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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002987-MR (DIRECT APPEAL)
AND
NO. 1996-CA-002990-MR (CROSS-APPEAL)

CATHY J. WILLIAMS — APPELLANT/CROSS-APPELLEE

and

WAVERLY M. TOWNES — APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE THOMAS L. WALLER, JUDGE
ACTION NO. 92-CI-00660

LARRY K. WILLIAMS — APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART and REMANDING
** ** ** ** **

BEFORE: DYCHE, EMBERTON AND JOHNSON, JUDGES.

EMBERTON, JUDGE: This appeal and cross-appeal arise from the dissolution decree which also divided the marital property, assigned debt, and awarded child support, maintenance and attorney's fees. Although each party advances numerous arguments for reversal, the specific areas of dispute focus upon: (1) both parties' dissatisfaction with the valuation and distribution of marital property and the allocation of debt; (2) appellant Cathy Williams' contention that the awards of child support and

maintenance are insufficient and appellee Larry Williams' countervailing contention that the amounts awarded are excessive; (3) the complaints of both parties concerning the failure to restore various nonmarital interests in the marital property; and (4) Cathy's allegation that the trial court erred in awarding her only $3,000 in attorney's fees.

The parties were married in 1981 and had two children who were ages 7 and 5 at the time of the dissolution. Following their marriage, the family resided in Sheperdsville, Kentucky, where Larry had recently established a dental practice, and Cathy was employed by the Bullitt County Department of Health. When the parties separated in October 1992, they had only two major assets: the marital residence and Larry's dental practice which includes the office building. The largest debt of the parties is the amount owed on the marital residence. The trial court, in an expressed attempt to reach an equal division of the property and permit Larry to retain the dental practice and Cathy the marital residence, credited both with their nonmarital interests, and ordered Larry to pay an amount which would evenly divide the marital equity of the assets. Although we find no error in the objective of equal distribution of the limited assets to each party, we believe the trial court erred in various respects regarding the nonmarital and marital interests of the parties and in the amount of the maintenance and child support awards. Mindful of the dictates of Kentucky Revised Statutes (KRS) 403.190(1), which requires that each party first be restored nonmarital property and each be allocated nonmarital debt prior

to the division of marital property, we will first discuss each asset in the context of its marital and nonmarital interests and liabilities.

THE MARITAL RESIDENCE

The trial court found the value of the marital residence to be $251,500. There is sufficient evidence in the record to support such finding and it will not be disturbed.[1] Shortly before the parties' separation, the indebtedness on the residence was refinanced. The residence was mortgaged, securing a promissory note in the amount of $195,000. The loan proceeds paid the existing debt against the residence in the amount of $121,835 and a pre-marital debt of Larry's on his dental office building in the amount of $49,298.58. The balance of the loan proceeds, $21,346.93, was deposited into Larry's office building account.[2]

The trial court awarded Cathy the marital residence and assigned to her the obligation for payment of the $195,000 promissory note. The $21,346.93 was held to be marital property from which each party would receive one-half. We agree with Cathy that the trial court erred in assigning to her the entire amount of the note, and we agree that Larry should be ordered to pay $49,298.58 on the loan representing his nonmarital debt. Furthermore, we see no benefit to dividing the $21,346.93 left

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[1] Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992).

[2] The sum of these amounts is $192,480.51. There is no dispute between the parties, however, as to the remainder of the $195,000 loan.

from the loan as a marital asset. It is, in reality, a debt which in order to most simply accomplish a just division of the property should be ordered paid by Larry to further reduce the mortgage.

Further complicating an equitable and equal division of the property, both parties claim a nonmarital interest in the residence. Shortly before the marriage, Larry purchased a house on Old Mill Stream Lane which was placed in his name and purchased in part with $17,000 of his nonmarital funds. The trial court found this to be his nonmarital interest in the residence, which we affirm.[3]

When the Mill Stream lot was subsequently sold, the proceeds were used in the construction of the marital residence. Cathy's father, Harold, was the real estate broker in the sale of the lot and waived his commission in the amount of $4,200 which Cathy maintains was a gift to her. Additionally, when the marital residence was built, Harold claimed to have waived a builder's fee which Cathy also argues was a gift to her. The trial court denied both claims. A gift of labor or "sweat equity" has been held not to be a nonmarital asset.[4] A waiver of a real estate commission or a builder's fee is also a gift of labor. Harold gave his labor to aid in the financial burden of the purchase of the property the same as if he had physically aided in the construction of the residence. We see no difference and therefore affirm the trial court's denial of Cathy's

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[3] Underwood, supra.

