

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002150-MR

RICHARD L. HOWE

APPELLANT

v. APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
ACTION NO. 98-CI-00199

NOVELLA K. HOWE

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: Richard L. Howe appeals an order in an action for dissolution of his marriage to Novella K. Howe,¹ dividing property and awarding Kaye maintenance.

Richard and Kaye were married on March 30, 1974. Both worked for Texas Instruments Company, initially in Houston, Texas. In 1991, Texas Instruments transferred Kaye to its plant in Versailles, Kentucky. Within several weeks, Richard was employed

¹ Novella is referred to as "Kaye" in the briefs of the appellant and the appellee. We will do the same.

at the Texas Instruments facility in Versailles as well. Eventually, Richard and Kaye purchased a home in Lawrenceburg.

In January 1998, Kaye resigned from Texas Instruments because she had decided to operate a restaurant in Lawrenceburg. Kaye withdrew all of the funds she had accumulated in retirement accounts while working at Texas Instruments and Richard borrowed \$20,000.00 from a retirement account to purchase the restaurant. Although the restaurant was not profitable, Kaye operated the business until April 1999. The restaurant was closed and on April 23, 1999, the remaining assets of the restaurant were sold at auction and the net proceeds were deposited with the court.

Richard and Kaye separated on July 28, 1998. On August 24, 1998, Richard filed a petition for dissolution of marriage. The court referred the case to its Domestic Relations Commissioner (DRC). David P. Nutgrass represented Richard in this action until August 19, 1999, when Michael L. Judy entered his appearance as Richard's counsel. On January 18, 2000, the DRC recommended to the court that the marriage be dissolved and submitted a plan for division of property and debts. The court adopted the DRC's recommendations with the exception that the court remanded the issue of maintenance to the DRC for a new hearing and findings of fact as required by Kentucky Revised Statute (KRS) 403.200. A successor DRC held a hearing on the maintenance issue on July 10, 2000. After the court adopted the successor DRC's recommended order concerning maintenance, this appeal followed.

On appeal, Richard asserts that the court erred: (1) in adopting the findings of fact, conclusions of law and decree of

dissolution prepared by Kaye's counsel; (2) by basing the division of property on an alleged agreement between Richard and Kaye; (3) in determining that a 1984 Chevrolet Corvette was marital property and awarding it to Kaye; (4) in assigning Richard one-half of Kaye's debts incurred during separation; (5) in dividing equally Richard's 401-K retirement account and employee stock plan; and (6) in concluding that Kaye was entitled to maintenance.

Adopting Findings and Conclusions Prepared by Counsel

On January 4, 2000, Richard tendered proposed findings of fact, conclusions of law and a decree of dissolution to the court. Kaye submitted proposed findings of fact, conclusions of law and decree of dissolution directly to the DRC. Kaye's tendered findings of fact, conclusions of law and decree of dissolution were adopted by the DRC and submitted to the court. Richard argues that because this case involved detailed, lengthy and contradictory issues, it was not a "routine matter" and that it was error, under these circumstances, for the court to adopt the DRC's proposed findings. Therefore, the question presented is whether, under the facts of this case, it was error for the DRC submit to the court, and for the court to adopt, the findings, conclusions and decree drafted by Kaye's counsel after the DRC had requested both parties to submit proposed findings of fact and conclusions of law.

Kentucky Rules of Civil Procedure (CR) 52.01 provides, in relevant part, that:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts

specifically and state separately its conclusions of law thereon[.]

In Bingham v. Bingham,² the Supreme Court said that the main concern in reviewing whether it was error for a court to adopt proposed findings of fact and conclusions of law submitted by the parties is "that the trial court does not abdicate its fact-finding and decision-making responsibility under CR 52.01. However, the delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's responsibility."³ On review we are to scrutinize the record carefully to see if it "reveals that the court was thoroughly familiar with the proceedings and facts of this case."⁴

Here, the circuit court reviewed the DRC's proposed findings, conclusions and decree and remanded the case to the DRC for a hearing on the issue of maintenance. The circuit judge signed not less than a dozen orders from March 16, 1999, to September 11, 2000. The parties filed exceptions and responses to exceptions on all contested issues. Richard makes "no showing that the decision-making process was not under the control of the trial judge, nor that these findings and conclusions were not the product of the deliberations of the trial judge's mind."⁵ When the court

² Ky., 628 S.W.2d 628 (1982).

