

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000485-MR

RAYMOND JOSEPH FIERRO

APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 02-CI-504538

CYNTHIA HELEN DECKER FIERRO

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND MINTON, JUDGES; EMBERTON, SENIOR JUDGE.¹

GUIDUGLI, JUDGE: In this dissolution action, Raymond Joseph Fierro has appealed from the Jefferson Family Court's Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment entered December 10, 2003, and from the portion of its February 6, 2004, order denying his motion to vacate, alter or amend.

Issues raised in this appeal include the designation of furs and jewelry as gifts, the award of maintenance to Cynthia Fierro,

¹ Senior Judge Thomas D. Emberton, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

and the amount of non-marital interest in the marital residence awarded to Raymond. We affirm.

Cynthia and Raymond were married in Cleveland, Ohio, on November 19, 1977. They separated on September 1, 2002, and Cynthia filed a Petition for Dissolution of Marriage in November. During the marriage, Cynthia took on the role of homemaker, raising the children and running the house. Their youngest child was 16 years old at the time the petition was filed. At the time of the hearing in this matter, Cynthia was working full-time and earning \$10.49 per hour at Aperture Credentialing. However, she had begun Sullivan University's 2½-year culinary arts program in January 2003. Raymond worked outside of the home during the marriage in sales for PPG Industries. He earned \$68,780 in 2002 and \$79,017 in 2001, as well as benefits.

On December 10, 2003, the family court entered its Findings of Fact, Conclusions of Law, Decree of Dissolution and Judgment, the relevant portions of which are set out below:

DIVISION OF PERSONALTY

The parties testified that the personalty of the parties has been divided between the parties. However, there are some jewelry and furs, a John Deere garden tractor, and a 1996 Cadillac automobile at issue. The Court finds the jewelry and furs to have been gifts from [Raymond] to [Cynthia], and she shall retain these items as her own property free and clear of any

claim of [Raymond]. The remaining John Deere garden tractor shall be awarded to [Raymond] and the 1996 Cadillac shall be awarded to [Cynthia]. Thus, the Court concludes that the personalty of the parties has been justly and equitably divided and each shall retain same free and clear of any claim or contribution by the other.

**RESTORATION OF NONMARITAL
PROPERTY/DIVISION OF MARITAL RESIDENCE**

[Raymond] has made a claim to a significant nonmarital interest in the parties' marital residence. He has submitted several documents which he claims to be "tracing" materials which support his claim for a substantial nonmarital award.

[Cynthia], on the other hand, disputes both [Raymond's] tracing techniques as well as his method of computing what he believes to be his nonmarital interest in the parties' marital home, located at 18702 Shelbyville Road. [Cynthia] asserts that Brandenburg v. Brandenburg, [] 617 S.W.2d 871 ([Ky.App.] 1981), upon which [Raymond] bases his claim, has been overruled by Travis v. Travis, [] 59 S.W.3d 904 ([Ky.] 2001). However, such is not the case. The court in Travis simply clarified the situation with regard to increases in value due to pure economic factors versus non-economic factors. In effect, it is the opinion of this Court that Travis simply provides yet another option by which marital and nonmarital interests in real property can be calculated.

However, despite the language of both Travis and Brandenburg, KRS 403.190(3) creates a presumption that any increase in value is marital property, and therefore, the party asserting that they should receive appreciation upon a nonmarital contribution bears the burden of proving the portion of the increase in value to be attributable to

a nonmarital contribution. Moreover, this is a court of equity and such principals must apply herein. Case law in the Commonwealth is clear that a housewife contributes to the creation of a home as much as the financial provider for the family. A spouse should not necessarily be punished simply because of the family's decision that one spouse be the source of income for the family while the other tends to the home and family.

The Court concludes that [Raymond] did succeed in tracing a portion of the amount he seeks to retain as nonmarital money, however, he by no means provided the Court enough evidence to find that he should walk away with over seventy (70) percent of the marital residence as his nonmarital contribution. There was a significant amount of commingling of assets of the parties, as well as uncontroverted testimony by both parties that they received monetary gifts from parents. The problem lies in the lack of evidence substantiating the amounts and actual intent of the gifts. The only thing certain the Court can ascertain is that [Raymond] received \$33,446.00 from the sale of his home obtained through the divorce from his first wife. It is uncontroverted that he used this sum as a down payment on the home the parties purchased at Foxwood Road. It is at this point that the picture becomes muddied with bridge loans, home equity loans, and alleged monetary gifts.

