

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

ANNA KATHLEEN
ACKERMAN LEGGETT,

Shelby Circuit No. 140746 R.D.
C.A. No. 02A01-9408-CV-00190

Plaintiff/Appellee,

Hon. D'Army Bailey, Judge

v.

TERRY LYLE LEGGETT,

Defendant/Appellant.

FILED

February 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DANIEL D. WARLICK, Warlick & Todd, Nashville, Attorney for
Defendant/Appellant.

GENEVIEVE M. DIX, Memphis, Attorney for Plaintiff/Appellee.

AFFIRMED AND REMANDED

Opinion Filed:

MEMORANDUM OPINION¹

TOMLIN, Sr. J.

Anna Kathleen Ackerman Leggett ("plaintiff") obtained an absolute divorce from Terry Lyle Leggett ("defendant") in the Circuit Court of Shelby County based upon a partial consent agreement between the parties. The trial court also divided the marital estate and awarded plaintiff rehabilitative alimony and attorney's fees. The only issue presented on appeal by defendant is the manner of division of defendant's retirement pension as part of the marital estate. We find no error and affirm.

¹Rule 10 (Court of Appeals). Memorandum Opinion.—(b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in a subsequent unrelated case.

Plaintiff and defendant were married in July 1982. At that time, defendant had been serving as an officer of the Shelby County Sheriff's Department for fourteen years. The parties separated in June 1992 and were divorced in January 1994. In December 1993, defendant began receiving a monthly pension of \$2,832.15 from Shelby County, based upon his 25 years, 9 months, and 28 days of service with the department. Defendant was 46 years old when he retired.

T.C.A. § 36-4-121(a) (1991) provides that marital property should be divided equitably without regard to marital fault. The trial court is given wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly-owned property. Barnhill v. Barnhill, 826 S.W.2d 443, 449 (Tenn. App. 1991). The trial court's division of marital property is entitled to great weight on appeal and will be presumed to be correct unless the preponderance of the evidence is otherwise. Id. at 449-50.

Insofar as it is relevant to this issue, T.C.A. § 36-4-121(b)(1) defines "marital property" as

all real and personal property, both tangible and intangible, acquired by either or both spouses during the course of the marriage . . . including income from, and any increase in value during the marriage, of property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation and the value of a vested pension, retirement or other fringe benefit rights accrued during the period of the marriage.

T.C.A. § 36-4-121(b)(1)(A) & (B). In Batson v. Batson, 769 S.W.2d 849, 857 (Tenn. App. 1988), this court held that pension benefits earned by a spouse during marriage are marital property even though the other spouse did not contribute directly to their preservation or appreciation.

We must keep in mind that defendant's pension had vested, and defendant had begun receiving the pension as a result of his retirement prior to the divorce hearing. The sole witness at the trial below was Waverly Seward, assistant manager of benefits for the Shelby County Government, who testified on behalf of plaintiff as to the method used to compute defendant's pension. Seward testified that defendant's pension was determined by (a) his length of service with the Sheriff's Department, and (b) the highest average pay he had received for 36 consecutive months at any time during his term of employment. According to Seward, defendant's salary during the highest 36-month consecutive period produced an average pay of \$49,740.09. Applying a formula of 2.7% per year of defendant's average salary for 25 years, and 1% of that salary for the remaining 9 months and 28 days, Seward calculated defendant's pension to amount to \$2,832.15 per month. This is the amount paid to defendant upon his retirement beginning in December 1993.

Seward further testified that had defendant retired in 1982 during the month of his marriage, his "vested benefit" in his pension would have been \$644.60 per month. The trial court subtracted this amount from \$2,832.15, the amount of defendant's pension, and equally divided the remaining amount between the parties. The court rounded off plaintiff's share of the pension to \$1,100.00 per month. The court also found that plaintiff was entitled to 38.84% of the gross amount of any increases or other distributions received by defendant from the Shelby County Government as a part of his pension.

Although not challenging the fact that his retirement pension is marital property, defendant contends that the trial court erred in not taking into account that he had 15 years of service with the Shelby County Sheriff's Department prior to marriage and in not determining the "true value" of his pension at the time of marriage. Defendant contends that the most equitable division of the retirement

pension would be to award plaintiff one-half of forty (40%) percent of the pension, which represents the percentage of time the parties were married during the accrual of pension benefits.

We find these contentions to be without merit. In determining the amount of defendant's pension had he retired upon the marriage of the parties in July 1982, the trial court did take into account plaintiff's prior service with the Sheriff's Department. The court subtracted this determined amount of \$644.60 per month from the amount of defendant's pension upon retirement to ascertain the amount of appreciation from the date of marriage to the date of defendant's retirement.

Defendant put on no proof nor did he cite to the record anything to show what should have been the proper calculation of the value of the pension prior to marriage. He merely contends that there may be more than one possible value for his vested pension benefits. Although defendant pointed out that there were different possible values for his pension depending upon his life expectancy, the trial court did not have the luxury of waiting thirteen years until defendant reached the age of 60 to determine the exact vested benefit of defendant's pension as of the date of the parties' marriage in June 1982. The record reflects that Seward used the same formula to calculate the vested benefit of defendant's pension as of June 1982 as she used to determine his actual pension upon retirement in 1993. In our opinion, the evidence does not preponderate against the trial court's determination in this regard. This argument is without merit.

Plaintiff also asks this court for the assessment of attorney's fees and costs in connection with this appeal. Although we are of the opinion that reasonable attorney's fees and costs of some nature should be awarded, we feel that the trial court is in the best position to ascertain the amount of attorney's fees and the nature and amount of costs to be reimbursed. Therefore, this cause is remanded

to the trial court for this limited purpose. Otherwise, the judgment of the trial court is affirmed. Costs in this cause on appeal are taxed to defendant, for which execution may issue if necessary.

TOMLIN, Sr. J.

CRAWFORD, P.J.

FARMER, J.