³ Id. at 629.

⁴ Id.

⁵ Id.

requests both parties to submit proposed findings of fact, "[i]t is not error for the trial court to adopt findings of fact which were merely drafted by someone else."⁶ We find no error.

Division of Property According to an Alleged Agreement

Richard argues that the court erred in adopting the DRC's recommendation concerning the division of marital property. With some exceptions provided by statute, marital property "means all property acquired by either spouse subsequent to the marriage[.]"⁷ "KRS 403.190 vests in the trial court wide discretion in the division of marital property."⁸

Richard contends that the DRC did not act properly in distributing the marital property because Kaye had refused to choose one of two lists of property tendered by Richard. After Kaye refused to make a selection, Richard tendered a selection of his own. In the end Richard did not get some of the property he had requested. Richard insists that the court should not reward Kaye by giving her the property on the list that he selected because Kaye had not complied with the court's order to submit a list. While we find no evidence in the record that Kaye submitted a list, we likewise find no evidence that she failed to comply with the court's order. All that was required of Kaye was to decide which property she wanted. Upon careful review of the record, we do

⁶ Prater v. Cabinet for Human Resources, Comm. of Ky., Ky., 954 S.W.2d 954, 956 (1997), citing Bingham, supra, n. 2.

⁷ Ky. Rev. Stat. (KRS) 403.190(2).

⁸ Johnson v. Johnson, Ky. App., 564 S.W.2d 221, 222 (1978).

not find the distribution of marital property to have been inequitable. No abuse of discretion has been shown.

Was the 1984 Corvette Marital Property?

The DRC awarded a 1984 Chevrolet Corvette to Kaye. Richard asserts that this award was erroneously made since Kaye had given the Corvette to him in 1987.

"All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property."⁹ "This presumption may be rebutted by clear and convincing proof that the property was acquired by, amongst other means, 'gift, bequest, devise, or descent.'"¹⁰ If the court determines that an automobile was a gift from one spouse to the other made during marriage the automobile is not considered marital property.¹¹ "[T]he donor's intent is the primary factor in determining whether a transfer of property is a gift."¹² Therefore, the question is whether Richard introduced evidence that "injected enough doubt that it would not have been reasonable for [the trial judge] to remain unconvinced [that the Corvette was nonmarital

⁹ KRS 403.190(3).

¹⁰ Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 441 (1992) (citations omitted).

¹¹ See Clark v. Clark, Ky. App., 782 S.W.2d 56, 62 (1990).

¹² Underwood, supra, n. 10, at 442. (citations omitted).

property]."¹³ The "court's determination concerning the gift or nongift status of an item, must be upheld unless there is clear error."¹⁴

Richard, while represented by his first attorney, indicated on a financial disclosure statement filed on November 12, 1998, that the Corvette was marital property. On November 2, 1999, while Richard was represented by his second attorney, another financial disclosure statement was filed listing the Corvette was nonmarital property. Testimony was heard on November 3, 1999, from two witnesses to the effect that Kaye had told them that the Corvette was a gift to Richard.

On a financial disclosure statement filed on November 6, 1998, Kaye indicated that the Corvette was marital property.

Richard testified that Kaye had purchased the Corvette without his knowledge; that Kaye arranged the financing; that Kaye delivered the Corvette as a surprise gift; that Kaye made the payments on the Corvette; and that Richard was the only person who drove the Corvette.

[T]his Court described four factors that must be considered to see if something is a gift. These are 1) the source of the money with which the item was purchased, 2) the intent of the donor at that time as to the intended use of the property, 3) the status of the marriage relationship at the time of the transfer, and 4) whether there was any valid agreement that the

¹³ Id., n.1. (citations omitted) (emphasis in original).