In light of the lack of sufficient evidence beyond the initial down payment on the parties' second home, the Court shall utilize the formula set forth in Brandenburg v. Brandenburg, *supra*, and determine [Raymond's] proportionate nonmarital interest in, and through, the Foxwood Property, and the resulting proportion in the Shelbyville Road residence. Utilizing such, the Court finds as follows:

Nonmarital contribution \$32,859.00
 Marital contribution \$34,287.00
 Total Contribution \$67,146.00
 NMC = 32,859/67,146 x 106,000 =
 \$51,865.80
 MC = 34,287/67,146 x 106,000 =
 \$54,126.60

The Court concludes that upon the sale of the Foxwood Road Property, [Raymond's] initial nonmarital contribution had appreciated to \$51,865.80. Next, this money was put into the current residence located on Shelbyville Road. This property was appraised by both David Waterman, the Court appointed appraiser, as well as Raymond Suell, who was retained for a separate appraisal by [Cynthia]. Mr. Waterman appraised the property at \$350,000.00 while Mr. Suell appraised the same property at \$385,000.00. While the Court respects the opinions of both gentlemen, it finds that Mr. Waterman's appraisal is most representative of the true market value of the home, particularly in light of the problems which were discovered during the inspection process. Thus, for purposes of determining each [party's] interest in the home for division purposes, the Court shall utilize Mr. Waterman's figure of \$350,000.00. Therefore, using same, the Court finds the following:

Nonmarital contribution \$ 51,865.80
 Marital contribution \$220,762.60
 Total contribution \$272,628.40
 NMC = 51,865/272628.4 x 313120.23 =
 \$59,555.46
 MC = 220762/272628.4 x 313120.23 =
 \$253[,]533.45

The Court concludes that [Raymond] has a nonmarital interest in the Shelbyville Road property in the amount of \$59,555.46. The parties have a marital interest in the home in the amount of \$253,533.45, with each

being entitled to one half, or \$126,766.72. It was established at trial that [Raymond] wishes to retain the residence and purchase [Cynthia's] interest in same. Therefore, in order for [Raymond] to buy out [Cynthia's] interest in the residence, he shall pay to her the sum of \$126,766.73 pursuant to terms agreeable to purchaser and seller. In the event such agreement cannot be reached within sixty (60) days of the date of this Judgment, the residence shall be placed on the market for public sale.

. . .

MAINTENANCE

An award of maintenance is within the discretion of the Court. Moss v. Moss, [] 639 S.W.2d 370 ([Ky.App.] 1982). Maintenance cannot be awarded until a division of marital property has been achieved, and the award is predicated on whether the party seeking maintenance lacks sufficient property to meet her reasonable needs, and whether she is unable to support herself through appropriate employment. Drake v. Drake, [] 721 S.W.2d 728 ([Ky.App.] 1986). The Court has discretion to set a maintenance award at an amount and for a period of time as it deems just based upon the following factors: (a) the financial resources of the person seeking maintenance; (b) the time necessary to acquire the education or training necessary to find appropriate employment; (c) the standard of living established during the marriage; (d) the duration of the marriage; (e) the age and physical and emotional condition of the person seeking maintenance; and (f) the ability of the spouse to meet his needs while meeting those of the spouse seeking maintenance. KRS 403.200(2). Furthermore, the Court may order maintenance even if the spouse seeking it is employed, but is living below the standard to which she had become

accustomed during the marriage. Drake v. Drake, supra.

The parties in this matter have been married for over twenty-two (22) years. It was well established that, during the marriage, [Raymond] was the primary income producer while [Cynthia] was the primary caregiver for the children as well as the one who ran the household on a daily basis. [Cynthia] did engage in some employment during the marriage, however, none for a substantial period of time and at no position did she earn more than \$11.00 per hour.

As noted above, [Cynthia] is forty-nine (49) years of age and, while she is in relatively good health, she does have some medical issues which must be maintained on a daily basis. [Cynthia] suffers from a hyperactive thyroid, asthma and has kidney issues. In addition, she has diabetes and is Type 1 Insulin dependent.

Both parties submitted expense lists which appeared to the Court to be somewhat inflated. [Cynthia] has a roommate who allegedly contributes "approximately \$400.00" per month, however, it is asserted that none of this contribution is for the purpose of contributing to rent or ordinary household bills (i.e., electricity, phone, etc.).

By the same token, [Raymond] tendered a list of expenses, however, he admitted that a number of the claimed expenses were actually for the parties' son. For example, car payment and car insurance are actually for the benefit of Anthony as [Raymond's] employer provides him with a company vehicle, insurance for that vehicle, as well as other fringe benefits associated with his employment.

