In re Marriage of Carson

97 Wash.App. 1095 (1999) | Cited 0 times | Court of Appeals of Washington | November 19, 1999

UNPUBLISHED OPINION

Raymond H. Carson, Jr. (Randy) appeals the trial court's division of property and its maintenance award in this dissolution action. He claims the trial court erred in dividing Mary Lynne Carson's retirement benefits pursuant to a property division order effective upon Mary's future retirement rather than allocating and awarding Randy his share of the benefits at the time of dissolution. Because we find that the trial court's method of dividing the property was not fair and equitable, we vacate the judgment and remand.

FACTS

This matter was tried in October 1997. At that time Mary Carson was 49 and Randy Carson was 52. They had married in 1968 and separated in February 1995 and their children were emancipated.

Mary had worked for the State of Washington for more than 30 years and was earning approximately $4,229 a month. She had became eligible to receive a retirement pension under PERS I in March 1997 but testified that she expected to continue working until age 65.

Randy had previously worked in heavy construction and had driven a concrete truck, but because of diabetes, related complications, and an industrial injury, he had discontinued that line of work. At the time of trial, Randy was receiving $834 per month in social security disability and $108.50 per month from a teamster's pension. He also had been receiving $500 per month temporary maintenance from Mary under a pretrial order.

David B. Kelley, M.D. testified in his deposition, which was admitted at trial, that he had treated Randy for diabetes since at least 1986. According to Kelley, Randy had suffered from diabetes since the age of 7 and currently suffered from numerous diabetes-related complications, including reduced vision, impaired use of his lower extremities, impaired function of his upper extremities, digestive dysfunction, and arteriosclerotic heart disease.

In Kelley's words, Randy's "body in general is ravaged by the complications of diabetes" and he "is living on borrowed time." Kelley opined that Randy's "chances of dying at his age after a number of years of diabetes, as compared to a man without diabetes of the same age, are 20 times greater than for the man who does not have diabetes." Kelley further noted that Randy suffered from clinical depression and had already outlived the median life expectancy of 49 years for people in his condition.

On cross-examination, Kelley conceded that Randy's medical condition did not preclude employment. But Kelley added that given Randy's vision and motor skill problems, "there would be little for him" in the job market. Despite his disabilities, Randy had purchased a used Harley Davidson motorcycle after the separation, incurring a monthly payment of $318. Randy said he bought the motorcycle "{b}ecause it seemed like my life wasn't going real good, and that was something that kind of made sense, made me happy, just to have a motorcycle and ride."

In 1997, Randy traded his Harley for a new model, which increased his monthly payment to $375. He said he liked to ride his Harley "{e}very day it's not raining" but was willing to work and had applied unsuccessfully for a state job as a file clerk.

At the time of trial, the community property included a family residence, two undeveloped lots, and Mary's PERS I retirement benefits and deferred compensation account. Two certified public accountants testified at trial as to the value of Mary's employment-related property: Beatrice Miles for Mary and Lawrence Siminski for Randy.

Regarding the retirement benefits, Miles provided present values of the community contributions based upon two different assumptions: (1) that Mary did not retire until age 65 ($26,500 to $52,000), and (2) that Mary had retired in March 1995 when her benefits unconditionally matured ($247,700 to $304,600).[1]

Miles also testified that if Mary had left her employment at the time of separation, she could have withdrawn $50,285 in accumulated benefits and foregone any future benefits. If Mary had retired at the end of April 1997, she would have been eligible to receive $2,396 monthly or $1,713 if she took a COLA option.

Siminski, applying a lower discount rate, valued the net present value of the community share of Mary's pension at $323,012 assuming she retired on her earliest date of eligibility, March 10, 1997. He estimated her monthly retirement to be $2,181.97.

Mary's deferred compensation account had an approximate value between $44,000 and $45,000 at the time of separation and $66,000 at the time of trial. Mary had contributed approximately $800 to $900 to the account during the time of separation.

