

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
In The Family Court

W. Thomas Sprott, Jr., Family Court Judge

Case No. 2009-DR-40-0736

Linda Rose Barber,

Respondent,

v.

Daryl Scott Barber as Personal
Representative of The Estate
of Robert Donald Barber,

Appellant.

FINAL BRIEF OF APPELLANT

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AUG 21 2012
SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE FAMILY COURT ERR IN ITS RECONSTRUCTION OF THE RECORD RESULTING IN A CONFUSING FINAL AMENDED DECREE AND ORDER.
2. DID THE FAMILY COURT ERR IN DIRECTING THAT THE EQUITABLE SHARE OF THE MARITAL PROPERTY BE RETROACTIVE TO DECEMBER 1, 2009
3. DID THE FAMILY COURT ERR IN AWARDING THE BENEFIT OF MR. BARBER'S SURVIVOR'S BENEFIT PLAN TO MRS. BARBER
4. DID THE FAMILY COURT BY AWARDING MRS. BARBER THE SUM OF \$200.00 ON A MONTHLY BASIS RETROACTIVE TO DECEMBER 1, 2009.
5. DID THE FAMILY COURT BY AWARDING MRS. BARBER ATTORNEY'S FEES OF \$1,547.50.

STATEMENT OF THE CASE

An action for separate maintenance and support brought in Lexington County resulted in a Court Order dated September 24, 1999, which awarded Mrs. Barber temporary unallocated support of \$1,300.00 per month.

This matter lay dormant until February 25, 2009, when Mrs. Barber filed an action in Richland County, seeking inter alia a divorce. This action resulted in an amended Pendente Lite Order filed May 26, 2009 (R.p. 5-8), which equitably divided Mr. Barber's two retirement plans on a fifty/fifty percent basis.

While the Richland County matter was pending, Mrs. Barber filed an action for contempt in Lexington County. The Lexington County action was subsequently dismissed due to the pending action in Richland County and the administrative Order of the Supreme Court dismissing cases over 365 days old. The Lexington County Order of Dismissal was filed July 21, 2009 (R.p. 9-11).

The Richland County action continued and a hearing on the merits was held November 16, 2009. On February 22, 2010, a Final Decree and Order was filed ((R.p. 12-18). Pursuant to the Defendant's Motion to Alter or Amend the Court entered its amended Final Decree and Order which was filed May 5, 2010 ((R.p. 19-26).

The Defendant filed the notice of appeal with this Court on June 18, 2010. In the course of this appeal it was discovered that the transcript of the trial could not be produced and the trial Court was Ordered to reconstruct the record. On November 29, 2011, the trial judge issued his reconstruction of the record ((R.p. 37-43).

FACTS

The parties were married October 6, 1973. Prior to September of 1999, the parties separated and have lived separate and apart since that date. A consent order was entered into September 24, 1999, in Lexington County which awarded Mrs. Barber separate support and maintenance.

In April of 2003, Mr. Barber sired a child by a third party mother. He was subsequently granted sole custody of said child, which he has had continuously.

A Pendente Lite action was subsequently initiated in Richland County and this action resulted in the subject of this appeal.

At the time of the Pendente Lite Order, Mrs. Barber was sixty-seven (67) years old and Mr. Barber was seventy-two (72) years of age.

ARGUMENTS

I. THE TRIAL COURT ERRED IN ITS RECONSTRUCTION OF THE RECORD RESULTING IN A CONFUSING FINAL AMENDED DECREE AND ORDER.

It would appear that the trial court was attempting an equitable division identical to that accomplished in the consent Pendente Lite Order. The trial court recognized errors in the Amended Final Decree and Order and in his reconstruction he attempted to correct the same.

He correctly determined that Mr. Barber's civil service retirement plan and his military retirement should be divided on a fifty/fifty basis utilizing the fifty percent divided by the parties coverture. He also correctly calculated a total funds generated during the period of coverture as being \$3,189.82.

Also correct was the trial court's recognition that Mrs. Barber was the beneficiary of Mr. Barber's survivor's benefit plan, the premium of \$442.00 per month being paid by Mr. Barber,

such premium to be deducted from Mrs. Barber's equitable share. It is contended however that the trial court erred in its conclusion in the following areas:

- 1) By directing that Mr. Barber pay as "alimony" the sum of \$1,594.91 per month arising at such number from her fifty percent of both plans which was an equitable apportionment of marital property.
- 2) By failing to deduct the premium cost of \$442.00 from the monies directed to be paid to Mrs. Barber.
- 3) By failing to consider that Mr. Barber receives the gross amount of these plans with survivor's benefit premiums and taxes being deducted prior to his receipt. The taxes paid on Mrs. Barber's share are \$282.19. By the court's failure to properly deduct the survivor's benefit premium and the withheld taxes result in the fifty/fifty division earlier contemplated. Mrs. Barber will receive the total sum of \$2,319.91, or roughly sixty-nine percent of the marital property. It obviously was not the intent of the trial court to create this discrepancy.

Mr. Barber would boldly assert that the court's error in this regard would be corrected by adopting the calculation as contained in the amended Pendente Lite Order (R.p. 5-8). This being for so long as the survivor's benefit premium, federal and state taxes are being withheld from the two plans prior to their distribution that Mrs. Barber would receive the same net amount as she has received since May 26, 2009, that being \$911.89.

II. THE TRIAL COURT ERRED IN DIRECTING THAT THE EQUITABLE SHARE OF THE MARITAL PROPERTY BE RETROACTIVE TO DECEMBER 1, 2009.

