RENDERED: June 4, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002598-MR

ELSIE JANE KING
AND BERNARD J. BLAU — APPELLANTS

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE STEVEN R. JAEGER, JUDGE
ACTION NO. 1994-CI-00171

JOSEPH J. KING — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART, AND REMANDING
** ** ** ** **

BEFORE: COMBS, KNOPF, AND KNOX, JUDGES.

KNOPF, JUDGE: Elsie King appeals from a June 16, 1997, judgment of the Kenton Circuit Court finalizing the dissolution of her marriage to the appellee, Dr. Joseph King, and resolving questions of property division and maintenance. Elsie objects to several aspects of the judgment, insisting that the trial court improperly characterized and failed to characterize property as nonmarital, improperly divided marital property and debts, and improperly denied her motion for attorney fees. We agree with Elsie that some of the trial court's decisions do not fully comport either with the evidence or with the law. Therefore, we

vacate the property settlement portion of the judgment and remand for further proceedings.

The Kings' marriage of thirty-one (31) years was dissolved by decree on December 13, 1995. Elsie was fifty-five (55) years old and Joseph was fifty-seven (57). The couple had raised eight children. All but one of the children had reached the age of majority prior to the dissolution, and the remaining minor child attained his majority during the course of these proceedings. Throughout the marriage, Joseph was self-employed as a licensed chiropractor. Elsie is a licensed, registered nurse. At the beginning of the marriage, she was employed in that capacity, but the success of Joseph's practice soon enabled her to devote all of her time and efforts to maintaining the couple's home and raising their children. Joseph is apparently in good physical health. During the latter years of the marriage, however, Elsie has developed some health problems. She suffered an injury in the mid-1980's and is still troubled by its effects. She also has high blood pressure and suffers from shortness of breath.

During this long relationship, the Kings acquired numerous assets. Among them were a farm, Joseph's office building, several cars, and a boat. Joseph's practice, too, was an asset of the marriage, which over the years developed a significant amount of good will. Other assets included bank accounts and an investment account.

During the pendency of this action, both before and after the entry of the divorce decree in 1995, Elsie and Joseph

had begun the difficult process of disentangling their affairs and establishing independent lives. They had sold the farm which had been their residence, had divided some of the proceeds from that sale, and had made arrangements for separate homes. Elsie had purchased a new house; Joseph had remodeled an apartment in his office building. Most of the couple's personalty had thus been divided by agreement prior to the June 1997 hearing on property division.

Following that hearing, at which the parties presented evidence concerning the assets just mentioned, the trial court awarded Joseph's business and the business premises to Joseph. It awarded Elsie her new house, her checking account, and the investment account. It ruled that the proceeds from the sale of the farm which the parties had already divided were non-marital property, and from the remaining proceeds it awarded a non-marital portion to Elsie.

Given the length of this marriage and both parties' extensive contributions to it, the trial court felt that the marital estate should be divided equally. To that end Joseph was ordered to pay Elsie some $11,000.00 as an equalization amount, and he was assigned a $40,000.00 tax liability, about $20,000.00 in other marital debts, and the $71,000.00 mortgage on his office building. Joseph was further ordered to maintain a life insurance policy for Elsie's benefit and to pay Elsie $2,580.00 per month as maintenance for thirty-six (36) months, at which time the matter is to be reviewed.

At first blush, the trial court's order would seem to satisfy KRS 403.190 and 403.200, which require marital estates to be divided "in just proportion," that is, first, with an eye to the parties' reasonable needs, and, second, to meet the parties' reasonable expectations given the history of the marriage. Davis v. Davis, Ky., 777 S.W,2d 230 (1989); Russell v. Russell, Ky. App., 878 S.W.2d 24 (1994). As is often the case where a divorcing couples' principal asset is a small business, the trial court here faced the difficult task of trying to ensure the business's continued viability for the active spouse while giving to the nonparticipating spouse assets of comparable value. The trial court's order provides for the continuance of Joseph's business not only by settling upon him the business's equipment and realty, but also by giving him enough cash to meet his immediate tax liability and operating expenses.

Elsie was awarded about $90,000.00 in both marital and non-marital cash, an investment account worth more than $20,000.00, and her new residence. As substantial as these assets are, they do not promise the sort of income Joseph's business is apt to produce. Accordingly, the trial court's order provides that Joseph must supplement Elsie's income for three (3) years, during which time--her health permitting--Elsie will have an opportunity to prepare herself for and to seek meaningful employment. Joseph was also ordered to maintain a life insurance policy with Elsie as beneficiary. The parties' needs and reasonable expectations would thus seem to have been addressed.