[4] West v. West, Ky., 736 S.W.2d 31 (1987).

nonmarital claims. For the same reason, we hold that the trial court erred in holding the waiver of a $2,625 real estate commission by Harold when the Old Mill Stream property was sold to be Cathy's nonmarital property.

On the other hand, the lots on which the residence was constructed were purchased from Cathy's father which he testified were sold for $25,000 less than the market value, as a gift to Cathy which the trial court found was Cathy's nonmarital interest. Unlike the gift of labor, the lots are tangible assets which are easily valued. Larry argues that under Calloway v. Calloway,[5] the gift was for the benefit of the entire family and cannot be claimed exclusively by Cathy. We agree. The lots were sold to Larry and Cathy during their marriage for the construction of the marital residence which not only Cathy would enjoy and use but also the entire family. Upon remand, the trial court is instructed to treat the price reduction as marital equity in the residence. However, as stated in Calloway, in the division of marital property the court must consider the factors set forth in KRS 403.190, including the contribution of each spouse to the acquisition of the property.[6] In so doing, the court here is to consider the source of the gift and that the gift was due to Cathy's familial relationship with her father.

Although Larry had a pre-marital interest in the residence, which arguably appreciated in value during the

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[5] Ky. App., 832 S.W.2d 890 (1992).

[6] Id. at 893.

marriage, neither party presented sufficient evidence to apply the formula set forth in Brandenburg v. Brandenburg.[7]

In summary, we hold there is no error in the trial court's finding that the house is valued at $251,500 and that the unpaid mortgage is $195,000. However, the more helpful values in equitable disposition of the property are the marital values of each. Therefore, after payment on the mortgage by Larry of his $49,298.58 nonmarital debt and the repayment by him of the $21,346.93 loan proceeds residue the mortgage is reduced to $124,354.49. That amount is a marital debt. Then, by deducting from the $251,500 house value the current mortgage obligation and Larry's $17,000 nonmarital interest we find the marital equity in the residence to be $110,145.51.

THE DENTAL PRACTICE AND BUILDING

Larry's dental practice is located in an office building which the trial court found to have marital equity of $171,199. For reasons previously discussed, Larry's claim that he has an additional $32,000 nonmarital interest in the building as a result of labor performed by his family is rejected.[8] We affirm the trial court on the marital valuation of the building except that on remand Larry must be given credit for the $49,298.58 paid as his nonmarital debt reducing the marital equity in the building to $121,900.42. There is sufficient evidence to support the trial court's findings as to the marital

[7] Ky. App., 617 S.W.2d 871 (1991).

[8] West, supra.

value of the office account at $20,440.13; accounts receivable of $12,400; and the equipment valued at $9,982.14. We do not disturb those findings.[9]

The major area of disagreement concerning the dental practice is the inclusion of $50,000 in goodwill in the valuation of the solo practice. Although Larry argues that his solo dental practice has no recognizable goodwill, in Heller v. Heller,[10] the court recognized that the goodwill of a solo professional practice is a divisible marital asset. Therefore, based on the evidence we find no error in the trial court's inclusion of $50,000 goodwill in the valuation of Larry's practice.

Although Larry did have pre-marital interest in the dental practice, he again failed to present sufficient evidence of its value at the time of the marriage rendering the Brandenburg formula inapplicable.

We affirm the values given the dental practice assets. However, on remand, the trial court is instructed to reduce the marital equity by $49,298.58, leaving the equity in the dental practice and office building at $214,722.69.

MISCELLANEOUS

Shortly before the marriage, having received his license to practice dentistry, Larry began his practice. To receive his education, he had obtained a student loan for $4,876.20 and borrowed funds from his grandparents. Cathy

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[9] Underwood, supra.

[10] Ky., 672 S.W.2d 945, 947 (1984).

presented evidence that during the marriage $12,578 of marital funds were used to repay these loans. In Van Bussum v. Van Bussum,[11] we held, that since a professional degree cannot be considered marital property, the debt incurred for its acquisition must be borne by the party who will reap the benefit from it, in this case Larry.[12] Although in Van Bussum, the professional license was obtained during the marriage, we believe the reasoning of the court is equally applicable to the present case. To the extent payments were made during the marriage toward Larry's nonmarital professional degree, Cathy is entitled to reimbursement of her marital share.

