

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002064-MR

APRIL E. WOLFORD

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE M. GARBER, JUDGE
ACTION NO. 96-FC-004965

RONALD A. WOLFORD

APPELLEE

AND NO. 2000-CA-002068-MR

RONALD A. WOLFORD

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE M. GARBER, JUDGE
ACTION NO. 96-FC-004965

APRIL E. WOLFORD;
VICTORIA ANN OGDEN;
MICHAEL T. CONNELLY; and
RICHARD A. GETTY

CROSS-APPELLEES

AND NO. 2000-CA-002140-MR

MICHAEL T. CONNELLY

CROSS-APPELLANT

v. CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ELEANORE M. GARBER, JUDGE
ACTION NO. 96-FC-004965

RONALD WOLFORD;
VICTORIA OGDEN; and
RICHARD A. GETTY

CROSS-APPELLEES

OPINION

AFFIRMING ON DIRECT APPEAL NO. 2000-CA-002064-MR

AFFIRMING ON CROSS-APPEAL NO. 2000-CA-002068-MR

AFFIRMING ON CROSS-APPEAL NO. 2000-CA-002140-MR

** ** * * * * *

BEFORE: BARBER, DYCHE, AND MILLER, JUDGES.

MILLER, JUDGE: April E. Wolford brings Direct Appeal No. 2000-CA-002064-MR. Ron A. Wolford brings Cross-Appeal No. 2000-CA-002068-MR. Michael T. Connelly brings Cross-Appeal No. 2000-CA-002140-MR. All appeals are brought from an August 4, 2000 order of the Jefferson Circuit Court. We affirm on Direct Appeal No. 2000-CA-002064-MR. We affirm on Cross-Appeal No. 2000-CA-002068-MR and Cross-Appeal No. 2000-CA-002140-MR.

April and Ron were married December 1, 1973. Ron held an undergraduate degree in sociology with a minor in business administration from Western Kentucky University. April held an undergraduate degree in Journalism and English from Western Kentucky University. April completed a masters degree in 1976 or 1977. In 1974, Ron and his father founded a home building business, Ron Wolford, Inc. (RWI). RWI is a popular builder of luxury homes in the Louisville-Jefferson County area. Ron has operated this business and worked full time as a builder since 1974. April worked for RWI in various capacities over the years. Most often she performed decorating and bookkeeping tasks. From 1973 to 1979, April worked as a high school teacher. In 1984,

she earned a law degree from University of Louisville. She practiced briefly. Several years later, she let her license "go into escrow." April reactivated her law license in 1997.

The parties enjoyed an extravagant lifestyle for most of their marriage because of the success of RWI. They lived in twelve or thirteen elegantly appointed luxury homes, typically "model homes" for RWI. The homes and the furnishings were owned by RWI. All repairs and upkeep for the homes as well as taxes and utilities were paid by RWI. The vehicles driven by the parties were also owned by RWI, and at one time included a BMW for the parties' son. Auto insurance and gasoline were provided by RWI, as was health insurance. Generally, all day to day items except for food and clothing were provided by RWI. Occasionally, however, Ron, would perform small jobs for customers and keep the cash payments for living expenses. Consequently, the parties had virtually no tangible assets. They had, however, managed to maintain a self-employed pension (SEP) account. At the time of dissolution, the account contained approximately \$379,000.00. The parties separated sometime in March 1996. April filed the current dissolution action on April 9, 1996.

After two years of extremely contentious pre-trial proceedings, a six day trial was held beginning June 2, 1998. The circuit court appointed Certified Public Accountant (CPA), John Anderson, to assess the value of RWI. Anderson opined RWI was worth \$240,000.00 when calculated using an "income-based approach." Ron offered the expert opinion of Helen Cohen, also a CPA, as to RWI's value. Cohen opined RWI was worth \$75,000.00,

using a "net income approach." The trial court also appointed CPA John Gravitt to perform limited forensic accounting to determine whether there was merit to April's numerous allegations of Ron's attempts to deprive her of marital assets.