¹⁴ Clark, supra, n. 11, at 62 (citation omitted).

transferred property was to be excluded from the marital property.¹⁵

We have no way of knowing whether these factors were considered by the court. However, because Kaye's intent is the primary factor in determining whether a transfer of property is a gift, and Kaye's intent is in dispute, donative intent has not been conclusively proven. Further, no evidence was presented to support an assertion that the Corvette was purchased with nonmarital property. The status of the marriage at the time the gift was made supports a finding that the Corvette was a gift; however, that factor standing alone cannot support a finding of gift status. Additionally, no evidence was presented that Kaye and Richard agreed that the Corvette was to be excluded from marital property.

We find no error in the finding that the Corvette was marital property subject to division. Richard's own reversal concerning whether the Corvette was marital or nonmarital property supports the DRC's conclusion. "The trial court has wide discretion in dividing marital property[.]"¹⁶ There was no abuse of discretion in the award of the Corvette to Kaye.

Debts Incurred After Separation

Several debts were incurred because of the ongoing operation of the restaurant, both before and after the Howes' separation. The court ordered that a total of \$115,952.65 in debts, much of which was due to the operation of the restaurant,

¹⁵ Clark, supra, n. 11, at 62, citing O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980).

¹⁶ Davis v. Davis, Ky., 777 S.W.2d 230, 233 (1989).

were to be paid equally by Richard and Kaye. Richard argues that it was error for the court to assign to him one-half of the debts incurred by Kaye during the parties' separation.

In O'Neill v. O'Neill,¹⁷ the Court noted "that while there is a presumption in KRS 403.190 that all property acquired during marriage is marital, there is no similar presumption as to debts."¹⁸ Under the facts of that case, "the trial court [had] properly determined that the joint activities of the parties ceased in January 1978."¹⁹ In 1985, this Court in Gipson v. Gipson,²⁰ held, based on O'Neill, that debts incurred to the benefit of only one spouse "are nonmarital."²¹

Richard argues that the debts complained of were unsubstantiated²² and that Kaye's incurring of the debts constituted reckless disregard for the financial well being of the parties. However, this argument misses the point. Richard also insists that the debts were substantial, unnecessary indebtedness and that Kaye was the only one who could have benefitted personally by continuing to operate a failing business. The circuit court did not agree,

¹⁷ Supra, n. 15.

¹⁸ Id. at 496.

¹⁹ Id. (The O'Neills separated in January, 1978, and the debts arising after the separation were held to be not marital debts.)

²⁰ Ky. App., 702 S.W.2d 54 (1985).

²¹ Id. at 55; see also Van Bussum v. Van Bussum, Ky. App., 728 S.W.2d 538, 539 (1987).

²² Kaye submitted an affidavit in support of the restaurant's expenses on November 18, 1999. Therefore, while we find no copies of receipts in the record, any claim that the expenses were "unsubstantiated" is specious.

nor do we. Even accepting as fact that the restaurant showed ongoing losses during the period of separation, this does not serve as conclusive evidence that the debts were incurred unnecessarily or that these debts could only benefit Kaye. Businesses necessarily assume risk.²³ The fact that Kaye incurred debt in an effort, although unsuccessful, to reverse the prospects of a losing business does not render the debt incurred an unnecessary debt. Further, there is no evidence that the debts incurred were for the personal benefit of Kaye. Had Kaye been successful in reversing the fortunes of the business, we doubt that Richard would have complained had he been awarded additional assets due to an increase in the value of the business.

Here, the court found that the proceeds from the sale of the restaurant's fixtures and equipment were marital property and Richard was assigned a half interest in the proceeds. Since the debts incurred were to the benefit of marital property, the restaurant, it was only just that the debts were assigned marital status. While there is no presumption that debts incurred during the marriage are marital,²⁴ we find no abuse of discretion in the court's assigning to Richard one-half of the debt incurred due to continued operation of the restaurant during separation.

Equal Division of Retirement Accounts

As previously mentioned, Kaye withdrew all of the funds she had accumulated in a retirement account while working at Texas

²³ Louisville & Jefferson Cty. Air Bd. v. Porter, Ky., 397 S.W.2d 146, 152 (1965) ("It is fundamental that a buyer of property assumes the risk of changing community conditions.).