Both parties object to the division of the personal property. Larry received $36,880 in marital personalty and Cathy $18,325; the trial court, however, compensated Cathy for the disparity and we find no error. It is not the role of the appellate court to revisit the specific property awarded each party but to determine whether the trial court reached a just division. We find that it did and affirm. Although each party is dissatisfied with the division of other assets, which we have not addressed, we see no purpose in further lengthening this opinion by a discussion of these issues, only to affirm them on the basis that the evidence supports the trial court's findings.

MARITAL DEBTS

[11] Ky., 728 S.W.2d 538 (1987).

[12] Id. at 538.

We have previously discussed the largest of the parties' marital debt, the marital residence. Cathy argues that from October 1992, when the parties separated, until May 1993, when the pendent lite order became effective Larry paid only the mortgage payment on the house and did not provide for her's and the children's living expenses. As a result, she was forced to borrow $20,000 from the Peoples Bank of Bullitt County and withdraw $9,000 from her credit savings account. While the $9,000 is not a debt for which credit can be given to Cathy, the $20,000 loan was taken out to meet the living expenses of the family during the marriage and is properly classified as marital debt.[13] We find that the trial court erred in awarding that debt solely to Cathy.

PROPERTY DIVISION

The result reached by the trial court was an equal division of the property with Cathy retaining the marital residence and Larry the dental practice. The disparity in the property awarded was supposedly resolved by Larry making a cash payment to Cathy.

Although KRS 403.190(1) does not require the court to make an equal division of the assets, we believe an equal division was appropriate. On remand, we direct the court to make a similar division of the marital assets unless it finds, that under KRS 403.190, Cathy is entitled to the amount representing

[13] Underwood, supra.

the reduction in price on the Somber Way lots as a result of her sole contribution to that asset.

Cathy was assigned the entire debt on the marital residence. Because of the desire to permit the custodial parent to reside in the marital residence, we find no error in the assignment of this debt to Cathy. Should she desire to continue to reside in the residence her payments will, of course, increase her equity in the property, and because we find that a certain portion of that debt is to be paid by Larry, her payments will be reduced. The issue however, is whether Cathy, on her income and the property awarded to her, can continue to maintain the lifestyle which she enjoyed during the marriage. If not, then she is entitled to maintenance and the issue becomes one of amount.

MAINTENANCE

We preface our discussion on the issues presented with a citation of the statutory underpinnings of maintenance awards. In KRS 403.200, the General Assembly provided the following guidelines for determining eligibility for maintenance and for setting an appropriate amount:

> (1) In a proceeding for dissolution of marriage or legal separation . . . the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
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> > (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 or is custodian

> of a child whose condition or circumstance make it appropriate that the custodian not be required to seek employment outside the home.
>
> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
>
> (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
>
> (c) The standard of living established during the marriage;
>
> (d) The duration of the marriage;
>
> (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
>
> (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

Contrary to Larry's assertion that Cathy failed to meet the criteria set out in subsection (1), we note that those requirements have been interpreted as providing a relative, rather than an absolute, test and must be construed to include a spouse "unable to support himself through appropriate employment according to the standard established during the marriage."[14]

[14] Casper v. Casper, Ky., 510 S.W.2d 253, 255 (1974).

Like the trial court, we believe Cathy "has met her burden in showing her entitlement to maintenance." It is clear that Cathy's income is insufficient to allow her to maintain for herself and the parties' children the standard of living established during the marriage. While Larry received the primary income-producing asset, his dental practice, Cathy received only the marital residence and personalty with little or no income-producing potential. In light of these factors, we cannot say that the trial court abused its discretion in determining that Cathy was entitled to maintenance.[15]

We are convinced, however, that the amount of maintenance awarded to Cathy is so clearly insufficient that it constitutes an abuse of discretion. The "unable to support himself" component of the statutory standard for entitlement to maintenance must be measured by the standard of living established during the marriage.[16] The fact that a spouse is capable of contributing to her support through employment does not relegate her to a lower standard than she enjoyed during the marriage, nor does it disqualify her from receiving maintenance in an appropriate amount. As the Casper court notes, "[w]e cannot believe the law intended the anomaly that one who cannot work at all may have the benefit of a better standard of living than one who is able to eke out the bare necessities of life."[17]

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[15] Calloway, supra.