Despite the issues surrounding the monthly expenses of the parties, the Court concludes that [Cynthia] is entitled to maintenance. In light of the foregoing discussion regarding both the statutory requirements as well as the factors set out in case law, it is clear that [Cynthia] is unable to meet her reasonable needs through appropriate employment. [Cynthia's] earning history, as well as her age and current health problems, convince the Court that she will not be able to obtain employment at a higher income level than that at which she is currently earning. Moreover, her current health concerns require a constant prescription intake as well as medical oversight.

Upon review of the circumstances surrounding this matter, the Court concludes that maintenance is proper. The Court directs that [Raymond] shall pay to [Cynthia] the sum of \$1,000.00 per month for a period of ten (10) years. Said payments shall commence on the first day of the month immediately following the entry of this Order and shall be payable on the first day of each month thereafter.

Raymond filed a motion for reconsideration on these three issues as well as on the child support award. The family court denied the motion, except as to the child support portion, which was altered. This appeal followed.

Raymond raises three issues in his brief: 1) that the family court abused its discretion by refusing to divide gifts of jewelry and furs as marital property; 2) that the family court's award of maintenance was an abuse of discretion; and 3) that the family court abused its discretion by failing to award

a more substantial amount of non-marital interest in the marital residence to Raymond. On the other hand, Cynthia asserts in her brief that the family court did not abuse its discretion and that its decision should not be reversed for any reason.

Our standard of review in dissolution actions is well settled, and was recently restated by this Court in Hunter v.

Hunter:²

Under CR[] 54.02, in an action tried without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court."[] A factual finding is not clearly erroneous if it is supported by substantial evidence.[] Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person.[] An appellate court, however, reviews legal issues *de novo*.[] (Footnotes omitted.)

With this standard in mind, we shall review the case before us.

Raymond first argues that the family court should have divided his gifts of furs and jewelry to Cynthia during the marriage as marital property, rather than awarding them to Cynthia as non-marital gifts. In response, Cynthia points out that in his tendered findings of fact, Raymond suggested that

² 127 S.W.3d 656, 659 (Ky.App. 2003).

each party should retain the personal property in his or her possession, and that this would create a just division of marital personal property. Cynthia argues that even if the family court had held that the jewelry and furs were marital property as requested by Raymond, they would have been assigned to her anyway pursuant to Raymond's request.

KRS 403.190(2)(a) excepts from "marital property" all "[p]roperty acquired [by either spouse subsequent to the marriage] by gift, bequest, devise, or descent during the marriage and the income derived therefrom." O'Neill v. O'Neill³ sets out a four-part test to determine whether property given from one spouse to another falls within the statutory meaning of "gift":

In each case, consideration should be given to the source of the money with which the "gift" was purchased, the intent of the donor at the time as to intended use of the property, status of the marriage relationship at the time of the transfer, and whether there was any valid agreement that the transferred property was to be excluded from the marital property.[⁴]

In O'Neill, the husband testified that the items in question, including a ring with an appraised value of \$35,000 and other jewelry with an appraised value of \$15,900, were purchased as

³ 600 S.W.2d 493 (Ky.App. 1980).

⁴ Id. at 495.

investments. However, in Ghali v. Ghali,⁵ the same court held that the evidence supported the trial court's determination that two rings given to the wife were gifts. And recently this Court again addressed this issue in Hunter,⁶ holding that "the intent of the purported donor is considered the primary factor in determining whether a transfer of property is a gift. . . . Whether property is considered a gift for purposes of a divorce proceeding is a factual issue subject to the clearly erroneous standard of review." (Citations omitted.)

In the present matter, we cannot conclude that the family court was clearly erroneous in finding that the jewelry and furs were given to Cynthia as gifts. Although the items were purchased with marital funds, as was the case in O'Neill, Raymond did not present any evidence that those items were intended to be anything other than gifts. Furthermore, the relatively low appraised values of the jewelry (\$2,590) and furs (\$435) would tend to negate any claim that the items were bought for investment purposes. The family court did not abuse its discretion in awarding the jewelry and furs to Cynthia as gifts.

We shall next address Raymond's argument that the family court abused its discretion in awarding maintenance to

⁵ 596 S.W.2d 31, 32 (Ky.App. 1980).

⁶ 127 S.W.3d at 660. See also 15 Ky. Prac. Domestic Relations L. § 15.18 (2003).

Cynthia in the amount of \$1,000 per month for ten years. He argues that Cynthia was awarded sufficient property to provide for her reasonable needs and that she could support herself through appropriate employment. Cynthia disagrees, arguing that the family court's findings were supported by the evidence.

KRS 403.200(1) provides that a court may grant maintenance only if it finds the spouse seeking it:

- (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.

