

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001900-MR

DALE MORGAN

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 07-CI-00479

VICKY LYNN MORGAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: NICKELL AND WINE, JUDGES; HARRIS, SENIOR JUDGE.

WINE, JUDGE: Dale Morgan appeals from an order of the Carter Circuit Court distributing property in an action for the dissolution of marriage. On appeal, he contends that the trial court erred by distributing the property on a “50/50” basis. He further contends that certain assets were improperly classified as marital. Upon a review of the record, we affirm.

History

Dale Morgan and Vicky Lynn Morgan were married on May 22, 2004. The petition for dissolution was filed on November 14, 2007, and the decree of dissolution was entered on September 11, 2008. No children were born of the marriage. Dale had one minor child from a previous marriage for whom Vicky acted as the primary caretaker. Both parties were employed during the marriage. Dale was employed at Marathon Oil and earned \$94,000.00 in 2004; \$83,000.00 in 2005; and \$100,000.00 in 2006. Vicky was a school teacher and earned approximately \$44,000.00 per year for each of the above years.

Marathon Thrift Savings Plan

Both parties had money in retirement plans prior to the marriage and contributed to their own retirement plans during the marriage. At the time of the marriage, Dale had a Thrift Savings plan through his employer, Marathon Oil, with a balance of \$65,582.15. He continued to make regular contributions to the plan during the marriage at the rate of 7% of his income. At the time of the final hearing, the Thrift Savings plan had a balance of \$157,399.06. The trial court found that \$74,497.27 was marital (such amount being determined by offsetting the marital funds in his account against Vicky's account, which exempts her teacher retirement account from consideration as marital property).¹

Dale does not dispute the classification of this amount as marital; however he appeals the distribution of this asset on a "50/50" basis.

Marital Residence

¹ Kentucky Revised Statutes 161.700 and 403.190(4).

Dale purchased the marital residence with non-marital funds three days before the parties were married. He also paid off the balance on the mortgage with non-marital funds before the petition for dissolution was filed. The trial court found that \$6,231.19 represented the amount of marital equity that had accumulated in the residence and awarded Dale the marital residence. Dale does not appeal the amount of this asset deemed marital, however he appeals the distribution of same, which the trial court divided equally between the parties.

Commercial Checking Account

Dale also had a commercial checking account (hereinafter “the checking account”) which he maintained at the Commercial Bank of Grayson during the marriage. At the time of the marriage, the checking account had a balance of \$53,836.68. At the time of the final hearing, the balance was \$43,147.00. The account held funds which were significantly comingled, both marital and non-marital, and was used to pay both marital and non-marital debts. The trial court, reviewing the transaction history, determined that \$5,475.00 represented the amount of non-marital funds remaining in the checking account and that \$37,672.00 represented the amount of marital funds subject to distribution. Dale contends on appeal that substantial non-marital deposits were made into the checking account, including his children’s inheritance checks (from Dale’s deceased wife’s estate). Additionally, he notes that Social Security benefits for his minor daughter were deposited into the account monthly. Dale claims that the trial

court should have concluded that only \$12,672.07 of this account was marital.

Thus, he appeals both the classification and distribution of this asset.

Savings Account

Dale also held a savings account with the Ashland Federal Credit Union (hereinafter, “the savings account”) at the time of the marriage. When the parties married, the savings account had a balance of \$3,491.91. At the time of the final hearing, the savings account had a balance of \$20,301.05. The account history showed that regular deposits were made from Dale’s paychecks into the account. In addition, a deposit was made into the account from the proceeds of the sale of Dale’s non-marital home. However, the proceeds from the non-marital home were soon withdrawn and used for improvements on the marital residence. After a review of the various transactions, and in consideration of the fact that the balance never fell below \$3,491.91 (the amount present at the time of the marriage), that amount was deemed to be non-marital. The remaining amount, \$16,809.14 was deemed marital and distributed equally between the parties. Dale does not dispute this finding; however, he again appeals the equal distribution of this asset.

Certificates of Deposit

Also at the time of the parties’ marriage, Dale had a certificate of deposit numbered “1913” (CD #1913) with the Ashland Federal Credit Union with a balance of \$41,262.61. Regular interest and dividend amounts were earned on CD #1913 and deposited back into the CD during the marriage.

On June 20, 2006, Dale transferred \$20,000.00 from the checking account into the savings account and purchased another certificate of deposit, numbered "4599" (CD # 4599). The trial court found that this money was deposited from wages earned during the marriage and allocated the asset as marital.

Also on June 20, 2006, Dale transferred another \$20,000.00 from the savings account and opened a money market share account. The trial court again found that this money was deposited from wages earned during the marriage and allocated the asset as marital.

