IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

THOMAS GEORGE PALMER,	)	
	)	KNOX CIRCUIT
Plaintiff/Appellee	)	
	)	No. 03A01-9506-CV-00205
v.	)	
	).	
PAULA MAKSIM PALMER,	)	
	)	REVERSED AND REMANDED
Defendant/Appellant	).	

L. Caesar Stair III, Chattanooga, For the Appellant.

David L. Valone, Knoxville, For the Appellee.

O P I N I O N

INMAN, Senior Judge

A dispositive issue is whether this judgment should be set aside in whole, in part, or not at all. We conclude that the judgment should be set aside, *in toto*, and that the case should be remanded.

I

A "judgment for divorce" was entered on January 28, 1994. It included a negotiated property settlement, which was approved by the court, with the remaining issues of child custody, support, and visitation being reserved for a later resolution. Within the purview of Rule 54.02 the January 28, 1994 judgment was not final since it did not include an express determination that there is no just reason for delay and did not expressly direct the entry of judgment.

On February 28, 1994 the defendant [hereinafter, Wife] filed a motion to set aside the January 28, 1994 judgment because the Property Settlement Agreement did not take into account the plaintiff's Civil Service Retirement Annuity. The trial

court seemingly recognized the omission, but held "this case [i.e., the property settlement] . . . was concluded . . . as a knowing bargain" and, by order entered on June 9, 1994, denied the motion.

The case was finally concluded on March 1, 1995 by the entry of judgment which disposed of the remaining issues. A notice of appeal was filed March 30, 1995.

II

The appellee [hereinafter, Husband] filed a motion in this Court to dismiss the appeal alleging only that wife made a "knowing arm's length agreement" in the "resolution of the divorce action." This assertion may be a ground for affirmance of the judgment, but it obviously is no reason for dismissal of the appeal, and the motion is denied.

III

Husband was employed by the F.B.I. on April 4, 1971. He retired on June 3, 1994 with 26 years of creditable service for retirement purposes and was entitled to and is receiving a Civil Service Retirement System Annuity pursuant to 5 U.S.C. §§ 8335, 8336 and 8339, formulaically computed to be about $50,000.00 annually. Assuming the continued viability of the federal treasury and that Husband (now 51) will live to age 70, he will receive more than one million dollars from this annuity, which through inadvertence was not included in the marital estate.

IV

Besides this annuity, Husband had another retirement option, called the "FBI Lump Sum Retirement," comprised of his contributions to the system together with earned interest. This "Lump Sum Retirement" aggregated $65,549.00.

V

Rule 10 of the trial court requires parties in a domestic relations case to file a pre-trial stipulation listing all of their assets and liabilities classified as either separate, marital or disputed. This requirement, obviously a salutary one, is

zealously enforced. Various Rule 10 documents were exchanged and filed, but in every instance the husband listed only his "FBI Retirement" of $59,592.00, which was the net amount after adjustment for pre-marriage contributions, if he elected to cash-out. This amount was then factored into a supposed marital estate of about $220,000.00 which was by agreement apportioned $160,00.00 to Wife and $60,000.00 to Husband. In the interests of strict accuracy, Husband should have valued his "FBI Retirement" for at least one million dollars, with appropriate explanation from an actuarial perspective.

When asked why the parties neglected to include the Annuity on any Rule 10 filing, Wife's then attorney responded:

> A. Well, all I can tell you is the focus . . . was on this $59,000 figure going back to the first draft that . . . Mr. Valone submitted for me . . . . And there was . . . *never any discussion between us about adding an annuity in those terms in the Rule 10.*
>
> Q. And at the time you negotiated the settlement on November the 29th, was there any discussion at that time of the annuity?
>
> A. My recollection is no, there was none.

(emphasis added).

When asked pointedly why the annuity had been omitted, counsel testified:

> A. You know, Mr. Lockridge, I don't make any bones about the fact that I missed that annuity. *David [Husband's attorney] and I both knew about that annuity*, and it just never came into discussion when we settled the case. That's just an absolute fact. We both missed it. It is not in either of the Rule 10's in any way, shape or form. . . . It was a substantial asset of this marriage.

(emphasis added).

This testimony was given in hindsight, of course, because courts sit in hindsight. Earlier, counsel testified that at the time he negotiated the settlement, he believed that the only retirement asset [in his words, the only asset on the table] was the lump sum of $59,000.00.

VI

Inherent in the dispositive issue propounded by Husband is whether the Property Settlement Agreement "was a knowing bargain" and whether the annuity "was left out" or "dealt with" under the "alternative valuation theory." In this connection, we are mindful that appellate review is *de novo* accompanied with a presumption of the correctness of the judgment unless the evidence otherwise preponderates. TENN. R. APP. P. 13(d); *Bah v. Bah*, 668 S.W.2d 663 (Tenn. App. 1983).