Elsie disagrees. Looking at the details of the trial court's order instead of its overall effect, she insists that the trial court's numerous mistakes deprived her of a fair settlement. Although we agree with Elsie that the details of a property settlement must be scrutinized in light of the statutory standards and that such scrutiny is the only way to ensure that settlement rulings attain a measure of objectivity (*see* Weakley v. Weakley, Ky., 731 S.W.2d 243 (1987) (dissenting opinion by Justice Leibson)), we believe, nevertheless, that our review of the trial court's judgment must also consider the settlement's overall effect. Trial courts are vested with broad discretion to fashion property settlements; their efforts are not to be disturbed on appeal unless the result raises a serious doubt that the statutory purposes have been met. Cherry v. Cherry, Ky., 634 S.W.2d 423 (1982).

Elsie first complains that Joseph should not have been given credit for the office building's $70,000.00 mortgage. We agree. Joseph was given the asset underlying the mortgage, and those two (2) items offset each other. That fact, however, was not reflected in the trial court's calculations. The trial court credited both Elsie and Joseph with one-half (1/2) the office building's equity. It should not then have deducted the amount of the mortgage from Joseph's share, at least not without also adding back an equal amount to account for the value of the building.

Joseph argues that the trial court did not award the office building to him, but left it in the estate to be divided

later.[1] Suffice it to say that this would be an unorthodox method of settling an estate. In the absence of a much clearer intention to adopt such a method than appears in this record, we decline to impute such an intention to the trial court.

Elsie next complains that the court erred by deeming a $40,000.00 bank account Joseph's non-marital property. Apparently, when Elsie and Joseph sold their farm they received, after settling the mortgage, at least $260,000.00. This money was to come to them in three (3) installments, and they had received two (2) of the installments prior to the hearing. The trial court found that the couple had fairly divided the money they had already received and had thus converted those funds to non-marital property. Although much of the money had been spent, Joseph had retained $40,000.00 of his portion, and the trial

[1]The dissenting Judge understands the record to support Joseph's interpretation. If he is right, if the trial court's intention was to leave the marital estate open with the office building its sole asset to be divided at some point in the future, then he is also right that the outstanding mortgage was properly deemed a marital debt for which Joseph could be given credit. Although the trial court's order does not expressly so hold, we concede that the order can be read the way Joseph and the dissenting Judge read it. Indeed, this approach, although delaying the parties' disentanglement, would provide Elsie with an interest in the office building's appreciation. The point, however, with which the dissent seems to agree, is that if Elsie is to bear a portion of the outstanding mortgage, which is the effect of giving Joseph credit for it, then she is entitled to an interest in that portion of the asset covered by the mortgage. If her interest in the asset has been terminated, which is how she understands the trial court's order, and is, we believe, the interpretation recommended by the usual practice of closing a marital estate upon entry of the dissolution decree, then she should bear no portion of the mortgage, and Joseph should receive no credit. We leave it to the trial court on remand to clarify its choice between these alternatives.

court rejected Elsie's claim that this money should be included in the marital estate.

KRS 403.190(2)(d) excepts from the definition of marital property, "property excluded by valid agreement of the parties." We are persuaded that this provision applies here. The parties' testimony supports the trial court's ruling that they had validly agreed to exclude from their marital estate the proceeds from the sale of their farm that they had already received. There is no dispute that the $40,000.00 was a part of those proceeds. Joseph explained that he had retained this money in anticipation of a large tax bill. The trial court did not clearly err by so finding.

The parties also testified, however, that Elsie used part of her share of the farm-sale proceeds to make a down payment on a new house. The court ruled, nevertheless, that the house was marital property. It may have based its ruling on the fact that Elsie was unable to obtain financing for the purchase without Joseph's co-signing, but we believe the testimony clearly establishes the Kings' intent that the house be Elsie's non-marital property and that it was acquired with her non-marital funds. The trial court erred, therefore, by including the equity on the house in the marital estate.

Additionally with respect to the sale of the farm, Elsie maintains that she was awarded an insufficient non-marital share of the proceeds. She traced approximately $15,500.00 of non-marital funds into the $67,000.00 purchase price of the farm.

She claims that she was thus entitled to a proportionate non-marital share of the total equity.

As mentioned above, however, by the time of the hearing, the Kings had already received all but one of the installment payments due from the purchasers of the farm, and they had divided those payments equally between themselves. The trial court deemed that division a full and valid settlement of the parties' rights to those payments and so limited its consideration of Elsie's non-marital interest in the farm proceeds to the one installment payment still outstanding. Applying the so called "Brandenburg formula,"[2] to that installment, it determined that Elsie's non-marital share of the farm proceeds was about thirty-one thousand dollars ($31,000.00). Elsie contends that this was an error, that the trial court should not have read into the prior division of proceeds her agreement to disclaim her non-marital share of them, but should instead have applied the "Brandenburg formula" to the entire farm equity and awarded her a non-marital share of approximately one-hundred-twenty thousand dollars ($120,000.00).