The decision whether to award maintenance is reviewed for abuse of discretion.⁷ Once it has been decided that maintenance is appropriate, a court must then consider all relevant factors in determining the amount and duration of maintenance pursuant to KRS 403.200(2). These factors include the spouse's financial resources, the time needed to obtain sufficient education or training, the standard of living during the marriage, the duration of the marriage, the age and condition of the spouse seeking maintenance, as well as the ability of the paying spouse to meet his needs. Similarly, "the amount and duration of maintenance is within the sound discretion of the trial court."⁸

⁷ Powell v. Powell, 107 S.W.3d 222, 224 (Ky. 2003); Sayre v. Sayre, 675 S.W.2d 647, 647 (Ky.App. 1984).

⁸ Weldon v. Weldon, 957 S.W.2d 283, 285 (Ky.App. 1997).

We shall first address the family court's decision to award maintenance. After setting out the applicable law, the family court recognized the primary facts introduced during the hearing, including the length of the marriage, that Raymond was the primary income-producer while Cynthia ran the household and raised the children, Cynthia's age and medical conditions, as well as their "somewhat inflated" monthly expenses. The family court concluded that, "[i]n light of the foregoing discussion regarding both the statutory requirements as well as the factors set out in case law, it is clear that [Cynthia] is unable to meet her reasonable needs through appropriate employment." The family court also indicated that Cynthia would not ever be able to earn more than what she was currently earning, which, coupled with her age and health problems, led to a maintenance award of \$1,000 per month for ten years.

Regarding Cynthia's entitlement to maintenance, we agree with Raymond that the family court did not specifically address the first prong of the test, namely whether she lacked sufficient property, including marital property, to provide for her reasonable needs. However, we can infer from the family court's ruling that this factor was considered and that even with the marital property awarded to her there is sufficient evidence of record to establish her entitlement to maintenance.

The family court did not abuse its discretion in this determination.

Next, we must address the amount and duration of the maintenance award. The family court awarded Cynthia \$1,000 per month for ten years, reasoning that because of her earning history, age and health problems, she would not be able to earn any more than she was currently earning. The record contains substantial evidence to support both the amount and duration of the award, based upon the length of the marriage, Cynthia's efforts to obtain training, as well as Cynthia's age and health conditions. Furthermore, the maintenance award was limited to ten years, rather than being unlimited. While we note that Cynthia's future completion of the culinary arts program might have some impact on her earning potential, that would be a matter to raise in a motion to modify maintenance. The family court did not abuse its discretion in the amount or duration of maintenance awarded.

We shall next address Raymond's argument that he should have received a larger non-marital interest in the marital residence. He asserts that precise tracing of non-marital property is not required and that he satisfied his burden of tracing his claimed non-marital assets, entitling him to a 73% non-marital interest in the marital residence. Cynthia disputes this claim, arguing that Raymond did not present

sufficient evidence to meet his burden by clear and convincing evidence and that his reliance on Allen v. Allen⁹ and Chenault v. Chenault¹⁰ is misplaced.

While we agree with Cynthia that Allen and Chenault have different factual patterns, we are still able to utilize those opinions for the proposition that tracing is required. In Chenault, our Supreme Court addressed this requirement:

In KRS 403.190(2)(b), marital property is defined, in part, as "all property acquired by either spouse subsequent to the marriage except: . . . (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, or devise or descent." Subsection (3) of KRS 403.190 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. Numerous decision of this Court and the Court of Appeals have construed this statutory provision and from these decision has emerged the concept of "tracing" although this term is nowhere found in the statute.[¹¹]

The Chenault court then held that "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

⁹ 584 S.W.2d 599 (Ky.App. 1979).

¹⁰ 799 S.W.2d 575 (Ky. 1990).

¹¹ Id. at 578.

draconian requirements heretofore laid down."¹² (Emphasis added.)

In the present case, the family court did in fact give Raymond credit for his non-marital interest in the marital residence, which was comprised of funds he received from the sale of a house he owned during his first marriage. After that, the family court described the situation as "muddied with bridge loans, home equity loans, and alleged monetary gifts." Furthermore, and despite the notebook of documentary evidence he introduced, Raymond was unable, and admitted he was unable, to provide any documentary verification to create a record of what money he claimed was non-marital. He admitted that the closest documentary proof was his and his mother's tax records. We agree with the family court that Raymond did not provide enough tracing evidence to establish his entitlement to be awarded any more of a non-marital interest, especially in light of the significant commingling of assets that took place in this case. The family court did not abuse its discretion in limiting Raymond's non-marital interest in the marital residence.

For the foregoing reasons, the family court's judgment is affirmed.

ALL CONCUR.

¹² Id. at 579.

BRIEF FOR APPELLANT:

John K. Carter
LaGrange, KY

BRIEF FOR APPELLEE:

Katie Marie Brophy
Louisville, KY