The trial court granted Mary, among other things: one of the community's two undeveloped lots, which had a stipulated market value of $30,000 to $35,000; an equitable lien against the community home in the amount of $30,697; her retirement benefits, subject to a property division order awarding Randy an undivided one-half interest in the retirement benefits accrued from the time of marriage to the date of separation; and all of Mary's deferred compensation account, which the trial court valued at $45,472, using the value as of the date of separation while noting that the account's value as of the time of trial was approximately $60,000.

The trial court awarded Randy, among other things: the community home, with a stipulated value of $155,000, minus $5,000 for deferred maintenance, and subject to the equitable lien in Mary's favor; the other undeveloped lot, which had a stipulated value of $30,000 to $35,000; and one-half of the retirement benefits Mary accrued during the marriage, as set forth in the property division order.

The trial court also ordered Mary to pay Randy $200 per month in maintenance until such time as Randy receives his share of Mary's retirement benefits or until the death of either party, whichever comes first. The trial court reasoned that $200 was all Mary could afford.

The trial court explained its reason for valuing the deferred compensation account as of separation rather than trial by stating: "{I}t is my belief in the exercise of my discretion that when the marriage becomes defunct, a mere shell of a marriage, absent some extraordinary circumstances, that's the point in time at which the assets of the marital community are to be valued for division purposes." Report of Proceedings (10/24/97) at 15.

The trial court did not assign a present value to Mary's retirement benefits.

The trial court declined to award the retirement benefits as a lump sum because they would not be available until Mary's retirement and it would be premature to allocate them as of the time of trial. Accordingly, as an alternative, the trial court concluded it would be just and equitable to divide the retirement benefit pursuant to a property division order. To equalize the award of more community property to Randy, the trial court granted Mary a lien of $48,697 against Randy's house. But to reflect the $300 per month reduction in Randy's maintenance, the trial court reduced the lien by $18,000 ($300 x 60 months) to arrive at a final lien amount of $30,697. The trial court calculated the total property division as 56 percent to Randy and 44 percent to Mary.

At the presentment hearing, the trial court elaborated on the reasoning supporting the property division order:

What clearly reflects my thinking, right, wrong or indifferent, is that the disparity in the experts' valuation, the controversy regarding net present cash value, in my view, in addition to the status of the parties that's disclosed by the evidence and the record, warrants that I treat the division of that particular asset by a property division order.

Report of Proceedings (1/09/98) at 8.

The property division order grants Randy one-half the community share of the retirement benefits at the time Mary retires, assuming she takes monthly payments upon retirement. In the alternative, it grants him $25,142.46 if Mary withdraws her contributions in a lump sum in lieu of future benefits. This figure represents half of Mary's accumulated retirement benefit at the time of separation.

DISCUSSION

A. Maintenance

Randy, citing In re Marriage of Williams, 84 Wn. App. 263, 269, 927 P.2d 679 (1996), argues that the trial court should have awarded him maintenance in an amount equal to half the monthly payments Mary would have received if she had retired at the date of dissolution.

Factually, this case is somewhat similar to Williams. There, the married couple separated after 27 years of marriage. 84 Wn. App. at 265. The husband's pension vested and matured one month before trial, but he decided to continue working. Williams, 84 Wn. App. at 266. The trial court awarded the wife maintenance equal to one-half of the community share of the husband's retirement benefit. Williams, 84 Wn. App. at 266. But it characterized the award "as a property settlement rather than true maintenance." Williams, 84 Wn. App. at 266.

Division Three of this court affirmed (Thompson, J. Dissenting on other grounds). Williams, 84 Wn. App. at 273. The Williams court noted that the trial court properly included the husband's retirement benefits among the community's assets and properly computed maintenance by valuing the pension at the time it matured, divided by two. 84 Wn. App. at 268-69.

Moreover, the Williams court took special note of the fact that the trial court "did not attempt to justify {the wife's} monthly {receipt of} payments as maintenance, but rather as a property settlement." 84 Wn. App. at 268. "Unlike typical maintenance awards, the payments do not terminate upon {the wife's} cohabitation or marriage, but only upon the death of either party or {the husband's} retirement." Williams, 84 Wn. App. at 268. Because the payments are tied to "a specific property allocation," a vested and matured pension plan, it was appropriate to characterize it as a property settlement. Williams, 84 Wn. App. at 268 (citing In re Hurd, 69 Wn. App. 38, 45, 848 P.2d 185 (1993)).

