

RENDERED: April 30, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-001538-MR

DIANE CHUMBLEY PEDRO
and WILLIAM L. HOGE, III

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE HENRY WEBER, JUDGE
ACTION NO. 95-FC-00009

SAMUEL JOSEPH PEDRO
and

APPELLEE

NO. 1998-CA-000109-MR

DIANE CHUMBLEY PEDRO
and WILLIAM L. HOGE, III

APPELLANTS

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE WILLIAM P. RYAN, JR., JUDGE
ACTION NO. 95-FC-00009

SAMUEL JOSEPH PEDRO

APPELLEE

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON and MCANULTY, Judges.

HUDDLESTON, Judge. Diane Chumbley Pedro appeals from the findings of fact, conclusions of law and decree of the Jefferson Family Court in a dissolution of marriage proceeding.

Diane Chumbley Pedro and Samuel Joseph Pedro were married on June 20, 1975. Diane and Samuel had one child, John Patrick, during their marriage. When this action began, Samuel was 75 years of age and retired, Diane was employed at MCC Behavioral Care as a substance abuse counselor and recovery facilities director. She has an average gross monthly income of approximately \$3,019.00.

Prior to the marriage, Samuel was a majority shareholder of Embassy Supper Club, Inc. and Embassy Investment Corporation which owned and operated the Embassy Supper Club (Embassy), a restaurant in Louisville, Kentucky. Instead of paying taxes on the earnings made from the Embassy, Samuel funneled money to Mexico into a so-called "retirement fund account." In 1973, Samuel pleaded guilty to tax evasion. He served 55 days in a federal penitentiary and paid approximately \$100,000.00 in back taxes.

In the early 1980s, profits from the Embassy declined and Samuel made personal loans to the corporation. The funds were paid out of his retirement fund in an attempt to financially regenerate the Embassy. The Embassy purchased the leasehold interest in its property for \$160,000.00.

The family court determined that the parties' marital residence located at 9107 Taylorsville Road, rental property located at 9113 Taylorsville Road, the Forest Hills Subdivision and the Embassy leasehold interest were marital property and divided the value between the parties. The family court denied Diane's request for maintenance and awarded Diane's attorney \$7,500.00 in fees.

Both parties filed motions to alter or amend the decree. After a hearing, the family court, on May 21, 1997, amended its

decree and determined that the real property located at 9107 and 9113 Taylorsville Road, the Forest Hills Subdivision and the Embassy leasehold interest were non-marital property and awarded the property to Samuel. The family court affirmed its denial of Diane's request for maintenance, but amended its decree and awarded Diane's attorney \$10,000.00 in fees. Diane's motion to alter or amend the May 21, 1997, order was denied.

Diane filed a notice of appeal to this court. Soon after, she moved this Court to hold the case in abatement, and she filed a Ky. R. Civ. Proc. (CR) 60.02 motion with the family court claiming to have newly discovered evidence. On December 15, 1997, the family court denied Diane's CR 60.02 motion. Diane then appealed the order denying her CR 60.02 motion. The appeals have been consolidated.

Diane's first point is that the family court erred when it determined that the real property located at 9107 and 9113 Taylorsville Road, the Forest Hills Subdivision and the Embassy leasehold interest, are non-marital property. Diane argues that the family court improperly placed the burden on her to establish the marital character of the property. She also contends that the family court erred by finding that the property was non-marital based solely on Samuel's testimony. She alleges that there is no documentary evidence that Samuel's retirement fund existed and that most likely this money came from skimming the Embassy during the marriage.

The following facts are relevant for purposes of reviewing the family court's disposition of the marital and non-marital property in question. The parties' marital residence,

located at 9107 Taylorsville Road, was purchased before their marriage by Samuel, together with several other lots which became known as the Forest Hills Subdivision. Prior to the marriage, Samuel also purchased property at 9113 Taylorsville Road. Samuel financed several improvements to the marital residence before and during the marriage. However, the parties used winnings they received from a Kentucky Derby bet to construct an indoor swimming pool. Samuel also loaned money to the Embassy to enable it to purchase the leasehold interest. Samuel testified that he used the funds in his retirement account to purchase these assets and to make improvements to the marital residence.

The family court found that Samuel purchased the 9107 and 9113 Taylorsville Road properties prior to the marriage and that the Forest Hills Subdivision was developed on the property at 9107 Taylorsville Road. The court concluded that the property was non-marital. The court also found that Samuel loaned the Embassy funds from his retirement account which the Embassy used to purchase the leasehold interest. Because the leasehold interest was purchased from the retirement fund, the court determined that the leasehold interest was non-marital. The court made the following findings of fact and reached the following conclusions of law regarding the non-marital property:

The next question revolves around the amount of appreciation which has been enjoyed in the property during the marriage, and the burden of proof falls on [Diane] to establish the amount and, consequently, prove the existence of a marital interest. KRS 403.190(2) states that "For the purpose of this chapter, "marital

property” means all property acquired by either spouse subsequent to the marriage except . . . “[t]he increase in value of property acquired before the marriage to the extent that such increases did not result from the efforts of the parties during the marriage[.]” KRS 403.190(2)(e). [Diane] has failed to prove the increase to be marital, therefore, it shall be considered non-marital.

