

Commonwealth Of Kentucky

Court Of Appeals

NOS. 1999-CA-000138-MR & 1999-CA-000172-MR

JAMES ROY WHITLOW

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM ALLEN CIRCUIT COURT
HONORABLE WILLIAM R. HARRIS, JUDGE
ACTION NO. 1997-CI-00116

CONNIE KINGREY WHITLOW AND
JAMES S. SECREST, SR.

APPELLEES/CROSS-APPELLANTS

OPINION
AFFIRMING
** **

BEFORE: HUDDLESTON, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: James Roy Whitlow (Roy) appeals from a December 16, 1998, decree of the Allen Circuit Court dissolving his marriage to the appellee, Connie Whitlow, and winding up the parties' marital estate. Roy maintains that the trial court incorrectly characterized some of his non-marital property as marital, that it misconstrued Connie's waiver of her interest in his pension, and that it abused its discretion by awarding Connie maintenance. Connie cross-appeals from the same decree. She maintains that the trial court awarded her insufficient maintenance and insufficient attorney fees, and that it misstated

two of the maintenance award's conditions. Being unpersuaded by any of these allegations of error, we affirm.

The parties were married in June 1970, when Connie was nineteen and Roy twenty-six. Roy was working as a truck driver for Kimball International, Connie had just finished high-school and was working in her father's restaurant. Two months prior to the marriage, Roy purchased approximately 73 acres of farm land. He paid \$3,000.00 down and agreed to pay the \$12,000.00 balance in 3 annual installments. He also purchased farming equipment and a few head of cattle. Following the marriage, Roy continued to work for Kimball International, and he and Connie operated the small farm. Eventually the couple acquired a residence in Scottsville, Kentucky, improved the farm with barns and a tool shed, purchased additional livestock, acquired additional farm land (approximately 107 acres), and acquired a vacant lot in Scottsville next to the home of Roy's mother. The couple also raised three children, all of whom had become adults before this action began. Connie dedicated herself primarily to homemaking. She also helped on the farm, and, later in the marriage, when the children were grown, worked outside the home, principally at Pizza Hut where she was employed from late 1990 until 1997.

Early that year, Connie's father, whose home was close to that of the Whitlows, became terminally ill. Connie devoted herself increasingly to caring for him, until in May 1997, she was granted a three-month leave of absence from her job so that she might care for him full time. Connie's father died in August 1997, shortly before Connie's leave of absence expired.

During this same period, Roy and Connie's relationship broke down. In early June 1997, there were two angry confrontations between them. Connie claims that on both occasions Roy threatened to kill her. Roy admits that he confronted her angrily and even admits that on one of the occasions he pointed a gun at her and said that he ought to kill her, but he denies having harmed her or having threatened her in such a way that she could have thought herself in any real danger. In any event, on the evening of June 13, 1997, Roy drove Connie to the police station and left her there. She contacted a friend and arranged to stay at a shelter for abused women. Connie and Roy have not lived with each other since then. Indeed, they have been ordered apart by an emergency protective order and a domestic violence order.

At the shelter Connie began to see a psychiatrist who diagnosed her as being depressed and as having an anxiety disorder. He prescribed an anti-depressant and medication to help her sleep. This psychiatrist later concluded that Connie was suffering from post-traumatic stress syndrome. These diagnoses have been confirmed by Connie's family physician and by a psychiatrist Roy hired to examine her. Meanwhile, concerned about her father, Connie left the shelter after about two weeks and returned to the marital residence. Shortly after her return, the residence was burglarized. Frightened by the burglary, Connie preferred not to spend the night at her former residence, and so began a somewhat nomadic existence. She returned to the residence during the day, but slept sometimes at her father's

house, while he was alive, sometimes with friends, sometimes in her car, sometimes with her daughter, and sometimes in a motel.

As noted, Connie's father died approximately one month after she returned from the spouse abuse shelter and near the end of her leave of absence from Pizza Hut. Feeling overwhelmed by recent events, Connie requested that Pizza Hut extend her leave, but the company refused. When Connie failed to return to work at the scheduled time, her employment was terminated. Between then, August 1997, and the final hearing before the trial court in October 1998, Connie did not return to work of any sort. Her doctors unanimously agreed that she was incapable of doing so and that she would likely remain disabled for the foreseeable future.

The matter was initially tried before a domestic relations commissioner, whose report the trial court adopted *in toto*, after considering the parties' exceptions thereto. The final decree dissolved the parties' twenty-seven year marriage and divided the marital estate roughly equally. In determining the estate's assets, the court acknowledged Roy's \$3,000.00 non-marital contribution to the acquisition and improvement of the 73-acre farm (a total expenditure of \$28,000.00) and calculated (using the Brandenburg formula)¹ that his non-marital interest had come to be worth approximately \$9,300.00 from a total value of the farm of approximately \$87,000.00. Roy maintains that the entire 73-acre farm should have been deemed his non-marital property. He bases this claim on the assertion that the farm and

¹Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981).

its improvements were paid for from proceeds derived from the yearly sale of calves and that the calves derived, ultimately, from the few head of cattle he purchased with non-marital funds shortly before the marriage.