Even were we to agree with Elsie that the trial court misinterpreted the couple's agreement to divide the first and second farm payments, we would still be obliged to affirm the trial court's division of the proceeds because we are not persuaded that Elsie succeeded in making waiver of them a genuine issue: she did not establish the non-marital interest in them she

[2]Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981).

claims not to have waived. Tamme v. Commonwealth, Ky., 973 S.W.2d 13 (1998); Newman v.Newman, Ky., 451 S.W.2d 417 (1970); Clark v. Young, Ky. App., 692/285 (1985).

Elsie relies on Brandenburg for the proposition that she is entitled to a non-marital share of the farm equity in proportion to her non-marital contribution to the farm's price. Brandenburg involved an application of KRS 403.190(2)(e). That statutory section excepts from marital property, "[t]he increase in value of property acquired before the marriage *to the extent that such increase did not result from the efforts of the parties during marriage*." (Emphasis added).

In Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989), our Supreme Court warned that sub-section (2)(e) and Brandenburg do not apply when the increase in value can be attributed to the parties' efforts during the marriage:

> An increase in the value of nonmarital property during marriage which is the result of a joint effort of the parties establishes the increase in value of the nonmarital property as marital property.

780 S.W.2d at 40.

Property acquired during the marriage is presumed to be marital. Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990). To be entitled to a fully proportionate non-marital share of the farm's equity, therefore, Elsie bore the burden of proving that the substantial increase in the farm's value was not due at all to her and her husband's efforts. She presented no such evidence and so is in no position to complain that the trial court's

determination of her non-marital share was inadequate.[3] Thus, although for reasons different from the trial court's, we are persuaded that the trial court did not err by limiting Elsie's non-marital share of the farm-sale proceeds to an amount less than that derived from applying the so called "Brandenburg formula" to the entire farm equity.

Elsie also failed to meet her burden of proving that a tort settlement award was her non-marital property. In 1984, apparently, Elsie was involved in an automobile accident in which she suffered a serious leg injury. She subsequently settled her claim for damages. She and Joseph deposited the money, approximately $20,000.00, in an investment account. The trial court awarded this account to Elsie, but deemed it a part of the marital estate. Elsie claims that this account should have been deemed non-marital.

In Weakly v. Weakly, Ky., 731 S.W.2d 243 (1987), on which Elsie primarily relies, our Supreme Court held that damages awarded for pain and suffering are not marital property. The Court went on to say, however, that it

> d[id] not attempt to decide here the proper procedure for the allocation between marital and nonmarital property of a personal injury award for an injury sustained during the

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[3]Apparently, during the marriage Elsie received a fifty-thousand-dollar ($50,000.00) inheritance. Although only ten thousand dollars ($10,000.00) of that inheritance was used to purchase the couple's first house and was traceable into the farm, Elsie maintains that at the very least she should receive a fifty-thousand-dollar ($50,000.00) non-marital share of the farm proceeds. Elsie made no attempt, however, to trace the balance of her inheritance, and thus the trial court did not err by refusing to give her additional non-marital credit on the basis of it. Chenault v. Chenault, Ky., 799 S.W.2d 575 (1990).

> marriage where the settlement or judgment does not indicate what portion of the award applies to earning capacity and what portion is allocated to pain and suffering.

731 S.W.2d at 245. Elsie maintains that her entire settlement may be presumed to have been for pain and suffering because at the time of the accident she was not employed outside the home.

The fact that Elsie was unemployed outside the home, however, has little bearing on the propriety of a settlement for medical expenses, for lost past wages (which can be estimated from the value of home making services), and for lost future wages (which can be based on the loss of earning capacity). Her lack of a job, therefore, does not permit a presumption that her settlement award was exclusively for pain and suffering. Because Elsie did not otherwise introduce evidence indicating how her settlement had been apportioned, she again runs up against the presumption that property acquired during the marriage is marital. The trial court's ruling, therefore, was neither clearly wrong nor an abuse of discretion.

As noted above, at the time of the hearing Joseph estimated that he owed the Internal Revenue Service $40,000.00 for unpaid income tax on his 1995 income. The trial court characterized this tax debt as marital and credited Joseph for it in the settlement. Elsie maintains that this debt should have been assigned to Joseph as nonmarital. She notes that Joseph earned the income after their separation. She points out that the couple filed separate income tax returns for both 1995 and 1996. And she contends that in O'Neill v. O'Neill, Ky. App., 600 S.W.2d 493 (1980), the Court deemed similar tax debts nonmarital.

