

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000641-MR

RICHELLE HARDY (now MIZELL)

APPELLANT

v.

APPEAL FROM BOYD CIRCUIT COURT  
HONORABLE C. DAVID HAGERMAN, JUDGE  
ACTION NO. 97-CI-00208

RICHARD HARDY

APPELLEE

OPINION  
AFFIRMING IN PART,  
REVERSING IN PART, AND REMANDING  
\*\* \*\*

BEFORE: GUDGEL, CHIEF JUDGE, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal from those portions of a decree of dissolution which distributed the parties' marital and non-marital property. Appellant argues that the court erred in valuing the parties' real estate, in awarding appellee \$10,000 for his non-marital contribution to the purchase of said real estate, and in the division of the parties' personal property. Upon review of the record herein and the applicable law, we affirm in part as to the valuation of the real property and the division of personal property. As to the court's award for appellee's alleged non-marital contribution to the purchase of

the real property, we reverse and remand for redistribution of this property.

Appellant, Richelle Hardy (now Mizell), and appellee, Richard Hardy, were married in 1988. In March of 1997, Richelle filed the petition for dissolution of marriage. A hearing was held regarding the distribution of the parties' property on January 26, 1998. On January 27, 1998, the court entered its judgment valuing the parties' residence at \$100,000. The court also found that Richard had contributed \$10,000 of non-marital funds to the down payment on the property. As to the parties' personal property, the court awarded each party the property they had in their possession, as well as certain pieces of furniture and each party's respective collectible items. The court went on to make the following finding in deciding to award Richard the motorcycle and sidecar valued at approximately \$11,000:

Based upon the testimony, the Court finds that the Petitioner [Richelle] purposely filed an inaccurate tax return and received all of a \$4,100 refund which was marital property and further that she caused the Respondent to incur several thousands of dollars in unnecessary tax liability. The Court further finds that the Petitioner took most of the marital property from the marital residence before leaving and has understated the extent of the collectibles removed by her. Accordingly, the Respondent is awarded the motorcycle and sidecar.

From this judgment, Richelle now appeals.

Richelle first argues that the trial court erred in finding that Richard had contributed \$10,000 in non-marital funds to the down payment on the parties' residence. Richelle maintains that Richard did not meet his burden of proving this

contribution because he produced no written documentation thereof. At the hearing, Richard testified that the \$10,000 in question had come from a bonus he had received and put into a savings account before using it for the down payment. Richard claimed that he had located a statement from this savings account dated prior to the marriage, which indicated that he had \$14,000 in savings at that time. He also claimed to have that statement at the courthouse on the day of trial. On redirect, Richard stated that the statement showed a \$8,000 withdrawal from this account in May of 1988. According to Richard, he moved the other \$2,000 from this savings account at a later date. However, that statement was never produced by Richard at trial. In fact, no written documentation to support this claim was ever produced by Richard at trial or prior to trial during discovery. At some point in his testimony, Richard insinuates that he lacked the documentation in question because Richelle took all of his files when she moved out of the house.

KRS 403.190(2)(b) provides that property acquired in exchange for property acquired before the marriage is non-marital property. KRS 403.190(3) states in part, "[t]he presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section." Thus, the burden to show that the down payment monies were from a non-marital source was on Richard. In Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990), the Court relaxed the strict tracing requirements espoused in cases such as Turley v. Turley, Ky. App., 562 S.W.2d 665 (1978) and Brunson v. Brunson, Ky. App., 569

S.W.2d 173 (1978). However, the Court stated, "we believe the concept of tracing is too firmly established in the law to be abandoned at this time." Chenault, 799 S.W.2d at 579. The Court specifically held, "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 draconian requirements heretofore laid down." Id.