Marital property is defined as all property acquired by either spouse subsequent to the marriage, with five exceptions: (a) by gift, bequest, devise or descent; (b) property exchanged for type (a), above; (c) property acquired after a decree of legal separation; (d) property excluded by valid agreement of the parties; and (e) the increase in value of property acquired before marriage. KRS 403.190(2)(a)-(e). KRS 403.190(3) creates a presumption that all property acquired during the marriage is marital property, but permits this presumption to be overcome by proof that the property was acquired as in subsection (2) of the statute. Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990). KRS 403.190(2) has been construed to require tracing of assets claimed to be non-marital into assets owned at the time of dissolution. Id.

In the present case, the family court determined that Samuel established the existence of a retirement account. Samuel testified that he invested funds in Mexico and retrieved the funds prior to his marriage. He stated that he used this reserve to purchase property located at 9107 and 9113 Taylorsville Road, the

Forest Hills Subdivision and the leasehold interest. He argued that even though he has no documentary evidence showing the existence of the fund or of the amount which it contained, the existence of other proof showing the lack of other family financial resources proves that the funds must have existed. The court concluded that Diane failed to produce any evidence to establish the increase in value of the property resulting from the efforts of the parties during the marriage. KRS 403.190(2)(e).

Diane argues that the family court made a clear mistake of law in allowing Samuel to establish the non-marital character of the property by his testimony and by negative evidence. It is within the exclusive province of the trier of fact to assess the credibility of witnesses and to determine the weight to be given to particular evidence, whether positive or negative. Ironton Fire Brick Co. v. Burchett, Ky., 288 S.W.2d 47, 50 (1956). Samuel's failure to produce documents to support the existence of a retirement fund goes only to the weight of the evidence. In such matters, we are bound by the clearly erroneous standard and cannot substitute our judgment for that of the trier of fact. Ghali v. Ghali, Ky. App., 596 S.W. 2d 31, 32 (1980); CR 52.01. With these considerations in mind, we hold there is sufficient evidence to support the family court's finding that the real property located at 9107 and 9113 Taylorsville Road, the Forest Hills Subdivision and the leasehold interest are non-marital property.

Diane challenges the family court's denial of a maintenance award. She contends that the court ignored her standard of living, the property distributed to the parties and

the duration of the marriage in so doing.¹ The court made the following finding of facts regarding the issue of maintenance:

[I]t was established that [Diane] had approximate gross monthly income of \$3,019.00. Her statement of expenses revealed that she claimed to have \$3,102.34 in monthly expenses. Upon review of said statement, the Court has taken the position that these are somewhat inflated, and, in fact, several of the claimed expenses are only relative to the parties' now emancipated son the Court finds that her monthly expenses are \$2,506.34. Said adjustments were made by subtracting the son's car payment, gas, and food from [Diane's] expense list. Upon subtracting [Diane's] expenses from her gross monthly income, the Court finds that [Diane] has \$512.66 in residual funds.

* * *

The Court has considered [Diane's] age, earning ability, standard of living established during the marriage, and [Samuel's] ability to pay, as well as the threshold question of sufficient property to meet her reasonable needs, and ability to support herself through appropriate employment The Court does not find, based on such analysis, that [Diane] is entitled to maintenance.

¹Diane states that Samuel's income was at least three times greater than hers during the parties' 20 year marriage because of her housemother status and later employment as a rehabilitation counselor.

The amount and duration of maintenance is within the sound discretion of the family court. Russell v. Russell, Ky. App., 878 S.W.2d 24 (1994). KRS 403.200 provides, in relevant part, that:

(1) [T]he court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and

(b) Is unable to support himself through appropriate employment

(2) The maintenance order shall be in such amounts and for such periods of times as the court deems just, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance ;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage;

(e) The age, and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

In Casper v. Casper, Ky., 510 S.W.2d 253 (1974), Kentucky's highest court held that the circuit [family] court is to determine whether the spouse seeking maintenance lacks sufficient property to meet reasonable needs and is unable to support herself through appropriate employment according to the standard of living established during the marriage. (Emphasis supplied). The Court noted that:

. . . once the conditions of KRS 403.200(1) are satisfied, KRS 403.200(2) specifies a number of relative factors to be considered in determining the amount of maintenance, including "standard of living established during the marriage." The statute, as did the law before, simply recognizes that what might be ample for a scullery maid is not necessarily sufficient for one accustomed to the lifestyle of a duchess, and it seems to us that the same is true with respect to what is "support."

