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COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
70057-0-1

ROBERT E. ANDERSON,

APPELLANT,

V.

BEVERLY L. ANDERSON,

RESPONDENT.

RESPONDENT'S OPENING BRIEF

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I. STATEMENT OF THE CASE

Beverly Anderson and Robert Anderson were married for 39 years prior to their divorce in 1997. CP 89. Mr. Anderson was the financial provider for the entire marriage. Mrs. Anderson was a provider at home, taking care of the children, doing volunteer work, not undertaking monetary employment outside the home, but doing a lot for the family as a whole. CP 92. Mrs. Anderson's full attention to duties and tasks at home with the family facilitated Mr. Anderson's ability to work and to provide, so his income-earning ability was a community asset that was built up during the course of the marriage. CP 92.

At the time of the divorce, both parties were near traditional retirement age. CP 93. Mrs. Anderson, because of her lack of significant gainful employment, would likely find a job paying only minimum wage. CP 93. In contrast, Mr. Anderson continued to have substantial earning power and testified that in 1997 he would earn between $250,000-$300,000 and would continue to earn six figures beyond 1997. CP 93. Mr. Anderson's earning capacity was in the range of twenty times that of Mrs. Anderson. CP 93.

The divorce trial was held in April 1997. On May 19, 1997, the Honorable Robert H. Alsdorf entered Findings of Fact and Conclusions of

Law and a Decree of Dissolution. CP 1-10 and 88-96. Findings of Fact 2.12 states "[p]erhaps despite the lifestyle, or perhaps because of it, no retirement has been obtained beyond social security." CP 92. Conclusions of Law 3.6.5 states "Social Security received by the parties should be equalized as set forth in the Decree." CP 95.

An Amended Decree of Dissolution was entered October 7, 1997, nunc pro tunc back to July 3, 1997. CP 11-19. Just as the original Decree, the Amended Decree of Dissolution provided as follows:

> When the husband commences receiving his social security benefits, he shall pay 50% of the gross amount to the wife, each month, until the wife commences receiving social security benefits under her own claim. When she commences receiving her own social security benefits, the gross amount received by the wife shall be subtracted from the gross amount received by the husband, and the husband shall pay to the wife one-half of the difference between his benefit and her benefit on a monthly basis. CP 18.

In September 1997, Mr. Anderson requested the court to modify maintenance and to clarify the Amended Decree to provide for a payment of a loan. CP 97-103. In June 1998, Mr. Anderson again motion the Court, but this time it was to request to terminate maintenance and to also avoid payments to a reserve for a property referred to as the "Ranch." CP 104-113. In September 1998, Mr. Anderson brought a CR60 motion requesting correction of a clerical error which he later withdrew. CP 114-

116. In his motions, Mr. Anderson did not request the Court to void the judgment under Federal and State law; or, claim that the social security provision was void under Federal and State law. CP 97-116.

On April 19, 1999, the parties entered into a CR2A contract which was approved "as being fair at the time of its execution" by Judge Alsdorf on September 8, 1999. CP 33. In the CR2A contract, the parties agreed "[t]he provision in the decree entitled Social Security shall be given its full effect." CP 34.

II. ARGUMENT

A. The trial court did not illegally divide Social Security Benefits; thus, an error did not occur.

Mr. Anderson's social security benefits were not valued or distributed in violation of federal and state laws when the Findings of Fact and Conclusions of Law and the Decree of Dissolution were entered on May 19, 1997.

In a dissolution action, all property, community and separate, is before the court for distribution. In re Marriage of Stachofsky, 90 Wn.App. 135, 142, 951 P.2d 346 (1998). While the distribution of property must be just and equitable in consideration of the circumstances,

it does not have to be equal. In re Marriage of Washburn, 101 Wn.2d 168, 179, 677 P.2d 152 (1984).

In reaching a "just and equitable" property division, the court must consider four statutory factors: (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 the parties at the time of the property division. RCW 26.09.080.