On December 27, 2007, CD #1913 and CD #4599 were transferred into the money market share account, creating a total balance in the money market account of \$85,530.68. Following this transaction, the entire balance of the money market account was placed into a new certificate of deposit numbered 5636 (CD # 5636). Monthly interest payments accruing after this time were re-deposited into the account. At the time of the final hearing, CD #5636 had a balance of \$91,615.64. The trial court traced \$41,262.61 of this amount back to non-marital funds contributed by Dale and allocated said sum as non-marital. The remaining sum of \$43,098.94 was allocated as marital and distributed equally between the parties.

Dale contends that a greater percentage of CD #5636 should have been considered non-marital property. Specifically, he contends that the two \$20,000.00 transfers on June 20, 2006 were comprised of non-marital assets, and

thus, that the trial court's findings were clearly erroneous. Dale appeals both the classification and division of this asset.

Analysis

We first address Dale's contention that the trial court erred by dividing the property equally between the parties. Second, we address the trial court's classification of a substantial portion of the Commercial Checking Account and CD #5636 as "marital."

Standard of Review

The division of marital property pursuant to the dissolution of marriage is within the sound discretion of the trial court. *Neidlinger v. Neidlinger*, 52 S.W.3d 519 (Ky. 2001). We will not disturb a trial court's division of property absent an abuse of that discretion. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006). Further, a trial court's classification of property as marital or non-marital is a factual finding that is subject to the clearly erroneous standard. *Cochran v. Cochran*, 746 S.W.2d 568, 569 (Ky. App. 1988). Classification of property as marital or non-marital will not be found clearly erroneous unless unsupported by substantial evidence. Great deference is given to the trial court, as the trial court is in the best position to adjudge the credibility of witnesses and the weight of the evidence presented. *Smith, supra*, 235 S.W.3d at 6.

Division of Property

When dividing marital property pursuant to a divorce, there is no presumption that it be divided equally. *Russell v. Russell*, 878 S.W.2d 24, 25 (Ky. 1994). Indeed,

[T]he trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in “just proportions.” This does not mean, however, that property must be divided equally. It means only that division should be accomplished without regard to marital misconduct and in “just proportions” considering all relevant factors.

Lawson v. Lawson, 228 S.W.3d 18, 21 (Ky. App. 2007) (*internal citations omitted*). Relevant factors in determining the division of property include:

- (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 . . . to the spouse having custody of any children.

KRS 403.190. Dale points out that the marriage was of a short duration, lasting only three-and-one-half years. He further points out that he earned approximately 69% of the parties’ income as well as provided the most of the funds invested into the CDs and Marathon Thrift Plan. Finally, he maintains that his financial situation prior to the marriage far exceeded Vicky’s. Dale avers that the trial court

failed to consider the above factors when dividing the property by merely defaulting to a “50/50” distribution.

A review of the trial court’s “Findings of Fact, Conclusions of Law and Decree of Dissolution of Marriage” reveals that the trial court did not merely default to a “50/50” distribution, but instead considered all of the applicable factors under KRS 403.190. Indeed, each of the statutory factors listed in KRS 403.190 is recited in paragraph 57 of the trial court’s findings and dissolution decree. The trial court discussed the factors in detail, stating that “both parties contributed to the acquisition of marital property,” and that while “Dale earned significantly more than Vicky throughout the marriage . . . Vicky did contribute in excess of \$40,000.00 annually.” The trial court also noted that Dale had significant non-marital property restored to him, including the marital residence, and that Vicky had nothing other than miscellaneous items of household furnishings. Even though the marriage was of a relatively short duration, it was clear to the trial court that Dale would be in a much better economic position than Vicky at the time the division of property was to become effective. Further, the trial court noted that the only significant debt to be assigned from the marriage was the debt associated with a Toyota Solara, which was assigned to Vicky. Upon considering each of the relevant statutory factors, the trial court found that an equal division of the marital property was appropriate. As the trial court properly considered each factor laid out in the statute when determining how to distribute the property, there was no error.

Classification of Property

We next address Dale's contention that the trial court erred by classifying a substantial portion of the checking account and CD #5636 as marital property. As previously noted, a trial court's classification of property as marital or non-marital is a factual finding that is subject to the clearly erroneous standard. *See, e.g., Smith, supra.*

There is a presumption in Kentucky that all property acquired after the marriage is marital. *Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). A party seeking to have any such property assigned as non-marital bears the burden of proof. *Id.* Further, judicial construction of KRS 403.190 has led our courts to create the concept of "tracing," which requires the party to trace any previously owned non-marital property to assets currently owned by the party. *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990). Thus, whenever the original property alleged to be non-marital is no longer owned by the party, he or she must "trace the previously owned property into a presently owned specific asset." *Sexton*, 125 S.W.3d at 266.

Dale contends that the checking account contained significant non-marital funds which were not considered by the trial court in its analysis, namely, inheritance checks which were deposited into the account as well as his daughter's social security benefits. Dale further contends that it was "clearly erroneous for the trial court to determine that the only money spent from said account comprised that of non-marital funds, being replaced by those that were marital."