We are not persuaded that the trial court erred in this instance. In Underwood v. Underwood, Ky. App., 836 s.W.2d 439 (1992) and Daniels v. Daniels, Ky. App., 726 S.W.2d 705 (1986), this Court ruled that under KRS 403.190, debts incurred during a marriage, even during the period of separation prior to a divorce decree, are rebuttably presumed to be marital. The presumption may be overcome by a showing that the property or service acquired in exchange for the debt was devoted to a nonmarital purpose. Daniels, *supra*.

O'Neill v. O'Neill, *supra,* is not to the contrary. Although in that case the Court declined to presume that a debt incurred during the separation period prior to divorce was marital, there was evidence that the tax debts deemed nonmarital were owed on income that the recipient had devoted exclusively to his own use. Here, however, there is no suggestion that Joseph's 1995 income was used for anything but marital purposes. The couple paid off many joint debts that year, and it is undisputed that Joseph paid Elsie $400.00 per week throughout that period and paid most of her bills. The trial court did not err by deeming the 1995 income tax debt to be marital.

Finally, Elsie insists that the trial court abused its discretion by denying her motion for attorney fees. Joseph's large income, she argues, and her own lack of income make a fee award necessary. She cites Beckner v. Beckner, Ky. App., 903 S.W.2d 528 (1995) and Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993).

In Beckner, the more pertinent of these cases, the Court held that the disparity in the parties' resources could be so great as to mandate an award of attorney fees. Ordinarily, however, fee awards are not mandatory and are entirely within the trial court's discretion. Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512 (1975); Underwood v. Underwood, *supra*.

Elsie was awarded more than $90,000.00 in marital and nonmarital cash. She was also awarded more than $2,000.00 per month in maintenance. These resources are adequate, we believe, to distinguish this case from Beckner and Glidewell, and to justify the trial court's decision not to award Elsie her attorney fees.

To summarize, we are fully persuaded that the trial court understands the purposes of the divorce provisions of KRS Chapter 403, which are to ensure the post-divorce support of marital dependants and to uphold, to the extent reasonably possible, the expectation interests of the parties. In furtherance of those purposes, the trial court sought to preserve the viability of Joseph's chiropractic practice and to provide Elsie with support during the period of transition to an independent life. Given Elsie's age, her health problems, and her long absence from employment, her transition is apt not to be altogether smooth. The trial court was fully justified, therefore, in leaving open the possibility that Joseph's support obligation would extend beyond the three (3) years initially provided.

In light of the long duration of this marriage the trial court appropriately, we believe, stated its intention to divide the marital estate evenly between the parties. We are concerned that this intent may have been frustrated by the errors noted above with respect to the mortgage debt on Joseph's office building and the equity on Elsie's house. It appears that as a result of these errors, Joseph was awarded about $80,000.00 more in marital property than was Elsie. She would need an additional award of $40,000.00, therefore, to equalize the settlement.

An equitable settlement is not necessarily an equal one, of course. In the circumstances of this case, where the business asset is the most valuable item in the estate but admits of neither precise valuation nor easy division, we can not say that this disparity in the division of marital property would necessarily amount to an abuse of discretion. Here, however, the disparity is so contrary to the trial court's stated intention to divide the estate evenly that it renders the court's findings both inaccurate and unsupportive of the result. CR 52.03.

Accordingly, for the reasons discussed above, we vacate the June 16, 1997, property settlement order of the Kenton Circuit Court, and remand for the purpose of allowing the trial court either to modify its order in light of the errors we have identified, or to justify more fully than it has done, pursuant to KRS 403.190, the disparity we have noted in the awards to Elsie and Joseph. There is no requirement that the court hear new evidence or entertain new arguments, although it may do so if it wishes. The court's new order shall contain findings to

support and conclusions to explain its decision regardless of whether that decision is to modify the property settlement or to leave it undisturbed. In all other respects, the Kenton Circuit Court's June 16, 1997, judgment is affirmed.

COMBS, JUDGE, CONCURS.

KNOX, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

KNOX, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent only from so much of the Majority Opinion that addresses appellant's argument that the trial court's recapitulation sheet deprived appellant of a $71,000 credit by reducing appellee's assets by $71,000. My dissent is based upon the assumption that the business property was not awarded to appellant, but was left to be divided later.

I believe that any error in the recapitulation sheet occurred when the trial court assigned each party one-half of the current equity in the business property, rather than one-half of the current value, particularly since the trial court assigned the entire debt on the business property to appellee. What seems to me to be advantageous to appellant is the fact while appellee is paying the entire debt on the business property which will continue to be jointly held, appellant will be building a nest egg in the equity being built up by virtue of appellee's mortgage payments.

I assume that the trial court's resolution of this issue means that, in the event this property is sold prior to the

mortgage payoff, appellant will still receive one-half of the total proceeds, exclusive of any mortgage debt.

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