April was awarded half of the value of RWI, half of the SEP account, half of the cash value of life insurance policies owned by Ron, and half of the marital personal property. She was also awarded \$7,500.00 in attorney fees.

The court further ordered that the value of the aforementioned awards would be paid to April from the SEP account. The court also awarded maintenance to April in the amount of \$4,525.00 per month for a period of seven years, following an initial eighteen month "reacclimation period." This order was entered July 29, 1999.

After a motion to alter or amend by April, the court issued a supplemental order December 30, 1999. In said order, the circuit court increased the duration of April's maintenance to lifetime, awarded her an additional \$5,000.00 in attorney's fees, and modified tax consequences related to withdrawals from the portion of the SEP account awarded to April to satisfy Ron's property obligation.

Ron filed a motion to alter, amend or vacate in January 2000. That same month, the Hon. Juda Maria Hellman replaced Judge Mason Trenaman as the presiding Judge. Judge Hellman recused herself from the case, which was then transferred to Hon. Eleanore Garber, the successor court. The successor court adopted the findings of fact of Judge Trenaman, the predecessor

court, and granted Ron's motion to alter, amend or vacate. The successor court modified the maintenance provisions from lifetime maintenance of \$4,525.00 per month to \$4,525.00 per month for a period of seven years, beginning in December of 1999, to be followed by an additional three years of maintenance at \$3,000.00 per month by order entered August 4, 2000. This appeal followed.

DIRECT APPEAL NO. 2000-CA-002064-MR

April contends the successor court erred in modifying the predecessor court's judgment and order.¹ A successor judge is allowed to carry on the business of the court to the same extent as their predecessor. Herring v. Moore, Ky. App., 561 S.W.2d 95 (1977). The trial court may, upon proper motion, appropriately enter new conclusions or alter the judgment. Id. It is well established that our standard of review is that of abuse of discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." (Citation omitted). Goodyear Tire and Rubber Company v. Thompson, Ky., 11 S.W.3d 575, 581 (2000).

¹Ron argues consideration of various issues is barred because the issues did not appear on the pre-hearing statement. Ky. R. Civ. P. (CR) 76.03(8). We disagree. Substantial compliance, absent prejudice, is sufficient to satisfy CR 76.03(8). A review of the record reveals the issues were addressed throughout this action. We believe there was substantial compliance with CR 76.03(8), and thus no prejudice against Ron. Cf. Capital Holding Corporation v. Bailey, Ky., 873 S.W.2d 187 (1994).

Pursuant to Kentucky Revised Statutes (KRS)

403.200(1)(a)(b), a court may grant maintenance for a spouse only if it finds 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
. . . .

Under KRS 403.200(2)(a), the amount and duration of the award will be determined after considering all relevant factors, including:

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

The successor court, adopting the predecessor court's findings of fact in her order altering the December, 1999, judgment, concluded the maintenance award was excessive. The successor court modified the award from a lifetime maintenance award of \$4,525.00 per month to \$4,525.00 per month for seven years, followed by three years at \$3,000.00 per month. April is a well educated former teacher, who is now a licensed attorney with practice experience. At the time of the hearing, April was in her late forties, with no health problems which would interfere with full-time employment. The marriage lasted some twenty-two years, during most of which the parties' enjoyed an extravagant lifestyle. The maintenance award totals some \$563,000.00 over a ten year period. Upon the whole, we cannot

say the successor court abused its discretion in modifying April's maintenance award.

April's next assignment of error is that the circuit court erred in the distribution and valuation of marital property. Specifically, April maintains the court erred in: (1) distribution of personalty at Ron's house, (2) distribution of the SEP account, (3) ignoring issues of dissipation, and (4) the valuation of the parties' business. We address these issues seriatim.

April asserts certain property in Ron's home is marital. April correctly maintains that the property in the home is presumed to be marital unless proved otherwise. KRS 403.190(3). Ron testified that these items belonged either to his live-in girlfriend, Martha Brown, or her family, and as such, the property was not "acquired" during the marriage. The circuit court found the property in question was the property of Brown; April offered no testimony or evidence to the contrary. We are, thus, of the opinion that there exists substantial evidence to support the court's finding that the property at issue was non-marital.

