

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

ROBERT KELLY,

Appellant,

v.

CARLOTTA A. KELLY,

Respondent.

DOCKET NUMBER WD72238

Date: May 10, 2011

Appeal from:
Clay County Circuit Court
The Honorable Kathryn E. Davis, Judge

Appellate Judges:
Division One: Mark D. Pfeiffer, Presiding Judge, Thomas H. Newton and Alok Ahuja, Judges

Attorneys:
George A. Wheeler, Kansas City, MO, for appellant.
Brent L. Winterberg, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS -- WESTERN DISTRICT

ROBERT KELLY

Appellant,

v.

CARLOTTA A. KELLY,

Respondent.

WD72238

Before Division One: Mark D. Pfeiffer, P.J., Thomas Newton and Alok Ahuja, JJ.

Robert Kelly (“Husband”) appeals aspects of the decree dissolving his marriage to Carlotta A. Kelly (“Wife”).

The trial court’s decree specifies that the parties’ marital home be sold, with the proceeds divided 60% to Husband, and 40% to Wife. The decree specifies that the home initially be listed for \$240,000, then be reduced in listing price \$10,000 for every 60 days it remains unsold, ending at \$210,000. The decree does not specify an end date for the marketing of the home, or specify what will happen if the home fails to sell even at the reduced listing price of \$210,000. The circuit court allowed Husband to continue to live in the home, but required that he continue to pay the mortgage and utility bills. Additionally, the circuit court ordered that Husband pay Wife \$15,000 in the event he defaulted on the mortgage and a foreclosure resulted.

The circuit court classified 11.5% of Husband’s pension and Thrift Savings Plan account as marital property, based on the fact that he was married for three of the 26 years he worked at the federal Department of Housing and Urban Development (“HUD”). The court divided this marital portion evenly. The circuit court did not require Wife to contribute to Husband’s claimed \$30,000 in home upkeep expenses, and ordered Husband to pay \$1,000 of Wife’s attorneys fees. Although both parties requested it, the trial court did not order that spousal maintenance be paid to either party.

**REVERSED AND REMANDED WITH RESPECT TO SALE OF MARITAL HOME;
AFFIRMED IN ALL OTHER RESPECTS.**

Division One Holds:

The dissolution decree specifies a schedule by which the listing price for the marital home will be gradually decreased from \$240,000 to \$210,000. This represents a practical approach to the sale of marital real estate in the current economic climate. However, the decree fails to provide Wife with any incentive to facilitate the sale of the home other than at the listing price(s) specified in the decree, because she is paying no share of the costs associated with the home's financing or physical upkeep. In these circumstances, the judgment must contain some provisions to ensure that the residence is not marketed indefinitely, and provide some mechanism for selling the property if the parties are unable to agree to a disposition. The portions of the dissolution decree addressing the sale of the marital home are therefore reversed, and remanded to the trial court for it to designate a definite time period for the final sale of the home, and any other conditions the court deems appropriate.

The circuit court did not abuse its discretion in classifying 11.5% of Husbands' pension, and of his defined-contribution Thrift Savings Plan account, as marital property, and dividing the marital portion equally. Pensions are deemed to have been earned ratably over the period of employment, and here Husband was employed with HUD for three out of 26 years, or 11.5% of his total employment period, during the marriage. The trial court was justified in applying the same percentage to Husband's Thrift Savings Plan account, since he failed to meet his burden of establishing that some greater percentage of this account was non-marital, such as by providing information concerning the balance in the account at the time of the marriage, his history of contributions to the account, the rate of return earned on the account before and after the marriage, or other such information.

The trial court did not err in failing to order Wife to pay a share of the upkeep costs of the marital home, since Husband testified that he was not asking for Wife to pay a share of the upkeep costs, if she was not awarded maintenance (which she was not). Husband cannot attack a portion of the property division he invited. Finally, Husband has failed to present any persuasive argument that the trial court abused its discretion in awarding Wife \$1,000 of the \$4,000 in attorneys fees she requested.

Opinion by: Alok Ahuja, Judge

May 10, 2011

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