Here, the trial court did not characterize its maintenance award as a form of property division. But the basic terms of the award are similar to those set forth in Williams; Randy is to receive maintenance until either or he or Mary dies or until Mary retires, at which time Randy would receive his share of Mary's pension. See Williams, 84 Wn. App. at 268.

But the trial court here departed significantly from Williams in determining the amount of maintenance. It awarded Randy only $200 per month.

Although the trial court has discretion "to grant a maintenance order in an amount and for a period of time the court deems just," it must consider the post-dissolution financial resources of the parties; their abilities to meet their needs independently; the duration of the marriage; the standard of living they established during their marriage; their ages, health and financial obligations; and the ability of one spouse to pay maintenance to the other. Williams, 84 Wn. App. at 267-68 (citing RCW

26.09.090(1); In re Marriage of Terry, 79 Wn. App. 866, 869, 905 P.2d 935 (1995)).

Here, the trial court considered these factors. Williams, 84 Wn. App. at 267-68. And given Mary's net monthly income of $2,870 and net monthly expenses of $2,853, the trial court's Conclusion that she will be unable to pay more than $200 in maintenance is not unreasonable. Consequently, viewed in isolation, the trial court's maintenance award is not an abuse of discretion. But, as we discuss below, the maintenance award may be insufficient if viewed as a Williams hybrid maintenance/property distribution of the pension.

B. Retirement Benefits

The trial court attempted to compensate for the limited maintenance award by awarding Randy a greater share of the community property. But Randy argues that it was not just and equitable to divide the retirement benefit using a property division award because of his "zero" life expectancy. He contends that he should have an award that essentially gives him immediate access to his share of the retirement benefits.[2]

As with the maintenance award, the use of a property division order, by itself, does not constitute an abuse of discretion. See Williams, 84 Wn. App. at 268. But given Randy's circumstances, we find that the overall property division is neither just nor equitable.

"The trial court has broad discretion to distribute marital property." In re Marriage of Zahm, 91 Wn. App. 78, 82, 955 P.2d 412 (1998), aff'd, 138 Wn.2d 213, 978 P.2d 498 (1999). We review the distribution for a manifest abuse of discretion, considering whether the trial court based its decision on untenable grounds or provided untenable reasons. In re Marriage of Washburn, 101 Wn.2d 168, 179, 677 P.2d 152 (1984); Zahm, 91 Wn. App. at 82; In re Marriage of Tower, 55 Wn. App. 697, 700, 780 P.2d 863 (1989).

The relevant factors to consider include: "(1) The nature and extent of the community property; (2) The nature and extent of the separate property; (3) The duration of the marriage; and (4) The economic circumstances of each spouse at the time the division of property is to become effective . . . ." RCW 26.09.080; Bulicek v. Bulicek, 59 Wn. App. 630, 636, 800 P.2d 394 (1990). "Earnings arising from services performed during marriage are community property." Hurd, 69 Wn. App. at 45.

"Deferred earnings not subject to forfeiture are 'vested'." Hurd, 69 Wn. App. at 45. If a person may receive these deferred earnings immediately, they are "matured." Hurd, 69 Wn. App. at 45. "Whether or not they are available at the time of dissolution, pension benefits, as deferred compensation, constitute property rights subject to division by the court." In re Marriage of Chavez, 80 Wn. App. 432, 436, 909 P.2d 314 (1996). Here, the parties agree that Mary's pension was vested and matured at the time of trial.

A trial court may award pension rights on a percentage, as-received basis. Chavez, 80 Wn. App. at 437; Bulicek, 59 Wn. App. at 638. "Such a Disposition avoids difficult valuation problems, shares the risks inherent in deferred receipt of the income, and provides a source of income to both spouses at a time when there will likely be greater need for it." Bulicek, 59 Wn. App. at 638.

When expert opinion as to the present value of pension benefits varies widely, the trial court has discretion to disregard such testimony in favor of a percentage formula for division of retirement benefits on an as-received basis. Bulicek, 59 Wn. App. at 639; In re Marriage of Pea, 17 Wn. App. 728, 731, 566 P.2d 212 (1977) (noting that lack of evidence as to present value warrants use of percentage formula).