Casper, 510 S.W.2d at 255. Therefore, to determine whether a spouse is able to "support" herself under KRS 403.200(1)(b) the court must consider factors listed in KRS 403.200(2).²

In Weldon v. Weldon, Ky. App., 957 S.W.2d 283 (1997), this Court, relying on Casper v. Casper, Ky., 510 S.W.2d 253 (1974), considered the marital property assigned to a spouse, the spouse's annual income and the standard of living established by

² In Casper v. Casper, Ky., 510 S.W.2d 253,254 (1974), the Court said "The real issue here is whether the criterion provided by KRS 403.200(1)(b) is absolute or relative, and we think the answer must be that it is relative."

the parties during the marriage in order to determine whether the lower court abused its discretion in awarding maintenance. In Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992), the Supreme Court of Kentucky said that in order to reverse a maintenance decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the lower court abused its discretion. Considering these authorities, we hold that the family court abused its discretion by not awarding Diane maintenance given the fact that the parties were married for 20 years, the standard of living established during their marriage and the non-marital and marital property distributed to each.³

Diane's attorney, William L. Hoge, III, argues that the family court abused its discretion in awarding but \$10,000.00 in fees in light of Samuel's abuse of discovery which, he says, caused an excessive amount of time to be expended on trial preparation and because of the disparity in financial resources of the parties. KRS 403.220 provides that the family court, after considering the financial resources of both parties, may order a party to pay a reasonable amount to cover the costs incurred by the other party in maintaining or defending any proceeding under KRS Chapter 403 including fees. The court must consider the financial resources of the parties, and the award of attorney fees is appropriate where one party's resources exceed those of the other. Drake v. Drake, Ky. App., 809 S.W.2d 710, 714 (1991); Hollingsworth v.

³In the July 17, 1996, decree, the family court said: "It is the opinion of this Court that [Diane] has sufficient property to meet her reasonable needs, and she is able to support herself through appropriate employment. In light of the assets which have been awarded her through these proceedings, and her present employment." (Emphasis supplied.)

Hollingsworth, Ky. App., 798 S.W.2d 145, 147 (1990). The court has great discretionary power in its determination to award or deny attorney fees. Drake, 809 S.W.2d at 714; Hollingsworth, 798 S.W.2d at 148. The court amended its award of attorney's fees after its reclassification of the aforementioned property as non-marital. We detect no abuse of discretion in the award of attorney fees.

Two appeals have been filed by Diane, the first being from the family court's final decree and the second from the denial of her CR 60.02 motion. The merits of the initial appeal have been addressed. The CR 60.02 motion filed by Diane was based upon evidence that she discovered at the time of the family court hearing and later reviewed, and which she alleges proves the marital nature of the aforementioned properties. After a review of the record, we find no abuse of discretion in the family court's denial of Diane's motion. Fortney v. Mahan, Ky. 302 S.W.2d 842 (1957).

The decree is affirmed in part and reversed in part, and this case is remanded to the family court for an award of maintenance. The appeal from the denial of Diane's CR 60.02 motion is affirmed.

McANULTY, Judge, concurs.

GUIDUGLI, Judge, Concur in Part, Dissents in Part and Furnishes Separate Opinion.

GUIDUGLI, Judge, Concurring in Part and Dissenting in Part. I respectfully dissent from the majority's opinion that the real property located 9107 and 9113 Taylorsville Road, the Forest Hills Subdivision and the leasehold interest are non-marital property. I believe that Samuel Joseph Pedro (Samuel) failed to

present any documentary evidence showing the existence of the alleged "retirement account" from which he alleges he purchased these properties. The majority believed that "Samuel's failure to produce documents to support the existence of a retirement fund goes only to the weight of the evidence." I do not agree.

In Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990), the court relaxed the strict tracing requirements espoused in cases such as Turley v. Turley, Ky. App., 562 S.W.2d 664 (1978) and Brunson v. Brunson, Ky. App., 569 S.W.2d 173 (1978). However, the Court stated, "we believe the concept of tracing is too firmly established in the law to be abandoned at this time." Chenault, 799 S.W.2d at 579. The Court specifically held, "we shall adhere to the general requirement that nonmarital assets be traced into assets owned at the time of dissolution, but relax some of the draconian requirements heretofore laid down." Id.

In the instant case, the only evidence of Samuel's alleged retirement account is his self-serving testimony. Samuel never produced any records or evidence which would have constituted sufficient tracing under Chenault. As such, I believe the trial court failed to require adequate documentary proof of the retirement account or for that matter, where the assets used to purchase the property came from. In the alternative, if I was to accept the majority's finding that Samuel's testimony as to the existence of the retirement funds goes to the weight of the evidence, then I believe the trial court's findings were clearly erroneous. In either case, I believe the burden was on Samuel to produce valid documentary evidence to overcome the presumption that

property acquired during marriage is marital property. KRS 403.190
(3).

I concur with all other aspects of the majority opinion.

BRIEF FOR APPELLANTS:

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BRIEF FOR APPELLEE:

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