[16] Casper, supra.

[17] 510 S.W.2d at 255.

It is apparent that the parties enjoyed a very comfortable and substantial lifestyle prior to separation. The trial court initially set maintenance at $2,000 per month based in part upon the requirement that Cathy pay the refinanced mortgage payment of $1,864 per month. In addition, Cathy testified to child care expenses of $854 per month and health insurance expenses in the amount of $144. Although we have ordered that Cathy's obligation for the mortgage payment be reduced, subtracting the total of just these three items from Cathy's income (her salary, maintenance and support) her net income is insufficient to provide for her ordinary living expenses (food, clothing, utilities, etc.), as well as taxes, insurance and upkeep on the marital residence. Since there is nothing in the record to suggest that any of these expenses have been exaggerated or are excessive, we can conclude only that the amount of the maintenance award is grossly insufficient.

Nor does the fact that Cathy was awarded a cash payment from Larry to equalize the division of marital property support such a substantial reduction in maintenance from the pendent lite award to the final judgment award. Although it would be expected that Cathy would properly utilize these funds to help provide for her reasonable needs, it would be clearly inequitable to impose upon her a duty to exhaust those resources in order to preserve for herself and the parties' children the lifestyle enjoyed prior to separation.[18]

[18] See Atwood v. Atwood, Ky. App., 643 S.W.2d 263 (1982).

Though the record is not clear, the low maintenance award seems to be premised in large part on the perceived inability of Larry to meet his own needs if ordered to pay a higher maintenance award. The trial court, in a continuing effort to equalize the positions of the parties, added to Cathy's income her child support payments, then added an amount of maintenance per month which apparently was intended to equalize the parties' monthly incomes. If this is the method employed by the trial court it has not achieved equity for Cathy.

We believe it would be helpful toward reaching equitable results in setting both maintenance payments and child support payments for the trial court to revisit the matter of Larry's income. KRS 403.212(2)(c) requires that self-employment income be carefully scrutinized.[19] The statute offers specific guidance as to the methodology to be employed in establishing a parent's income from self-employment:

> For income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely held corporation, "gross income" means gross receipts minus ordinary and necessary expenses required for self-employment or business operation. Straight-line depreciation, using Internal Revenue Service (IRS) guidelines, shall be the only allowable method of calculating depreciation expense in determining gross income. Specifically excluded from ordinary and necessary expenses for purposes of this guideline shall be investment tax credits or any other business expenses inappropriate for determining gross income for purposes of calculating child support. Income and expenses from self-employment or operation of a business shall

[19] Petrilli, Kentucky Family Law, §27.3, 1999 cumulative supplement, at 90.

> be carefully reviewed to determine an appropriate level of gross income available to the parent to satisfy a child support obligation. In most cases, this amount will differ from a determination of business income for tax purposes. Expense reimbursement or in-kind payments received by a parent in the course of employment, self-employment, or operation of a business or personal use of business property or payments of expenses by a business, shall be counted as income if they are significant and reduce personal living expenses such as a company or business car, free housing, reimbursed meals, or club dues. (Emphasis added).

In order to satisfy the statutory mandate of close scrutiny of expenses, it is incumbent upon the trial court to enter specific findings as to what constitutes "ordinary and necessary expenses' deducted from the gross receipts of Larry's practice.

Here, the trial court set maintenance and child support based solely upon Larry's testimony that his "actual income" for 1993 amounted to $76,377 while reporting a gross income of $177,283. We find this testimony plainly insufficient in light of the acknowledgment by both Larry and Cathy of regular payment of household and other expenses from Larry's office account. It seems clear that such a practice serves to artificially reduce the true amount of Larry's income in prior years, giving rise to the need for particularly close scrutiny of his income for 1993. There can be no meaningful review of the trial court's adherence to the statutory mandate without specific findings as to the "ordinary and necessary" nature of the deductions from the gross receipts of Larry's practice. We, therefore, direct the trial court upon remand to carefully examine Larry's income in light of the factors set out in the statute and enter specific findings as

to whether deductions from his gross receipts were appropriate. We find it inconceivable that Larry does not have the ability to pay an amount substantially higher than the $50 per week awarded. That portion of the decree setting maintenance in the amount of $50 per week is reversed and remanded to the trial court for entry of an award in an appropriate amount.