Husband argues that Wife was knowledgeable about his retirement benefits and that the annuity was fully considered, citing *Duncan v. Duncan*, 789 S.W.2d 557 (Tenn. App. 1990) and *Seay v. City of Knoxville*, 654 S.W.2d 397 (Tenn. App. 1983), for the general rule that a judgment will not be set aside on grounds of newly discovered evidence when such evidence was readily discoverable by the exercise of diligence. The difficulty with this argument is that the annuity was neither knowledgeably or fully considered; this seems obvious. Its extrapolated worth was in excess of one million dollars; all other marital assets were paltry in comparison.

Husband argues that "the appellant's assertion that there are two retirements is incorrect, but that there is one retirement with two options." Whatever meaning is accorded this statement, it arises in this context:

Husband testified that he had the option of receiving about $4200.00 per month for the remainder of his life effective upon his retirement on January 3, 1994, or if he left his employment before age 50 [January 3, 1994] his only entitlement was the lump sum value of the annuity, about $65,000.00. We presume this is the reason his Rule 10 filing represented the value of his "FBI Retirement" as circa $59,000.00 after adjustment. Except for the fact that Wife's counsel knew better, as revealed in hindsight, that is, Wife's counsel was aware of the handsome monthly benefit that irrevocably accrued upon official retirement of Husband, we would unhesitatingly hold, as we must, that the Husband's representation of the value of his "FBI Retirement" was deceitful and calculatedly so. On the face of the Rule 10

filing, the valuation is clearly misleading, since fair-dealing required a representation that the "FBI Retirement" was $50,000.00 per year, assuming no election, as was the case, of survivor's benefits accruing to the Wife. We agree with the Wife that simple logic will not permit the consideration of an argument that she *knowingly* chose a lump sum valuation of $59,000.00 in preference to a vested annuity, the value of which exceeded one million dollars. Wife's counsel candidly says that "We both missed it." We accept this premise because no other explanation comes to mind. Was it a "knowing bargain?" *No.* How can it reasonably be argued that it was? Husband vehemently defends his windfall on the basis of a negotiated deal, court-approved; but this offends our notion of fair-dealing and justice, keeping in mind that TENN. CODE ANN. § 36-4-121 requires an equitable division of the marital estate, and the judicial system strives to bring this about. *Batson v. Batson*, 769 S.W.2d 849 (Tenn. App. 1988). The division, albeit contractual, between these parties is about as inequitable as is possible, and this point is not nor can it be seriously controverted.

We note that Husband argues that "the parties relied on the present value method, as opposed to the alternate evaluation method," i.e., that the parties mutually elected the lump sum value of $59,000.00 in preference to the one million plus value. Suffice to state that we find no evidence of this startling conclusion in the record. Moreover, it is counter-productive to the essential thrust of Husband's argument. If these parties did indeed rely upon the "present value" of the annuity, there was a gross, mutual mistake of fact which demands rectitude under the plainest principles of equity. Another approach is simplistic: Husband and counsel knew that the agreement allowed him to keep his entire pension of $50,000.00 per year. Should this glaring inequity--clearly overlooked by Wife and her counsel--have been revealed? While it may be true that everything is fair in love, war, politics and lawsuits, there are limitations to cynicisms. We are profoundly mindful that negotiated settlements ought not to be disturbed. We note the erudite comments of

the experienced trial judge directed to this point and are constrained to say that our notions of fairness rise no higher than his. But from our perspective, the sheer unilateralness of awareness of the facts coupled with the inevitable result requires another look. At the least, no harm will accrue; at best, justice or its appearance will have been served.

VII

Husband presents for review the issue of whether the Wife's appeal is timely, arguing that the January 28, 1994 "Judgment of Divorce" was not interlocutory, but final, as evidenced by the remarks of the trial judge on June 1, 1994 when he overruled the motion to set the judgment aside:

> This case concluded its property aspects on November 29, 1993. That portion of the case was fully and finally concluded on that day by an express statement of same by the Court; the Court did direct the entry of the final judgment as to the property issues, there being no just reason for delay at that time . . . ."

However this may be, the judgment, as entered, does *not* include the certifications referenced by the trial judge and as required by Rule 54.02, heretofore cited. *Fox v. Fox*, 657 S.W.2d 747 (Tenn. 1983). There the matter ends. The trial judge, six months after the fact, merely described something thought to have been done, but which, in reality, was not accomplished.

VIII

We considered vacating the approval of the property settlement only, as contrasted to a blanket reversal of the case. We conclude that in light of the substantial involvement of the Federal Civil Service Commission with its highly technical requirements, the issue of the survivor's annuity, *inter alia*, and in order to insure to the extent possible that the rights of both parties shall be equally protected, the judgment should be vacated *in toto*. The case is remanded for trial on all issues, with the costs apportioned equally.

William H. Inman, Senior Judge

Concur:

Houston M. Goddard, Presiding Judge

Don T. McMurray, Judge