The trial court's paramount concern is the economic condition of the parties. In re Marriage of Crosetto, 82 Wn.App. 545, 556, 918 P.2d 954 (1996); In re Marriage of Williams, 84 Wn.App. 263, 270, 927 P.2d 679 (1996). When making an equitable property division, the court is not required to use a precise formula or calculate the distribution with mathematical precision. In re Marriage of Martin, 22 Wn.App. 295, 298, 588 P.2d 1235 (1979); Crosetto, 82 Wn.App. at 556. A manifest abuse of discretion occurs if the decree results in a patent disparity in the parties' economic circumstances. In Re: The Marriage of Rockwell, 141 Wn.App. 235, 243, 170 P.3d 572 (2007).

The Court of Appeals will seldom modify a trial court's division of property and assets on appeal, and the spouse who challenges such a decision bears a heavy burden to show a manifest abuse of discretion on

the part of the trial court. This deferential standard of review exists because the trial court is "in the best position to assess the assets and liabilities of the parties" in order to determine what constitutes an equitable outcome. In re Marriage of Brewer, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

It is permissible for a trial court to consider social security benefits in making an overall just and equitable division of the parties' assets. In re Marriage of Zahm, 138 Wn.2d 213, 219, 978 P.2d 498 (1999) (citing 42 U.S.C. § 407(a) of the Social Security Act and its interpretation under Hisquierdo v. Hisquierdo, 439 U.S. 572, 590, 99 S. Ct. 802, 59 L.Ed.2d 1 (1979)). The Zahm court ruled that "a trial court may still properly consider a spouse's social security income within the more elastic parameters of the court's power to formulate a just and equitable division of the parties'

marital property which is consistent with the objects of RCW 26.09.080. See also, Rockwell, 141 Wn.App. at 244-45 (the present and future receipt of Social Security benefits by the parties is a factor the court is entitled to consider).

This matter is distinguishable from Hisquierdo. In Hisquierdo, the Supreme Court of California held that Mr. Hisquirdo's railroad retirement benefits were community property to be divided by the trial court. The United States Supreme Court reversed and found that federal retirement benefits may not be divided. Alternatively, the respondent requested "an offsetting award of presently available community property to compensate her for her interest in petitioner's expected railroad retirement benefits." The Supreme Court found the proposal tantamount to the prohibited reassignment of federal benefits.

In contrast, the agreed provision herein did not value the Social Security payments and give the wife an offsetting property award. CP 11-19, 77-78, 83-87. It did not attempt to require the federal government to pay an amount directly to the wife. CP 11-19, 86. Rather it was part of an overall distribution of a sizeable estate to equalize the property awarded to the parties. CP 11-19, 86.

The provision entitled "Social Security" in the decree required Mr. Anderson to make a property payment to Mrs. Anderson once he began receiving Social Security benefits. The provision did not require that the benefits themselves be divided at the source; i.e., "as a regular deduction from his benefit check." Hisquierdo, *at 588.* CP 86. Once the benefits were in the hands of Mr. Anderson, he was required to provide Mrs. Anderson with a sum of money. Accordingly, Mr. Anderson 's method of payment included paying Mrs. Anderson from a joint checking account which he shared with his present wife. CP 172-178.

Zahm is also distinguishable from this matter in that at the time of dissolution, the petitioner in Zahm received monthly income from federal social security. Zahm, In this matter, Mr. Anderson was not receiving social security benefits, so the value of his benefits were unknown.

Zahm is also called into question because Congress later amended the Railroad Retirment Act to permit an award of an interest in the pension to the non-employee spouse. 19 Wash. Prac 11.5. This change draws into question the founding of the ruling in Zahm that Social Security benefits cannot be divided because that court specifically stated:

> Given the Supreme Court's assertion of an affinity between Railroad Retirement Act benefits and federal social security benefits in Hisquierdo, we conclude social security benefits themselves are not

subject to division in a marital property distribution case. Zahm. CP 85.

The Honorable Deborah Fleck stated "I don't believe this provision would have been challenged if the attorneys and the parties had simply picked two figures, ones that an accountant estimated for them, that would have been payable as further property division when the husband and later the wife, began receiving Social Security." CP 86. Mr. Anderson's Social Security benefits were not distributed in violation of Section 407(a).

B. The trial court did not err when it denied the motion vacate under Court Rule 60.

A motion to vacate a judgment is to be considered and decided by the trial court in the exercise of its discretion, and its decision should be overturned on appeal only if it plainly appears that it has abused that discretion. Martin v. Pickering, 85 Wash.2d 241, 533 P.2d 380 (1975). The trial court did not abuse that discretion.