Here, the experts presented conflicting evidence as to the present value of the retirement benefits. Assuming without deciding that it would be correct to value the benefits as of the earliest date Mary could retire, see Williams, 84 Wn. App. at 269, the estimates of present value ranged from $247,700 to $304,600. Thus, it was not unreasonable for the trial court to find an equitable alternative -- awarding Randy a percentage of Mary's pension on an as-received basis. Bulicek, 59 Wn. App. at 639.

To determine the community share of retirement benefits, courts use two variations of the following basic formula: years/months of marriage

------------------------------ x monthly benefit at retirement x

1/2

years/months of service See Williams, 84 Wn. App. at 269; Chavez, 80 Wn. App. at 436; Bulicek, 59 Wn. App. at 637; Pea, 17 Wn. App. at 731.

Some courts limit the denominator to the years or months of service before the paying spouse becomes eligible for retirement. Bulicek, 59 Wn. App. at 632 (275-month retirement eligibility); Pea, 17 Wn. App. at 731 (20-year eligibility). Other courts apply a denominator equal to the total time a spouse works until retirement. Chavez, 80 Wn. App. at 436-37 (spouse worked total of 365 months until retirement); see also Williams, 84 Wn. App. at 269 (citing Chavez but not discussing the figures applied by trial court).

Here, the Chavez formula yields $491 per month as Randy's share should Mary take the COLA option (317 months of marriage divided by 552 months of service to age 65 x $1,713 x ° = $491) or $688 per month should Mary forego the COLA option (317 divided by 552 x $2,396 x ° = $688).[3] By contrast, the Bulicek formula yields from approximately $754 dollars per month for the COLA benefit to approximately $1,055 for the non-COLA benefit (317 months of marriage divided by 360 months of service until Mary eligible for retirement).

The circumstances of the case should guide the trial court in deciding which formula to apply. In both Bulicek and Pea, the spouses requesting maintenance were facing difficulties that justified a favorable formulation. Bulicek, 59 Wn. App. at 634 (spouse in ill health and had limited job skills and experience); Pea, 17 Wn. App. at 730 (spouse cast into "below-poverty level of existence"). These hardships appear to be absent in Williams and Chavez. Because Randy's circumstances are comparable to those in Bulicek and Pea, equity would favor use of the Bulicek-Pea formula. Bulicek, 59 Wn. App. at 632; Pea, 17 Wn. App. at 731.

In determining property division and maintenance, the trial court's paramount concern should be the post-dissolution economic condition of the parties. Washburn, 101 Wn.2d at 181; Bulicek, 59 Wn. App. at 635. "Trial courts are given wide discretion to fashion a dissolution order that will address the circumstances of the parties." Bulicek, 59 Wn. App. at 634. Here, the property division order does not address Randy's post-dissolution economic condition -- his extremely limited life expectancy and the likelihood that he will not live long enough to participate in the distribution of any of the retirement benefits.

Pointing to Randy's affection for motorcycles, Mary contends that Randy's health is relatively good despite his medical problems. But Dr. Kelley made it clear that Randy's body was ravaged by the effects of diabetes, that Randy was living on borrowed time, and that Randy had little opportunity for employment.

These facts are similar to Bulicek where the divorcing couple had been married for more than two decades and the husband earned considerably more than the wife, who was in ill health and had limited job skills and experience. Bulicek, 59 Wn. App. at 631. The husband, who was 52 at the time of trial, was eligible for early retirement with a benefit of $948.18 at age 55. Bulicek, 59 Wn. App. at 632.

The trial court, after determining the wife's share to be 33.65 percent (1/2 x 185/275), awarded her maintenance of $500 for the first year and $400 for each year thereafter until her death or until she began receiving her share of the husband's retirement benefit. Bulicek, 59 Wn. App. at 632. Division One of this court held that the maintenance award was not an abuse of discretion. Bulicek, 59 Wn. App. at 635-36.

Here, the trial court attempted to fashion a property division responsive to Randy's medical and employability problems by awarding Randy a slightly disproportionate share of real and personal property. But that division is inequitable because the evidence indicates that Randy is unlikely to share in the retirement benefits.