The final point of disagreement over the maintenance award centers upon the date the permanent award is to commence. Cathy asserts that permanent maintenance begins as of September 12, 1996, the date of the trial court's opinion, while Larry insists that the amount of permanent maintenance became fixed as of the date of the commissioner's original report. In his July 11, 1994, report on the parties' motions to alter or amend the findings of the initial report, the Commissioner recommended that the permanent maintenance award should become effective on May 23, 1994, the date of his initial recommendations. Although the trial court adopted, with limited exceptions not pertinent here, both of the commissioner's reports, he also included in his opinion dated September 12, 1996, the following specific holdings:

> 3. The parties' property and debts shall be divided as set forth in the Commissioner's Reports of May 23, 1994 and July 11, 1994.
>
> 4. The Petitioner shall pay to the Respondent the sum of $50.00 per week in maintenance until her death, remarriage, or further order of this Court.

We are convinced that in entering these specific directives the trial court acknowledged the fact that it would be clearly inequitable and at odds with the statutory mandate to award

maintenance based upon the amount of property assigned the party seeking maintenance and then to commence the award prior to the date the party became entitled to the property. In our opinion, fairness and equity, as well as adherence to the intent of the General Assembly spelled out in KRS 403.190, requires that the award of permanent maintenance commence no sooner than the date of Cathy's entitlement to the property assigned her in the decree, the date on which the trial court adopted the commissioner's recommendations. There would be little point in instructing the trial court to consider the amount of property assigned in setting an appropriate amount of maintenance if the award were to commence almost two years before the spouse entitled to maintenance had access to the property.

CHILD SUPPORT

The primary issues regarding the amount of child support awarded are Larry's complaint about the amount Cathy expends on work-related child care and Cathy's contention that the trial court erred in determining Larry's income. While we perceive no error in the amount of child care expense, we have previously stated in this opinion that we are persuaded that the question of Larry's income should be re-examined.

One factor to be considered in setting child support is the standard of living the children enjoyed during the marriage. Their lives after the divorce should, as far as possible, reflect their lives prior to the divorce including the material aspects. In his recommendations, the commissioner acknowledged, that while

the amount of child care expenses appeared to be high, there was no evidence that they were any different than they had been during their marriage. Since there is sufficient evidence to support this determination, it cannot be disturbed on appeal.

Previously in our discussion of maintenance we have directed the trial court to re-examine Larry's report of his 1993 income. If the trial court concludes that his income is greater than the amount previously determined, child support shall be adjusted accordingly.

ATTORNEY'S FEES

Finally, Cathy maintains that the $3,000 she was awarded in attorney's fees is clearly insufficient given the nature of the property assigned to her and the fact that many of her legal expenses were incurred as a direct result of Larry's actions or inaction. Although the allocation of court costs and attorney's fees is a matter entrusted almost entirely to the discretion of the trial court, we agree with Cathy that the amount awarded is grossly insufficient under the circumstances of this case. A review of the record discloses protracted litigation, evidence that Cathy incurred legal fees and expenses exceeding $30,000, and significant disparity in the allocation of income-producing assets. We are thus convinced that the trial court should reconsider the award of attorney's fees in conjunction with the reassessment of Larry's income and the setting of an appropriate maintenance award.

CONCLUSION

Those portions of the decree relating to allocation of marital assets and debt, maintenance, child support and attorney's fees are reversed and remanded for entry of a judgment consistent with this opinion. In all other respects the judgment of the Bullitt Circuit Court is affirmed.

DYCHE, JUDGE, CONCURS.

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

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the Majority Opinion as to its disposition of all issues except the discussion on page 9 concerning Cathy being entitled to reimbursement for her marital share of payments made during the marriage toward Larry's non-marital professional degree, to which I respectfully dissent. I do not believe Van Bussum v. Van Bussum is appropriate authority for the Majority's holding.

BRIEF FOR APPELLANT:

W. Waverly Townes
Louisville, Kentucky

BRIEF FOR APPELLEE:

David B. Mour
Louisville, Kentucky