereof and as to what percentage the tax would be as to the whole.

Income taxes certainly would not have to be paid out of the funds of the Appellant and also by the Appellee or what she would have received thereafter since this would be double taxation.

Wherefore, the Appellee contends that the trial court did not err in not charing the wife's interest in retirement pay with income taxes.

CONCLUSION

The Court, in ruling a specific sum is due the Appellant as special equity, made a determination from the facts of the case that Appellant evidently spent approximately $3,984.00 of inherited funds, which, in equity and good conscience, he should have restored to him, the Court rounding out the figure to $5,000.00 without minutely figuring the exact sum he had expended. The Court further evidently made a determination that any enhancement of these said funds was not due to any effort on the part of the Appellant and, therefore, he was not entitled to such.

From the evidence adduced through a representative of the Appellant's employer it was conclusively shown that the retirement fund has a present day fixed value in the sum of $8,542.00 per year for the life of the Appellant if he reaches the age of 55 years and retires.

The lower court certainly did not err when it failed to charge any sums received by the ex-wife from said retirement pay since any such amount or percentage set would be purely speculation as to the law of the federal government at a time in the future.