In the instant case, the only evidence of Richard's \$10,000 contribution to the house down payment was Richard's self-serving testimony. Although he claimed that he could produce a bank statement showing he had these funds in a savings account prior to the marriage (which, in our view, would have constituted sufficient tracing under Chenault), no such record was ever produced. True, Richelle does not offer any explanation as to where all of the down payment funds came from (it is undisputed that some of the funds came from a loan from Richelle's parents). However, Richard has the burden of proving these funds were non-marital. Neither are we swayed by Richard's insinuations that he had no documentary proof regarding the funds because Richelle took these records when she moved out of the house. Richard could easily have obtained a copy of his prior bank statements from the archives of his bank. We cannot allow the trial court to base a finding regarding a significant non-marital contribution to marital property solely on the testimony of the party seeking to prove the contribution was non-marital, without any other corroborative evidence. We believe that Chenault at least requires some other proof regarding the non-

marital property. In Chenault, although the wife could not document every interest payment and reinvestment of her non-marital property, she did present evidence that she owned a home prior to the marriage, that it sold during the marriage for \$14,000, and that she bought a \$10,000 Treasury Note prior to the marriage. Here, Richard has presented no corroborative evidence of the existence of these non-marital funds. Accordingly, we believe there was not substantial evidence of Richard's \$10,000 non-marital contribution to the purchase of the parties' home. See Black Motor Co. V. Greene, Ky., 385 S.W.2d 954 (1964). Thus, we reverse the court's judgment crediting Richard for the \$10,000 contribution to the purchase of the marital residence and remand for a redistribution of this asset.

Richelle's next argument is that the trial court erred in valuing the parties' marital residence at \$100,000. The only documentary evidence regarding the value of this property was the appraisal of Micheal R. Helton, a certified real estate appraiser, which was submitted by Richelle. Helton appraised the property at \$112,000. On cross-examination, Richard expressed disagreement with the appraisal, stating that it was not an accurate valuation of the house. However, Richard did not obtain his own appraisal of the property. On direct, Richard testified that the house was purchased in 1998 for \$79,000 and that it was presently in need of about \$15,000 in repairs. Although the court did not state how it arrived at the \$100,000 figure in the original order of January 1988, in its order on Richelle's

subsequent motion to alter or amend, the court clarified its reasoning, stating:

The court further finds that the appraisal submitted by Petitioner's expert was slightly high, and did not take into consideration all necessary repairs.

It is Richelle's position that because there was only one appraisal of the property offered into evidence, the court was required to accept the value set by the appraiser. A trial court's valuation of property in a domestic action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992). In the case at bar, the court clearly did not believe that the appraisal was completely accurate and chose to accept the testimony of Richard that the house was in need of some repairs. A finder of fact has the right to believe part of the evidence and disbelieve other parts, even if the evidence came from the same witness. Sroka-Calvert v. Watkins, Ky. App., 971 S.W.2d 823 (1998). (In Sroka-Calvert, that witness was also an expert witness.) Accordingly, we cannot say that the court's valuation of the property at \$100,000 was clearly contrary to the weight of the evidence.

Richelle's final argument is that the trial court erred in its division of the parties' personal property. In particular, Richelle complains about Richard being awarded the motorcycle and sidecar worth approximately \$11,000. Under KRS 403.190, the court is required to divide marital property in "just proportions". This does not necessarily mean equal proportions. Quiggins v. Quiggins, Ky. App., 637 S.W.2d 666

(1982). From our review of the record, the court did not abuse its discretion in awarding Richard the motorcycle and sidecar. See Johnson v. Johnson, Ky. App., 564 S.W.2d 221 (1978). Richard presented expert testimony supporting the court's finding that Richelle filed her tax return so as to gain certain tax advantages of which both parties should have gotten the benefit. Further, there was sufficient evidence to support the court's finding that when Richelle moved out, she took much of the marital personal property.

For the reasons stated above, the judgment of the Boyd Circuit Court is affirmed in part, reversed in part, and remanded for redistribution of the parties' real property consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Gordon J. Dill  
Ashland, Kentucky

BRIEF FOR APPELLEE:

Richard A. Hughes  
Ashland, Kentucky