Mr. Anderson requested the court to void the judgment in the instant matter. A void judgment is a judgment, decree or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved. Dike v. Dike, 75 Wn2d 1, 7, 448 P.2d 490, 494 (1968).

The trial court had jurisdiction over the parties because they resided in King County. CP 181. The trial court also had jurisdiction over the subject matter because the Superior Court of the State of Washington for King County was the proper court to bring the parties' dissolution action. CP 181. Finally, the trial court had inherent power to make a just and equitable distribution of the parties' marital property. RCW 26.09.080. CP 181.

On November 2, 2012, the trial court ruled as follows:

> [T]he Social Security benefits provision in the Amended Decree of Dissolution entered on October 7, 1997 and in the subsequent court order of September 9, 1999 is hereby not void under Federal and State law because the Court used the amount of money as a substantial factor to arrive at a just & equitable property settlement distribution and did not divided social security benefits. CP 77-78.

Because the trial court found that the provision was not void, it followed that the motion was also not brought in a timely manner. CP 77-78. Upon Mr. Anderson's Motion for Reconsideration, the trial ruled that the motion was not brought within a reasonable time pursuant to CR 60(b)(11). Again, the trial court found that on February 19, 2013:

> Judge Alsdorf had jurisdiction over the parties and the subject matter of the dissolution and had the inherent power to require the respondent husband to pay money to the petitioner wife in an amount that was pegged to the amount of his Social Security payments; I don't believe this provision included in the Decree is void. Judge Alsdorf was, at a minimum, entitled to consider Social

> Security benefits in order to properly evaluate the economic circumstances of the spouses in this longer term marriage. If this provision is voidable, the motion is not brought within a reasonable time pursuant to CR 60(b)(11). CP 86.

The Court used proper discretion in ruling that Mr. Anderson's motion was not timely.

C. The trial court did not err when it ruled the CR2A executed by the parties was enforceable.

On February 19, 2013, the Honorable Deborah H. Fleck confirmed that the CR2A document signed by the parties in 1999 and approved by Judge Alsdorf, is a separate contract between the parties. CP 86. A contract, even if merged in a decree, is separately enforceable. 19 Wash. Prac §19.17. CP 87.

A stipulation disposing of property in a dissolution case is subject to court approval. Munroe v. Munroe, 27 Wn.2d 556, 561, 178 P.2d 983 (1947). A judgment by consent may not be set aside if it conforms to the stipulation unless obtained by fraud or mutual mistake. Haller v. Haller, 89 Wn2d 539, 544, 575 P.2d 1302 (1978) (quoting 3 E. Tuttle, A Treatise of the Law of Judgments §1352 at 2776-77 (5th ed. Rev. 1925)). A stipulation that has been approved by the court will not be disturbed unless there is a clear and manifest abuse of discretion. Mayo v. Mayo, 75 Wn. 2d 36, 38, 448 P.2d 926 (1968).

There is not a clear and manifest abuse of discretion. Just as the Amended Decree was not void, neither is the CR2A contract.

III. CONCLUSION

In conclusion, the Superior Court was with authority to approve, five times, that the amount of Social Security benefits to be received by Mr. Anderson, would be a substantial factor in an overall just and equitable distribution of the property held by the parties at the time of dissolution. The agreed provision herein did not value the Social Security payments; nor, did it give the wife an offsetting property award. Rather, it was used as a method of equalization. The judgment is not void because the Court had authority to approve the Decree(s) and the CR2A agreement. Mr. Anderson's appeal should be denied.

RESPECTFULLY SUBMITTED this 5th day of July, 2013.

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COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

ROBERT E. ANDERSON, Appellant, and BEVERLY L. ANDERSON, Respondent.	No. 70057-0-1 **DECLARATION OF SERVICE**

THE UNDERSIGNED, hereby declares as follows:

1. That I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, the attorney herein for Respondent Beverly L. Anderson, over the age of 18 years, not a party to the above-entitled action and competent to e a witness therein.

2. That on the 3rd day of July, 2013, I caused a copy of the following documents:

Respondent's Opening Brief, Declaration of Service to be delivered/served by the method(s) indicated:

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DATED this 3rd of July 2013.

GE Buetow

Ginger E. Buetow