

Commonwealth Of Kentucky
Court Of Appeals

NO. 1997-CA-003260-MR AND
NO. 1997-CA-003294-MR (CROSS)

LORNA A. BUNDY

APPELLANT/CROSS-APPELLEE

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JOHN R. ADAMS, JUDGE
ACTION NO. 95-CI-03237

DON R. BUNDY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART;
VACATING IN PART; AND REMANDING
** ** * * * * *

BEFORE: COMBS, EMBERTON, AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. This is an appeal by Lorna A. Bundy (Lorna) from dissolution of marriage proceedings in the Fayette Circuit Court. Lorna appeals the division of marital property and debt, as well as the court's classification of certain property as the appellee's non-marital property. There is also a cross-appeal by Don R. Bundy (Don) challenging the trial court's valuation of Blue Grass Manufacturing, Inc. (Blue Grass Manufacturing), the parties' most valuable marital asset; the valuation of his nonmarital interest in a townhouse; and the trial court's assigning of "final decision-making power" regarding the parties'

child to Lorna, even though Don was awarded joint-custody of the child.

The parties were married on December 2, 1979 and separated in October 1995. Divorce was granted on November 20, 1997. The parties have one child, Laura, born April 10, 1981.

A contested trial was held on June 3 and 4, 1997. On September 10, 1997, the trial court entered its order granting decision making authority of Laura to Lorna; establishing visitation guidelines; awarding Lorna child support pursuant to the guidelines based upon Don's actual income of \$84,000.00 per year and Lorna's imputed income of \$22,000.00 per year; awarding Lorna maintenance of \$750.00 per month for twenty-four months; assigning debts; and distributing marital and non-marital property. A supplemental order entered on September 11, 1997, required Don to pay \$4,000.00 of Lorna's attorney fees.

Lorna filed a "motion to reconsider" and Don filed a motion to alter, vacate, or amend. On November 20, 1997, the trial court entered an order altering and amending its September 10, 1997 order. The amendments primarily concerned the assignment of debts and the distribution of property. Following this, both sides filed appeals to this court.

Lorna argues that the trial court abused its discretion by awarding Don a two-thirds interest in Blue Grass Manufacturing. The parties' most valuable marital asset is Blue Grass Manufacturing. Don's expert valued Blue Grass Manufacturing at -\$433,555.00, while Lorna's expert valued the business at \$393,750.00. The trial court accepted Lorna's

evaluation. In its property distribution, the trial court awarded Blue Grass Manufacturing two-thirds to Don and one-third to Lorna "because Mr. Bundy has been the primary moving force behind this business[.]" Lorna contends that Blue Grass Manufacturing should have been divided equally between the parties.

KRS 403.190(1) requires the trial court to

divide the marital property . . . in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

With certain exceptions, "'marital property' means all property acquired by either spouse subsequent to the marriage[.]" KRS 403.190(2).

There is no statutory basis requiring that property be divided equally. Wood v. Wood, Ky. App., 720 S.W.2d 934, 935 (1986) (award of \$1,024,525 to husband and \$512,000, including \$300,000 cash, to wife upheld). "This court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous." Cochran v. Cochran, Ky. App., 746 S.W.2d 568, 569-570 (1988); Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978). The division and

valuation of property is within the sound discretion of the trial court. Cochran at 570.

Lorna's argument regarding the distribution of Blue Grass Manufacturing is unpersuasive because it fails to take into consideration the over-all property distribution. The trial court's task is to distribute the marital property in just proportions. This does not preclude the trial court, within its sound discretion, from awarding one particular item of marital property in a greater proportion to one spouse as long as the over-all distribution is in just proportions. Hence, we may not overturn the trial court's distribution on the sole basis that it did not award Lorna a fifty percent share of Blue Grass Manufacturing.

Lorna does not provide us with a complete property distribution analysis; however, it is clear that the trial court did not award Don two-thirds of the business and split all other property fifty-fifty. For instance, Lorna received, exclusively, the 533 Laketower 131 townhouse which had an equity value of approximately \$58,000.00.¹ Don also points out that Lorna received \$31,875.00 in personalty to his \$1,000.00. Lorna also received, net of the non-marital portion, the exclusive award of the parties' jewelry business valued at \$14,777.00. Lorna has focused on one asset, albeit the largest marital asset, and has failed to fully take into consideration the trial court's distributions which operated in her favor. In summary, Lorna

¹ See, however, pg. 10, *infra*, regarding Don's nonmarital interest in this property.

has failed to show that the trial court abused its discretion in its overall distribution of the parties' marital property.