²⁴ **Bodie v. Bodie**, Ky. App., 720 S.W. 2d 936, 938 (1986).

Instruments to purchase the restaurant. Richard borrowed \$20,000.00 from his Texas Instruments retirement account to assist in the acquisition of the restaurant and necessary equipment. At the time of separation, Richard had a 401-K retirement account and employee stock plan. The court awarded Kaye one-half of the value of Richard's 401-K account and the stock plan.

Again, the circuit court is vested with "wide discretion in the division of marital property."²⁵ KRS 403.190 mandates that the division is to be made in "just proportions."

Richard argues that awarding Kaye one-half of the value of his retirement accounts was unjust since Kaye dissipated her retirement savings by investing in and pursuing past its demise her restaurant. "The court may find dissipation when marital property is expended (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of [his or] her proportionate share of the marital property."²⁶ Here, the court, correctly, made no finding of dissipation. Such a characterization of Kaye's actions is not substantiated by the record.

We find no abuse of discretion in the court's award of one-half of the value of Richard's retirement accounts to Kaye.

Richard also argues that a just division of his retirement account requires consideration of the fact that he borrowed and is currently paying back the \$20,000.00 that he

²⁵ Johnson, supra, n. 8 at 222.

²⁶ Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 500 (1998), quoting Robinette v. Robinette, Ky. App., 736 S.W.2d 351, 354 (1987).

borrowed when the restaurant began operating. The court considered the debt Richard incurred and ordered both Richard and Kaye to pay that debt. The division was just; therefore, we find no error.

Ability to Pay Maintenance

Richard argues that the circuit court erred in failing to determine whether Kaye can support herself from her own income or assets received from the dissolution action.

[I]n order for an award of maintenance to be proper, the elements of both KRS 403.200(2)(a) and (b) must be established. In other words, there must first be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs. Secondly, that spouse must be unable to support himself [or herself] through appropriate employment according to the standard of living established during the marriage.²⁷

If this threshold inquiry is made, and the court determines that an award of maintenance is proper, then:

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

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently,

²⁷ Drake v. Drake, Ky. App., 721 S.W.2d 728, 730 (1986), citing Lovett v. Lovett, Ky., 688 S.W.2d 329, 332 (1985); KRS 403.200(1).

including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(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.²⁸

Here, the DRC specifically found, and the court subsequently adopted that finding, that Kaye was unable to support herself through appropriate employment. Additionally, it found that Kaye lacked sufficient property, including marital property apportioned to her, to provide for her reasonable needs. Substantial evidence supports these findings.

Richard argues that the circuit court erred in failing to address and properly conclude that he does not have the financial resources to pay Kaye maintenance. Richard asserts that the cost of meeting his reasonable needs exceeds his income.

²⁸ KRS 403.200(2).

Once it is determined that an award of maintenance is proper, "the court certainly must also consider the ability of the spouse from whom maintenance is sought to meet his or her own needs while at the same time meeting the needs of the spouse seeking maintenance."²⁹ The DRC, in reviewing income earned during recent pay periods, found that Richard had gross income of \$8,127.25 in a six-week period. Even after making payments on the debts incurred against Richard's credit union account and profit-sharing loans,³⁰ Richard's take home pay for this period amounted to \$2,412.02.

We have reviewed Kaye's and Richard's list of monthly expenses. Kaye's list does not include payments to be made on long-term or short-term indebtedness. However, exclusive of the debts owed by both, the living expenses listed by the two parties are almost equal.

It is apparent from the record that the court considered the ability of Richard to meet his own needs while at the same time meeting the needs of the Kaye by paying reasonable maintenance. We find no error.

Having considered all of Richard's allegations of error and finding none, we affirm.

ALL CONCUR.

²⁹ Dotson v. Dotson, Ky., 864 S.W.2d 900, 903 (1993).

³⁰ Kaye was, per the dissolution order, responsible for one-half of these debts.

BRIEF FOR APPELLANT:

Michael L. Judy
JOHNSON, JUDY, TRUE &
GUARNIERI, LLP
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Thomas M. Jones
Lawrenceburg, Kentucky