

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001276-MR

MARY ELIZABETH MOORE and
LAW OFFICE OF GORDON DILL, P.S.C.

APPELLANTS

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-01105

HOWARD F. MOORE

APPELLEE

and

NO. 1998-CA-001311-MR

HOWARD F. MOORE

CROSS-APPELLANT

v. CROSS-APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 96-CI-01105

MARY ELIZABETH MOORE

CROSS-APPELLEE

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING

*** ** **

BEFORE: COMBS, EMBERTON, and McANULTY, Judges.

COMBS, JUDGE: The appellant, Mary Elizabeth Moore (Beth),
appeals from the judgment of the Boyd Circuit Court in a marital
dissolution proceeding. She contends that the court erred in its

division of the property and in failing to award her maintenance and attorney's fees. The appellee, Howard F. Moore (Howard), cross-appeals, challenging the court's division of the property as well. Having reviewed the record, we affirm in part, vacate in part the judgment of the circuit court, and remand.

Howard and Beth were married on August 2, 1975. Two children were born of their marriage – one of whom is over the age of eighteen. Howard is employed as an engineer by Ashland, Inc., with an annual income of \$100,355.32. Beth has a hearing impairment and for most of the parties' marriage, she did not work outside the home. However, she worked as teacher for a short period early in the parties' marriage. Beth receives a small income from her investments of non-marital funds.

On November 12, 1996, Beth filed a petition to dissolve the parties' marriage. The court referred the action to a domestic relations commissioner (DRC). The DRC conducted a hearing and filed his report and recommendations with the court on March 4, 1998, dividing the parties' non-marital and marital property and addressing the issues of maintenance and custody of the parties' minor child. The DRC found that Beth had successfully traced her contribution of non-marital funds to the parties' farm (the marital residence). Using the formula set forth in Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981), the DRC calculated Beth's non-marital interest in the farm as 42.27% and the parties' marital interest as 57.73%. He recommended that the farm be sold, that Beth receive 42.27% of the proceeds as her non-marital contribution, and that the

remaining portion – the marital interest – be divided equally between the parties. The parties also owned several horses and operated a horse boarding facility on their farm. The DRC awarded Beth and Howard two horses each; he also allocated two horses to their minor daughter, stating that they should be maintained for her. The DRC directed that the remaining livestock should be sold unless the parties could reach an agreement as to its division.

The DRC found that Beth should be restored her non-marital investments totaling approximately \$277,800.00. As to the retirement fund accumulated during the marriage by Howard through his employment and the parties' other financial investments, the DRC recommended that they be equally divided between the parties. The DRC directed that pending the sale of the farm, Howard should pay Beth \$500.00 per month in maintenance and that he continue to be responsible for the mortgage payments and the taxes on the farm. The DRC recommended that the parties have joint custody of their minor child but that the child's primary residence should be with Beth.

On April. 14, 1998, the court entered an order adopting the DRC's report except for the recommendation as to the issue of custody. The court awarded Howard custody of the parties' minor child and granted Beth visitation rights. As the action proceeded forward, the farm was sold for \$425,000.00. After the mortgage was paid, \$317,000.00 remained from the sale of the farm from which \$60,000.00 was immediately distributed to Beth to purchase a house. Pursuant to the DRC's findings adopted by the

court, Beth received a total of \$225,497.95 and Howard received \$91,502.05. Subsequently, the court entered an order on May 1, 1998, correcting a clerical error regarding the distribution of certain life insurance policies. On May 18, 1998, the court entered a decree dissolving the parties' marriage, awarding Howard custody of the parties' minor child, and adopting and incorporating the DRC's report except as modified by the court's orders of April 14, 1998, and May 1, 1998. Additionally, Beth was ordered to pay Howard \$142.00 per month in child support. This appeal and cross-appeal followed.

Beth first argues on appeal that the court erred in failing to award her maintenance beyond the sale of the parties' farm. She contends that she lacks sufficient property to provide for her reasonable needs and that she is unable to support herself through appropriate employment. Beth asserts that her hearing impairment and other physical problems limit her ability to find appropriate employment. Therefore, she maintains that she is entitled to maintenance under KRS 403.200.

The scope of appellate review of a trial court's decision on the issue of maintenance is limited. It is a matter that is within the sound discretion of the circuit court. Moss v. Moss, Ky. App., 639 S.W.2d 370, 373 (1982). Absent a showing of abuse by the trial court, an appellate court may not disturb the trial court's findings. Clark v. Clark, Ky. App., 782 S.W.2d 56 (1990). In determining whether maintenance is appropriate, the court is required by KRS 403.200(1) to consider: (1) whether the spouse seeking maintenance lacks sufficient property,

including the marital property apportioned to her, to support herself; and (2) whether she is unable to support herself through appropriate employment.

The record shows that Beth was awarded a substantial amount of non-marital and marital property. She received approximately \$225,000.00 from the sale of the farm, and the amount of \$277,800.00 in non-marital financial investments was restored to her. Additionally, Beth's share of the division of the parties' other financial assets was approximately \$250,000.00. Although Beth has a hearing impairment and has been treated periodically for asthma and depression, the evidence shows that she managed the parties' horse boarding operation – an enterprise which required her to deal with customers, supervise employees, purchase materials, and attend to care of the horses. She is highly educated, having obtained a B.A., M.A., and Rank I status on her teaching certificate. Presumably, she could re-activate that certificate with a few additional hours of course work. We cannot say that the court abused its discretion in failing to award Beth maintenance beyond the sale of the farm. The criteria set forth in KRS 403.200 have not been met; Beth received a large amount of property, and she is capable of working. We find no error.

