

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000555-MR

DONNA N. MCCOY

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 06-CI-504556

BRYAN SCOTT MCCOY

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,¹ SENIOR JUDGE.

STUMBO, JUDGE: Donna N. McCoy appeals from Findings of Fact,

Conclusions of Law and Judgment of the Jefferson Circuit Court in a dissolution of

marriage proceeding filed by Bryan Scott McCoy (“Scott”). Donna contends that

the trial court did not apply the correct burden of proof when it characterized as

¹ Senior Judge Ann O’Malley Shake, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

non-marital property the appreciation in value of Scott's non-marital stock, and also erred in its finding of no active participation by either party in a family-owned business. We affirm the Judgment on appeal.

The parties were married on October 14, 1978, and were divorced by a Decree of Dissolution rendered on July 31, 2009. Three children were born of the marriage, each of whom has reached the age of majority.

In 1951, Scott's father and grandfather formed Bryan Scott McCoy, Inc. ("BSMI") which owns and operates Twinbrook Nursing Home and an assisted living facility called Twinbrook Hotel Apartments in Jefferson County, Kentucky. Scott began to work for BSMI in 1985 as manager of the assisted living facility, and he began receiving gifted shares of BSMI beginning in 1987. Since its inception, members of the McCoy family have operated BSMI, with Scott's father being active in the business until his death in 1997. Scott's brothers have taken active roles in BSMI over the years, and at the time of dissolution, Scott was the director of the assisted living facility where he received a salary of approximately \$150,000 per year in addition to shareholder distributions.

Donna has also been employed by BSMI, working for the corporation from the early to mid-1980s and again from 1997 to 2005. The trial court found that she was employed by BSMI as Director of Nursing of Twinbrook Nursing Home, in which capacity she earned \$70,000 per year.

By agreement of the parties, the trial court appointed expert witness James Gravitt to determine Scott's interest in BSMI at the time of dissolution.

According to the record, Gravitt employed three evaluation methods – income approach, market approach and asset based approach – to determine the fair market value of Scott’s interest in BSMI. Gravitt performed a weighted average of the three methods, placing the most weight on the income approach, and concluded that the value of Scott’s interest in BSMI as of June 30, 2007, was \$810,000.

Donna produced an additional expert witness, who opined that Gravitt’s estimation could be adjusted higher or lower depending on a number of variables. Donna’s expert did not provide an opinion as to the value of Scott’s interest in BSMI.

After taking proof, the trial court accepted Gravitt’s determination that Scott’s interest in BSMI as of June 30, 2007, was \$810,000. The court found this interest to represent a 22.6% share of BSMI. It went on to find that the value of the gifted shares when made was \$488,600, which it characterized as Scott’s non-marital property. The question then arose as to whether the increase in the value of those shares (from the gifted value of \$488,600 to the dissolution value of \$810,000) should be characterized as Scott’s non-marital property or the parties’ marital property. Scott argued below that the increase in value was properly characterized as his non-marital property because it resulted from the efforts of his father and the increase in value of BSMI’s land holdings, which existed prior to Scott’s receipt of the shares. Conversely, Donna maintained that the increase in value was marital property. She argued that the stock appreciated primarily, or to large degree, from the involvement of both herself and Scott in BSMI.

To resolve this issue, the court undertook to determine why the value of Scott's interest in BSMI increased from \$488,600 to \$810,000. It reasoned that if the increase resulted from the efforts of one or both parties, that increase should be characterized as marital property upon dissolution. Conversely, if the increase did not result from the efforts of either party, it would be characterized as non-marital. It additionally concluded that the burden rested with Scott to demonstrate that the increase was non-marital. The court then found that the increase in value resulted from factors other than the participation of Scott or Donna in BSMI, and accordingly characterized the increase as Scott's non-marital property. This appeal followed.