April contends that the \$240,000.00 value assigned to RWI by the court is error. The court heard testimony from two experts. Helen Cohen of Potter and Company was hired by Ron to perform a valuation on RWI. Randy Anderson of Crowe & Chizek was appointed by the court for same. April did not supply expert testimony or other evidence to the value of RWI. Cohen opined the value of RWI was \$75,000.00 using a net income approach.

Anderson determined the value of RWI was \$240,000.00 using an income-based approach. The circuit court made an extensive, well-reasoned determination that the income-based approach was the superior method to value the business. The court noted the income-based approach was preferable because it utilized RWI's actual revenues along with industry averages for expenses and pre-tax profit margins. The court further noted this approach assumed the business was being operated responsibly, and was not as susceptible to manipulation by means of various record keeping or bookkeeping methods. As such, we do not believe the court erred in the valuation of RWI.

April asserts the circuit court erred by distributing her property award through the SEP account. Specifically, April contends her property award will be greatly diminished by payment of taxes and penalties. The approximately \$379,000.00 SEP account was virtually the only liquidatable asset the parties possessed, thus the property settlement in this action is made largely from the SEP account.

From each parties' respective interest in the account, the circuit court either credited or debited amounts to equalize the property distribution. Because this is a pension account, any party liquidating will suffer significant tax and penalty consequences. While not completely clear concerning the distribution of the SEP, the court stated that its overriding objective in this case was to effect an "equal distribution of all marital assets." If April's award for her interest in the marital property were subject to substantial taxes and penalties,

the distribution could hardly be said to be equal. April's award for her interest in the marital property after adjustments was \$140,832.00. We believe, in order to keep the distribution equal, the court intended this amount be paid to April free and clear of any taxes or penalties. Thus, we are of the opinion Ron's payment to April will be a net amount of \$140,832.00, whether that means Ron pays any penalty and taxes on SEP funds, or simply makes a cash payment to April in that amount. It is upon this construction we affirm the circuit court.

April contends the circuit court erred in ignoring issues of dissipation. Dissipation occurs when one party spends marital funds for a non-marital purpose. Robinette v. Robinette, Ky. App., 736 S.W.2d 351 (1987). Dissipation is appropriately considered when the 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." (Citations omitted). Id. at 354. The spouse asserting dissipation must prove by a preponderance of the evidence that marital assets were used for a non-marital purpose. Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998). The circuit court noted that April contended "that [Ron] individually, or RWI itself had engaged in many courses of conduct . . . which sought to hide, disguise, de-value or somehow wrongly deprive her of her interest in the assets owned by these parties. . . ." April claimed one such attempt involved a lock box containing cash hidden in the marital home. The circuit court found that the box

contained approximately \$7,000.00 and that the money was expended for living expenses for the parties and their son. April also spent considerable time and energy trying to develop evidence Ron was wrongly depriving her of marital assets, without success. The court appointed a CPA to perform forensic accounting to uncover any irregularities in the parties personal or business finances, likewise without success. The court determined there was "absolutely no proof to support any of these various and numerous allegations." We are of the opinion there was no clear showing of Ron's intent to deprive April of any marital property. Thus, we believe the record supports the circuit court's rejection of April's claim of dissipation.

CROSS-APPEAL NO. 2000-CA-002068-MR

Ron contends the circuit court erred in dividing the cash surrender value of a life insurance policy owned by the parties. The parties owned a life insurance policy with a cash value of \$12,253.00 as of August 7, 1996. It is undisputed the policy was surrendered prior to the parties' separation. Ron asserts the proceeds were used to pay off a marital debt. He does not cite to any such evidence in the record. After hearing testimony concerning the funds, the circuit court found they were expended for maintenance, child support, and Ron's own support. As such, the circuit court awarded each party one-half of the proceeds. We cannot say the circuit court abused its discretion in dividing the proceeds from the life insurance policy.