Beth next argues that the court erred in failing to find that the farm was wholly Beth's non-marital property. During the parties' marriage, Howard executed a deed conveying sole title of the farm to Beth. She maintains that Howard conveyed to her his interest in the farm in exchange for her

agreeing to use \$25,000.00 of her non-marital funds to reduce the mortgage on the farm. Beth thus contends that Howard gave her his interest in the farm as a gift and that, therefore, it constituted non-marital property.

All property acquired after the marriage and before a decree of legal separation is presumed to be marital property regardless of whether title is held individually by one spouse or by both parties. KRS 403.190(3). However, "[p]roperty acquired by gift, bequest, devise, or descent during the marriage" is not considered marital property. KRS 403.190(2)(a). The court's determination regarding an item's status as a gift will not be disturbed absent clear error. Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980). In O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980), this court held that the following four factors must be considered in determining whether an item is a gift (and thus excluded from consideration in the division of the marital property): (1) the source of the money with which the item was purchased; (2) the intent of the donor at the time as to the intended use of the property; (3) the status of the marriage relationship at the time of the transfer; and (4) the existence of any valid agreement that the transferred property was to be excluded from the marital property. In evaluating these four elements, the case law in this jurisdiction indicates that donative intent constitutes the primary factor.

The DRC did not address this important issue in his report and wholly omitted mentioning that title to the farm was held by Beth. Nonetheless, the DRC specifically found that the

farm was purchased with both non-marital and marital funds. Howard testified that the farm was placed in Beth's name simply to make her "feel better." He indicated that there was no donative intent on his part to make a gift to Beth and that he had not intended to exclude the farm from the marital property. Moreover, he argues that the farm was purchased during the parties' marriage, that it was used as the marital residence, and that the mortgage payments were paid with marital funds.

The critical issue of donative intent needed to be examined carefully and addressed specifically by the DRC or the court in order to resolve the status of the farm as marital property subject to division or as Beth's non-marital property as a result of Howard's "gift" and therefore exempt from division. The DRC did not discuss this issue in his findings. When the exceptions filed by Beth properly raised the issue before the trial court, no mention was made and no findings were entered with respect to whether a valid gift of the farm in toto redounded to Beth by virtue of Howard's deed. We therefore vacate that portion of the judgment with respect to the marital/non-marital status of the farm and remand for entry of specific findings on this issue.

Beth also alleges on appeal that the horse Bambi (formally known as "Knight Deer") was her non-marital property and that the court erred in failing to assign her this horse. We agree. Bambi was not one of the horses assigned to Beth, to Howard, or to their daughter. Instead, she was included among

the livestock deemed to be marital property which the DRC directed to be sold unless the parties could reach an agreement.

Beth argues that she established that Bambi was purchased with her non-marital property funds. As substantiation, she notes that the horse Thumper was correctly assigned to her as her non-marital property, that Bambi is the mother of Thumper, and that Bambi and Thumper had been acquired together as mother and foal by her with non-marital funds.

The report and recommendation of the DRC omitted any mention of Bambi but assigned Thumper as non-marital property to Beth. Beth filed an exception with respect to Bambi, and at that time Howard did not dispute her contention. The court did not address the exception, allowing Bambi to be included among the livestock to be sold. On appeal, Howard contests Beth's non-marital interest in Bambi and contends that Bambi belongs to the minor child.

It appears that Bambi's omission from the DRC's report was an oversight – one that is surely understandable in light of the tremendous amount of property to be catalogued. However, we find that clear error occurred with respect to Bambi and direct the court on remand to award her to Beth as non-marital property.¹

The last issue raised by Beth on appeal is whether the court abused its discretion in ordering each party to pay his own

¹We are mindful of the equitable maxim cited by appellee on this point ("*De minimus non curat lex*"). However, what is a trifle to one party may be a treasure to another, and the law should concern itself with that distinction whenever possible.

attorney's fees. She argues that in light of the disparity between her income and Howard's, the court abused its discretion in failing to award her attorney's fees.

It is well settled that an allocation of attorney's fees in a divorce action is within the discretion of the trial court. Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977). The only guideline is that there be a disparity in the financial resources of the parties. KRS 4032.220; Gentry v. Gentry, Ky., 798 S.W.2d 928 (1990). Furthermore, KRS 403.220 provides only that the trial court may consider the financial resources of the parties; it does not require the court to make findings on the parties' financial resources nor does it provide a specific standard to evaluate the discrepancy in their respective financial resources. See generally Hollingsworth v. Hollingsworth, Ky. App., 798 S.W.2d 145 (1990). We find no evidence that the court failed to consider the parties' respective financial resources; thus, we cannot say that the court abused its discretion.

On cross-appeal, Howard argues that court erred in failing to recognize his non-marital interest in the farm and in calculating the parties' non-marital and marital interests in it. We disagree. The DRC made detailed findings tracing non-marital and marital funds used from the time of the purchase of the parties' first house until the farm. He then properly calculated the parties' non-marital and marital interests according to the Brandenburg formula. As the DRC's findings are supported by substantial evidence, we cannot say that court's judgment was

clearly erroneous or that it abused its discretion with respect to the calculations. However, this issue may be moot in light of our remand for specific findings as to whether a valid gift of the farm was conveyed to Beth by Howard's deed.

Based upon the foregoing reasons, we affirm in part and vacate in part the judgment of the Boyd Circuit Court, and remand this matter for additional proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Gordon J. Dill
Ashland, KY

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

John David Preston
Paintsville, KY