Donna now argues that the trial court erred in characterizing as non-marital property the appreciation of Scott's interest in BSMI. As a basis for this argument, Donna contends that the court did not apply the correct burden of proof, that the court's finding of no active participation by either party is not supported by substantial evidence, and that the court improperly failed to consider Donna's contribution as homemaker. Donna maintains that in characterizing the increase in value as non-marital, the trial court improperly failed to consider Scott's role as Vice President of BSMI and member of the Board of Directors, his role as manager of the assisted living facility, the redemption of brother David McCoy's stock in 2002 with business revenue, the decision to pay down long term debt, and the decision to apply for Medicaid/Medicare provider status. In addition, Donna claims to have provided substantial evidence of her own contributions, which

caused the increase in value, including her roles as homemaker and Director of Nursing at BSMI. In sum, Donna argues that the finding of no active participation by either party is not supported by substantial evidence, and that the trial court erred in failing to so conclude.

The division of property in a dissolution proceeding is a three-step statutory process. The trial court first characterizes each item of property as marital or non-marital; it then assigns each party's non-marital property to that party; and finally, the trial court equitably divides the marital property between the parties. KRS 403.190(2). As for the characterization of appreciating assets, the general rule is that an increase in the value of non-marital assets resulting from the efforts of one or both parties will be characterized as marital property upon dissolution. *Fehr v. Fehr*, 284 S.W.3d 149 (Ky. App. 2008). Conversely, the increase must be characterized as non-marital if it occurred for reasons other than the parties' efforts, such as general market conditions. *Id.* The burden of proof rests with the party who claims that the appreciation is non-marital. *Id.*

In the matter at bar, the Jefferson Circuit Court determined that the increase in value of Scott's non-marital shares of BSMI resulted from factors other than the efforts of Donna or Scott. The court first determined the evidence clearly showed that BSMI was the vision of Scott's father, Bryan S. McCoy ("Bryan") who oversaw the original building and subsequent expansion of the nursing home and assisted living facilities. It found that Bryan had the foresight to acquire the real estate holdings, which, due to general economic conditions, have contributed

to the increase in value of Scott's stock in BSMI. The court determined that it was Bryan who created any goodwill which may be associated with BSMI, and that the only significant change in the operating philosophy at BSMI since Bryan's death in 1997 was the decision to accept Medicare and Medicaid. Scott's brother Brad McCoy, in his position of licensed director of the nursing home, was found to be responsible for that decision.

The court went on to find that Scott did not foresee the need to initiate the Medicare and Medicaid certification process, nor did he play a role in such process. Additionally, while not discounting Donna's execution of her duties as Director of Nursing at Twinbrook, the court did not find that her employment increased the value of Scott's stock. Finally, the court noted that the parties were "nicely compensated" for their employment, with Donna earning \$70,000 and Scott receiving \$150,000 plus additional compensation.

We find no error in the court's determination that Scott's interest in BSMI appreciated for reasons other than the participation of either Scott or Donna in the operation of BSMI. Credible evidence was adduced that the value of BSMI appreciated since 1987 as a result of general economic conditions, the appreciation of BSMI's real estate holdings, and the corporate decision spearheaded by Brad McCoy to begin accepting Medicare and Medicaid reimbursements. While Donna offered evidence that her efforts and those of Scott contributed to the ongoing operations of BSMI, it cannot reasonably be argued that the BSMI's stock value would not have appreciated but for the employment of Donna and Scott at BSMI.

The question before us is whether the trial court's findings of fact were clearly erroneous and therefore subject to being disturbed on appeal. *Fehr, supra*. We must answer this question in the negative. The trial court has broad discretion to judge the weight and credibility of the testimony presented, *Bailey v. Bailey*, 231 S.W.3d 793 (Ky. App. 2007), and we find no basis for concluding that the Jefferson Circuit Court abused that discretion. The court made findings of fact, which are supported by the record, and applied the correct standard of law in reaching the conclusion that the appreciation of Scott's non-marital shares of BSMI appreciated for reasons other than the efforts of Donna and/or Scott. We are not persuaded by Donna's claim that Scott failed to meet the burden of tracing the assets, nor that the trial court improperly failed to consider her efforts as homemaker as they related to the appreciation of BSMI's stock value.

We find no error in the Jefferson Circuit Court's determination that the increase in value of Scott's shares of BSMI is properly characterized as Scott's non-marital property, and accordingly affirm the Judgment on appeal.

ALL CONCUR.

BRIEF FOR APPELLANT:

William L. Hoge, III
Louisville, Kentucky

BRIEF FOR APPELLEE:

Melanie Straw-Boone
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