The Trial Court overlooked the fact that since 1999, Mr. Barber has consistently paid

Mrs. Barber monthly sums ranging from \$1,300.00 to \$800.00 for an average payment of \$1,011.47. The sum that Mr. Barber has consistently paid exceeds his maximum obligation to Mrs. Barber.

It would appear that the trial court did not intend for Mr. Barber to retroactively pay the sum of \$1,594.91 when he has consistently paid monthly payments in amounts greater than his obligation. In fact, if Mr. Barber were to calculate the retroactive payments as in the court's reconstruction of the record, the gross sum would be approximately \$40,000.00 which would be an impossibility for Mr. Barber. This would be grossly unfair and it would appear that this was not intended by the trial court.

Further, the Amended Complaint of Mrs. Barber does not seek retroactive alimony. It is suggested that is because she did not feel she was entitled to the same. A similar issues was raised in the matter of Smith v. Smith, 308 S.C. 492, 419 SE2d 232 (Ct. App. 1992) in this instance retroactive alimony (or support) does nothing but provide her with an unexpected and unearned bonus.

III. THE TRIAL COURT ERRED IN AWARDING THE BENEFIT OF MR. BARBER'S SURVIVOR'S BENEFIT PLAN TO MRS. BARBER.

Again, referring to Mrs. Barber's Amended Complaint, she does not seek an interest in the survivor's benefit plan.

As stated in the matter of Abbott v. Gore, 304 S.C. 116, 403 SE2d 154 (Ct. App. 1991), the Court held that:

“due process requires that a litigant be placed on notice of the issues the Court is to consider and the rule that family court pleadings are to be liberally construed may not be stretched so as to permit the Judge to award relief not contemplated by

the pleadings.

Citing Henry v. Henry, 296 S.C. 285, 372 SE2d 104 (Ct. App. 1988).

In this matter, Mrs. Barber having not requested an interest, as a beneficiary of the survivor's benefit plan has waived that right and the trial court was in error to consider it and to award it.

Further, the award of the benefits of the survivor's benefit plan is unfair to the young son of Mr. Barber. At the time of the 2009 hearing, Mr. Barber was 72 years old, Mrs. Barber was 67, and the young son was 6 years old. As the plan pays the beneficiary Mr. Barber's retirement benefit for life. Economically the trial court's decision is not sound. At age 67, Mrs. Barber would have a life expectancy of 18.60 years, while the young son's life expectancy would be 74.97 years. It would seem prudent for the trial court to provide for the young child particularly so when Mr. Barber's life expectancy is 12.01 years. S.C. Code Ann. §19-1-150 (2004). When the child is eighteen his needs are going to be far greater than Mrs. Barber.

IV. THE TRIAL COURT ERRED BY AWARDING MRS. BARBER THE SUM OF \$200.00 ON A MONTHLY BASIS RETROACTIVE TO DECEMBER 1, 2009.

The income of Mr. Barber, as found by the court consists of his two retirement plans and his social security benefits.

By awarding Mrs. Barber \$1,594.91 plus \$200.00 per month in alimony when Mr. Barber's retirement generate \$3,189.82, violates federal law. The court's ruling results in a division of Mr. Barber's retirements of \$1,794.91 or 0.56 to Mrs. Barber and 0.43 to Mr. Barber, which is contrary to 10USCA §§1408 (a)(1), (c)(1) and Coon v. Coon, 364 S.C. 563, 614 SE2d 616 (S.C. 2005).

Such award is also contrary to the court's earlier declaration of a fifty/fifty division.

As Mr. Barber's sole income consisted of his two retirement plans and social security, the trial court erred by invading the protected one-half of his retirement and violated federal law by doing so.

V. THE TRIAL COURT ERRED BY AWARDING MRS. BARBER ATTORNEY'S FEES OF \$1,547.50.

Mr. Barber suggests that this court should consider his attorney's fees and costs in this matter which were \$12,735.30. The size of his fees was the result of Mrs. Barber failing to serve him with notice of the original Pendente Lite hearing; the necessity to set that decision aside; the necessity to secure an amended Pendente Lite Order (R.p. 5-8); the filing of a frivolous claim in Lexington County while the matter was still pending in Richland County and the attempt in Lexington to present Mrs. Barber's case through her son who had her power of attorney. The research and preparation for these collateral matters caused the increase in Mr. Barber's fees.

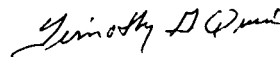
While the appellate court's review of an award of attorney's fees and is governed by the standard of abuse of discretion, Williamson v. Middleton, 374 S.C. 419, 649 SE2d 57 (Ct. App. 2007) it would appear that such discretion was abused in this instance.

In addition, there is a substantial question as to whether Mrs. Barber received a beneficial result. The re-calculation of the court's award figures as set forth herein would show that Mrs. Barber's action resulted in the same or a slightly lower monthly award then she was previously receiving.

CONCLUSION

Based upon the foregoing Mr. Barber concludes that this Court should issue its Order reforming the trial court's Order or in the alternative remand this matter for a new trial.

Respectfully Submitted.

A handwritten signature in cursive script that reads "Timothy G. Quinn".

Timothy G. Quinn

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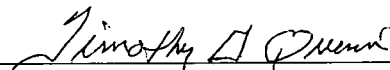
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief complies with Rule 211(b) and is identical to the Initial Brief previously served except for the references to the record and correction of typographical errors and misspellings.



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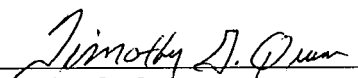
Appellant.

PROOF OF SERVICE

I certify that I have served the respondent with the Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2012, addressed to James Corley attorney of record as follows:

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