Lorna's second argument is that the trial court abused its discretion by awarding her only one-third of Blue Grass Manufacturing but awarding her one-half the marital debt. A trial court should divide the couple's marital debts in light of its distribution of the marital assets, and its assignment of debt is within its discretion. Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994). As with her first argument, Lorna again has mistakenly focused on the trial court's treatment of Blue Grass Manufacturing as opposed to the overall distribution of marital property. It was not, per se, an abuse of discretion for the trial court to award her only one-third of Blue Grass Manufacturing and at the same time award her one-half of the marital debt.

Lorna's third argument is that Don did not properly trace the \$20,000.00 non-marital investment in Blue Grass Manufacturing assigned to him by the trial court. All property acquired by either spouse in the course of the marriage is presumed to be marital property. KRS 403.190(3). However, this presumption may be overcome by showing that the property was acquired by gift, bequest, devise, or descent. Alternatively, a party may overcome the presumption by showing through "tracing" that the property was acquired in exchange for property acquired by gift, bequest, devise, or descent. KRS 403.190(2); Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990); Turley v. Turley, Ky. App., 562 S.W.2d 665 (1978); Brunson v. Brunson, Ky. App., 569

S.W.2d 173 (1978); Allen v. Allen, Ky. App., 584 S.W.2d 599 (1979); Daniels v. Daniels, Ky. App., 726 S.W.2d 705 (1986); Sharp v. Sharp, Ky., 516 S.W.2d 875 (1974). While the earlier cases prescribed somewhat rigid tracing requirements, including a documentation requirement, Chenault "relax[ed] some of the draconian requirements heretofore laid down in part, in reliance upon the trial courts of Kentucky to detect deception and exaggeration or to require additional proof when such is suspected." Chenault at 579.

The \$20,000.00 non-marital interest found in Blue Grass Manufacturing relates to a \$20,000 loan received from Don's mother. Upon the mother's death, the estate forgave the loan. The mother died in July 1981 and Blue Grass Manufacturing was purchased in December 1981. There was testimony that Don received an additional \$43,000.00 in distributions from his mother's estate prior to closing on Blue Grass Manufacturing. Don, in fact, testified that these amounts went toward the purchase of Blue Grass Manufacturing and that his actual nonmarital contribution toward acquiring the business was \$63,000.00.

There is conflicting testimony regarding this issue. We agree with Lorna that Don has not thoroughly documented the flow of monies received from his mother into the purchase of Blue Grass Manufacturing, and under pre-Chenault tracing requirements Don has probably failed to meet his tracing burden. However, Chenault relaxed those requirements and left it to the trial courts to detect deception and exaggeration and require

additional proof when necessary. Don largely bases his tracing upon the testimony of himself and his brother. Lorna disputes that testimony and claims that the \$20,000.00 went into the purchase of a house. We must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01. We cannot say that the trial court's finding that Don possessed a \$20,000.00 interest in Blue Grass Manufacturing was clearly erroneous. Having traced this nonmarital property into the purchase of Blue Grass Manufacturing, Don was entitled to a set-off for it. KRS 403.190.

Lorna's final argument is that the trial court erred in determining that Don had a \$12,500.00 non-marital interest in the parties' business Jewelry & Etc. The origin of the \$12,500.00 non-marital interest was Don's share of the proceeds from the sale of the mother's home.

As we understand her argument, Lorna concedes that Don had at least a \$12,500.00 non-marital interest in the jewelry business. Inasmuch as Lorna concedes the point, the trial court did not err in finding that Don had a \$12,500.00 nonmarital interest in the jewelry business and awarding him a set-off for that interest.

In his cross-appeal, Don argues that the trial court abused its discretion when it failed to deduct the shareholder debt to Blue Grass Manufacturing, Inc. in determining its valuation. Don contends that the debt as of the operative date of valuation of Bluegrass Manufacturing, December 31, 1996, was \$129,000.00. Similarly, Don argues that the trial court abused

its discretion when it valued Blue Grass Manufacturing at \$393,750.00.

A trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence, Heller v. Heller, Ky. App., 672 S.W.2d 945, 947 (1984); Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992). "[T]he trial court's judgment and valuations in an action for divorce will not be disturbed on appeal unless it was clearly contrary to the weight of evidence." Clark v. Clark, Ky. App., 782 S.W.2d 56, 58 (1990). In this case we cannot conclude that the trial court was clearly erroneous in its conclusion to assign no deduction for shareholder debt or in setting the value of Blue Grass Manufacturing at \$393,750.00. Roberts v. Roberts, Ky. App., 587 S.W.2d 281, 283 (1979).

The trial court heard conflicting evidence and determined that the valuation testimony presented by Lorna's expert was the more credible and accordingly valued Blue Grass Manufacturing at \$393,750.00, a valuation which took into consideration the assets and debts of the company, including shareholder debt. The parties each presented expert testimony regarding the value of Blue Grass Manufacturing, and, in this battle of the experts, the trial court chose to accept the valuation proposed by Lorna's expert. "Under CR 52.01, the Appellate Court's review of the trial court's decision is limited to reversing only clearly erroneous findings, keeping in mind that the trial court had opportunity to hear evidence and observe witnesses so as to judge credibility." Chalupa v. Chalupa, Ky.

App., 830 S.W.2d 391, 393 (1992); Bealert v. Mitchell, Ky. App., 585 S.W.2d 412 (1979). Disagreeing with a finding is not sufficient to rule the finding as clearly erroneous. Hence we must affirm the trial court's valuation of Bluegrass manufacturing.

Don's third argument is that the trial court erred by failing to determine that he had a \$16,240.00 non-marital interest in a townhouse located at 543 Laketower #131. Don contends that he purchased the townhouse in June 1979, six months prior to the parties' marriage, and made a down payment of \$7,200.00. The value of the condominium was stipulated by the parties as \$105,000.00, and the outstanding mortgage was \$47,000.00, for an equity balance of \$58,000.00. Don contends that after application of the formula set forth in Brandenburg v. Brandenburg, Ky. App. 617 S.W.2d 871 (1981), that his non-marital interest in the townhouse is \$16,240.00.

Don's trial exhibit 7 is a closing statement dated June, 22, 1979, for property located at 542 Laketower Drive, Lexington. From all appearances the statement refers to 543 Laketower #131, the property awarded exclusively to Lorna. The settlement statement shows that Don paid cash at closing of \$9,987.44, and that his closing costs were \$2,707.44, for a net equity down payment on the townhouse of \$7,280.00. Don claims nonmarital improvements of \$1,706.00, and, after application of the Brandenburg formula to the stipulated value of \$105,000.00, Don claims a nonmarital interest in the home of \$16,240.00.

In its November 20, 1997, order, in addressing this issue following Don's motion to modify or amend, the trial court stated, "[t]his Court hereby finds that there is not sufficient evidence of record to establish any other nonmarital interest of [Don] other than the \$20,000.00 nonmarital interest in Blue Grass Manufacturing and the \$12,500.00 nonmarital interest in Jewelry & Etc.[.]"

The closing statement dated six month's prior to the parties' marriage is sufficient to establish Don's claim to a non-marital interest in the townhouse. We believe the trial court was clearly erroneous in its determination that Don did not have a nonmarital interest in the townhouse. We therefore vacate that portion of the trial court's order and remand for a determination of Don's nonmarital interest in the townhouse under Brandenburg. We note, however, that in its September 10, 1997, order the trial court stated, "Lorna Bundy is awarded [533 Laketower 131]. . . . [t]his Court has reviewed the Brandenburg calculations submitted by [Don], but finds that in order to equalize the final distribution of property that the appropriate way to resolve this particular issue is as set forth above." This would indicate that the trial court based its original property distribution upon the premise that Lorna would receive the full equity value in the townhouse. If, upon remand, after Don is awarded his nonmarital interest in the townhouse, the trial court determines that the distribution is not then in just proportions, the trial court should make any additional

adjustments to the overall property distribution to ensure that the property is distributed in just proportions.

Don's final argument is that the trial court erred when it awarded Lorna final decision making-authority regarding Laura despite the fact that Don has joint custody of Laura.

Laura was born on April 10, 1981. Laura turned 18 on April 10, 1999, and is now emancipated. This issue is moot, and we will therefore not address it.

For the foregoing reasons, the orders of the Fayette Circuit Court are affirmed in part and vacated and remanded in part.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

Sandra Mendez-Dawahare
Kathleen Campbell Deskins
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BRIEF FOR APPELLEE/CROSS-
APPELLANT:

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