Further, in determining an appropriate offset, the trial court noted that before trial it had ordered Mary to pay Randy temporary maintenance of $500 per month. Following trial, the court reduced the maintenance to $200 and reduced Mary's lien on the house by $18,000 to offset the $300 reduction in maintenance over a five-year period. But given that the original $500 in maintenance was at least $254 below what Randy would have been entitled to had Mary retired in 1997 with a COLA allowance, the trial court's offset of property was insufficient to produce a just and equitable award.

Thus, we find that the property award fails to satisfy the just and equitable standard set forth in RCW 26.09.080. Consequently, we remand for an increase in the property award or in the maintenance/property distribution, or both, so as to enhance Randy's opportunity to receive a fair share of the retirement benefits.

C. Deferred Compensation

Randy also argues that the trial court erred in not including the value of the deferred compensation account as of the date of dissolution (approximately $60,000) instead of the date of separation ($45,472), among the community property to be divided. Given that Mary contributed only $800 to $900 to the account after separation, the approximate $14,500 increase in value must largely be attributable to the appreciation of the community's share of this asset. See Hurd, 69 Wn. App. at 49 (holding that valuation of deferred compensation plan should be as of the time of dissolution, not a future retirement date).

Because the record indicates that the trial court intended to award the entire account to Mary regardless of its exact value, the failure to properly value this asset was inconsequential. But on remand, we urge the trial court to consider that the earnings on community property between the time of separation and trial are also community property, and to fashion its award accordingly. See Hurd, 69 Wn. App. at 46; Bulicek, 59 Wn. App. at 638.

Although the trial court here made a diligent effort to arrive at a just, fair, and equitable result, the property allocation produces a result we cannot sustain.[4] Hurd, 69 Wn. App. at 55-56; Pea, 17 Wn. App. at 731.

Consequently, we vacate the judgment and remand for the taking of additional evidence, if necessary, as to the parties' current circumstances and for reallocation of the property in such a way as to provide Randy a fair and equitable share of the value of the retirement benefits calculated as of the date Mary's benefit unconditionally matured.[5] See Hurd, 69 Wn. App. at 48-49.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Seinfeld, J.

We concur:

Armstrong, A.C.J.

Hunt, J.

1. As of March 10, 1997, Mary was eligible to receive 60 percent of her gross salary ($4,229). The range in valuation turns on the discount factor applied ($304,600 at 7 percent, $275,200 at 8 percent, and $247,700 at 9 percent).

2. Randy also contends, citing Hurd, that the trial court erred in calculating the future value of Mary's pension as of the date of separation. But the trial court did not assign a future value to the pension, and both experts calculated present value as of the date of separation. Again citing Hurd, Randy argues that the trial court erred in basing its pension valuation on the future date of Mary's retirement. When a trial court assigns a present value to a spouse's vested and matured retirement benefit, it should calculate that value under the presumption that the spouse receiving that benefit will retire at the time of dissolution. Hurd, 69 Wn. App. at 45-46. But here the trial court did not assign a present value to the pension, preferring, instead, to divide the asset pursuant to a property division order.

3. Although Mary became eligible to retire in March 1997, Miles based her calculations on the assumption of retirement at the end of April 1997. We use Miles' figures because they appear to be the most reliable estimate in the record of Mary's monthly retirement benefit at the earliest date she could retire.

4. Randy proposes as an alternative distribution that the court award him the second lot, extinguish the lien on the house, and award him the deferred compensation account, and award Mary all the retirement benefits. Excluding the pension, this option would result in an award to Randy of more than $300,000 in property and an award to Mary of approximately $15,000 in property. This would leave Mary with nearly nothing until her retirement, which is not scheduled for over 10 years from the date of this appeal. This does not appear fair and equitable to Mary. Thus, we reject Randy's proposal.

5. Randy argues for attorney fees on appeal in his reply brief. As it would be unfair to Mary to consider an argument raised so late in the appeal, we will not consider it. In re Marriage of Kastanas, 78 Wn. App. 193, 201-02, 896 P.2d 726 (1995).