Ron next maintains the circuit court erred in its valuation of RWI. Specifically, Ron urges us to adopt Cohen's valuation over that of Anderson. We have previously addressed this issue in Appeal No. 2000-CA-002064-MR and therein concluded that the circuit court's valuation of RWI was proper. We adopt the reasoning set out above and likewise conclude there was no reversible error in the circuit court's valuation of RWI.

Ron maintains the circuit court erred in the allocation of taxes and penalties for the SEP account. We have previously addressed this issue, and therein concluded the circuit court's allocation of taxes and penalties for the SEP account was improper. We adopt the reasoning set out above and likewise conclude the circuit court erred in allocating the taxes and penalties.

Ron next assigns as error the failure of the circuit court to credit him for overpayment of child support. Ron paid April \$1,200.00 a month for temporary child support from April 1996 to May 1997, at which time the parties' son became emancipated. On October 14, 1997, the Domestic Relations Commissioner ordered Ron to pay April \$687.00 a month in child support. It is undisputed Ron overpaid his child support obligation prior to that time.

Restitution of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support. Clay v. Clay, Ky. App., 707 S.W.2d 352, 354 (1986). This is a finding left to the trial court. Id. The trial court's decision will not be disturbed on appeal unless clearly

erroneous. Id. The circuit court found that April expended the excess funds on support for the parties' son. Ron does not cite to contrary evidence. Thus, we perceive no clear error on the part of the circuit court in denying Ron credit for overpayment of child support.

Ron lastly asserts the circuit court erred in setting the amount and duration of maintenance awarded to April. As hereinabove concluded in Appeal No. 2000-CA-002064-MR, we are of the opinion the circuit court appropriately considered the award of maintenance under KRS 403.200.

Ron also contends the circuit court erred in refusing to credit him for maintenance paid to April *pendente lite*. We decline to do so. Allowance or not allowance of *pendente lite* maintenance payments is a matter for consideration of the trial court. Heustis v. Heustis, Ky., 381 S.W.2d 533 (1964); Hicks v. Hicks, Ky., 290 S.W.2d 483 (1956). In the case *sub judice*, the circuit court considered, in particular depth, the numerous and complex elements of this case. After so doing, the court declined to credit the *pendente lite* maintenance payments. Upon the whole, we are of the opinion the circuit court did not abuse its discretion in setting the amount and duration of maintenance or refusing to credit Ron for *pendente lite* maintenance paid.

CROSS APPEAL NO. 2000-CA-002140-MR

Connelly maintains the circuit court erred in its determination of attorney's fees awarded to April. The court may

order one party in a dissolution action to pay attorney fees of the other party. KRS 403.220. The trial court has broad discretion in awarding attorney's fees. Russell v. Russell, Ky. App., 605 S.W.2d 33 (1980); Wilhoit v. Wilhoit, Ky. App., 521 S.W.2d 512 (1975). Our standard of review is abuse of discretion. See Moss v. Moss, Ky. App., 639 S.W.2d 370 (1982).

Connelly represented April from August 1996 through July 14, 1997. In its July 29, 1999 order, the circuit court awarded April \$7,500.00 in attorney's fees. The circuit court indicated it considered the complexity of the litigation, the parties' respective incomes, and all "facts and circumstances surrounding these parties." This amount was transferred to Connelly by an Irrevocable Assignment and Transfer of Attorney Fee Judgment Award, executed February 10, 2000. In a supplemental order entered December 30, 1999, an additional \$5,000.00 was awarded to Connelly through April. The circuit court indicated it had reconsidered statutory and case law and found the additional award appropriate. Thus, Connelly ultimately received \$12,500.00 for his representation of April. Based on the foregoing facts, we cannot say the court abused its discretion in awarding attorney fees to April.

SUMMARY

In summary, we find no error in either the Direct Appeal or the Separate Cross-Appeals.

For the foregoing reasons, the judgment of the Jefferson Circuit Court in Direct Appeal No. 2000-CA-002064-MR is affirmed. Cross-Appeal No. 2000-CA-002068-MR and Cross-Appeal No. 2000-CA-002140-MR are affirmed.

ALL CONCUR.

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