However, the trial court found that the marital and non-marital funds in the account were comingled. It noted that the account balance was \$53,836.68 at the time of marriage and that the parties agreed that \$43,147.00 was the amount in the account at the time of distribution. Further, the trial court acknowledged that monthly deposits were made into the account which represented Social Security benefits Dale received on behalf of his daughter subsequent to his first wife's death. The court found that a total of \$27,706.00 in Social Security benefits was deposited into the account during the life of the marriage. Such benefits were classified as non-marital. The court also noted that Dale's paychecks were regularly deposited into the account and classified such amounts as marital. Additionally, the court found that a \$21,000.00 deposit made in 2005 from the sale of a house Dale purchased before the marriage was non-marital.

The trial court observed that there were two separate deposits Dale represented as a distribution of inheritance funds to his children; a \$30,790.00 deposit which allegedly represented a distribution of inheritance funds to his son and a \$25,000.00 deposit which allegedly represented a distribution of inheritance funds to his daughter. The trial court found that the \$25,000.00 deposit for Dale's daughter was made to reimburse Dale for a \$22,805.84 check he wrote to purchase a car for her. However, the trial court stated that there was no such documentary evidence to show that the \$30,790.00 was his son's inheritance money or that Dale paid any amount of that sum out to his son.

The trial court also considered a withdrawal made on June 20, 2006, in the amount of \$20,000.00. Dale testified that this amount represented inheritance monies for his son, however, no corresponding check to Scott or other documentary evidence supported that this amount was deposited into his account on this date. We note that the trial court was in a better position than this court to weigh the documentary evidence presented and the credibility of Dale's testimony.

The trial court concluded that, as the balance at the time of marriage was \$53,836.68 and the balance at the time of distribution was \$43,147.00, and as \$27,706.00 in Social Security benefits and \$37,672.00 in marital property was deposited into the account during the marriage, and as expenditures from the account included payment for both marital and non-marital expenses, that the funds were so commingled as to preclude a finding by the Court that any non-marital interest remained in the account. The trial court found, with respect to the remaining balance, that \$5,475.00 represented Dale's non-marital interest and that \$37,672.00 represented marital property to be distributed.²

We do not find that the trial court's classification was unsupported by substantial evidence as marital and non-marital funds were significantly commingled in the account and the trial court was supplied with insufficient documentary evidence to support some of Dale's claims attempting to trace such funds. The trial court was in the best position to weigh the evidence. Because

² \$5,475.00 was calculated as Dale's non-marital interest as this was the amount remaining in the account over and above the amount of marital property deposited into the account during the marriage.

only \$5,475.00 remained in the account after accounting for the \$37,672.00 calculated as marital property, it was not clearly erroneous for the trial court to classify the remaining amount of \$5,475.00 as non-marital.

We now address Dale's claim that the trial court improperly classified a large percentage of CD # 5636 as marital.

The trial court found that, at the time of marriage, Dale's CD #1913 had a balance of \$41,262.61 and that regular interest and dividend payments were added to it each month. The court also acknowledged that Dale purchased a second certificate of deposit on June 20, 2006 for \$20,000.00 (CD #4599). Also on June 20, 2006, Dale opened a money market account, using another \$20,000.00 transferred from his savings account. As the monies were transferred from a commingled source, containing marital and non-marital funds which were not adequately traced, such funds were considered marital.

On December 27, 2006, Dale transferred both CD's (#'s 1913 and 4599) into the money market account, giving the money market account a balance of \$85,530.68. Thereafter, this entire amount was transferred into a new CD, CD # 5636. At the time of the trial court's decree and order, CD #5636 had a balance of \$91,615.64. The trial court concluded that \$41,262.61 of that balance was non-marital, as it represented the amount he had in CD #1913 at the time of marriage. The remaining balance, \$43,098.64 was deemed marital.

The trial court did not clearly err in its assignment with respect to CD #5636, as only \$41,262.62 could be clearly traced to Dale's non-marital property

owned prior to the marriage. Although Dale contends that the two \$20,000.00 transfers were non-marital, the trial court found that such documentary evidence as would support this assertion was not presented. The trial court was in the best position to weigh this evidence. As there is a presumption that all property acquired during the marriage is marital, and as the party seeking to have property designated as non-marital bears the burden of proof, the trial court did not err in its assignment. *See, e.g., Brosick, supra.* The sources from whence these monies came were significantly commingled, and thus, only \$41,262.62 (the amount traceable to the CD Dale owned before the marriage) was deemed non-marital.

The trial court's decree of dissolution and order distributing property are hereby affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Brandon K. Mullis
Grayson, Kentucky

BRIEF FOR APPELLEE:

Sharon Easthom Rowsey
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