Even were we to assume that Roy had established the source of the funds used to purchase and improve the farm,² his claim rests on a misunderstanding of KRS 403.190. That statute does indeed provide, as Roy notes, that property acquired during the marriage in exchange for non-marital property remains non-marital and that the increase in value during the marriage of non-marital property is also non-marital. These rules, however, refer to specific items of property, the specific cows Roy bought prior to the marriage, for example, and contemplate either the exchange of those specific pieces of property or their passive appreciation. Roy's claim is based on neither of these eventualities. His claim is based on the production of calves in the ordinary course of farming. The general rule, of course, is that property acquired during the marriage is marital, and this includes income derived from non-marital business assets, such as Roy's cattle, particularly when, as in this case, the assets have been made productive through the efforts of the parties.

Goderwis v. Goderwis, Ky., 780 S.W.2d 39 (1989); Marcum v. Marcum, Ky., 779 S.W.2d 209 (1989); Sousley v. Sousley, Ky., 614 S.W.2d 942 (1981). Revenue from the sale of calves is income in this sense, and thus its reinvestment in the farm, if that is in

²In fact, however, he made no attempt to trace farm revenues into particular expenditures.

fact what was done with it, was a marital contribution. The trial court did not err, therefore, in apportioning the marital and non-marital shares of the 73-acre farm.

The trial court awarded Connie half of Roy's pension to the extent that it accrued during the marriage. Roy maintains that Connie waived her marital claim to any share of his pension and that the trial court misconstrued her waiver. Roy's contention is based on a "Designation of Beneficiary" form Connie executed in December 1994. The form, provided by Kimball International's Retirement Plan, is used to record the designation of someone other than an employee's spouse as recipient of the plan's survivorship benefits. The section of Kimball International's form creating that consent provides as follows:

The undersigned legal spouse of this employee consents to the appointment of a beneficiary (as indicated above) other than the undersigned spouse and releases and waives any rights of any kind to the proceeds that may become payable under the plan.

At Roy's behest (under duress and in response to his coercion, Connie claims), Connie executed this form in favor of their children. The trial court ruled that Connie's waiver extended only to survivorship benefits and not to the pension itself.³ Roy maintains that Connie consented, in essence, to

³The trial court noted that, under federal law, qualifying pension plans are required to provide for the designation of alternative survivorship beneficiaries and that such designations are valid only if consented to by the employee's spouse. While there is little doubt that Kimball International's pension plan is indeed subject to federal regulation, this fact seems not to have been established on the record. We are precluded,

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have the pension treated for all purposes as his non-marital property.

As this Court has noted, there is a distinction between a pension, as an accrued asset, and the right to benefits therefrom. Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998); Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993). The accrued asset is what is subject to division upon divorce. It was the right to benefits, however, on condition of Roy's death ("proceeds payable under the plan"), that was addressed and affected by the "Designation of Beneficiary" form Connie executed. We agree with the trial court that her waiver of those benefits, assuming the waiver valid, had no bearing on the division of the asset, which was properly deemed marital in large part and awarded accordingly to both parties. Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986).

In addition to various items of personalty, the trial court awarded Connie the marital residence, valued at \$41,000.00, and the unimproved farm land (the 107-acre farm), valued at \$77,000.00. It awarded Roy the improved farm, the farm equipment, the livestock, and the vacant lot near Roy's mother's house in Scottsville. The court also ordered Roy to pay Connie maintenance in the amount of \$500.00 per month "until such time as either party dies, the respondent remarries or engages in unmarried cohabitation; the petitioner retires; or there is a

³(...continued)
therefore, from considering what bearing if any federal law has on the question of Connie's waiver.

substantial and continuing change in either party's circumstances."

In awarding maintenance, the trial court found that Connie suffered from a mental disability, which impaired her capacity to work, and that she had not been awarded income-producing property sufficient to support herself. As noted above, the evidence of disability included the testimonies of three physicians, one of whom had experience performing disability evaluations for the Social Security Administration. The evidence also included Connie's testimony to the effect that Roy had been excessively controlling and abusive throughout the marriage, culminating in threats to kill her. Roy maintains that the trial court erred in finding Connie eligible for maintenance. He denies Connie's allegations of abuse, insists that she is capable of supporting herself through work, and contends that the maintenance award stemmed from the court's improper consideration of his alleged fault.

KRS 403.200(1) provides that the trial court may award maintenance upon a finding that the spouse seeking it "(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" In Casper v. Casper, Ky., 510 S.W.2d 253 (1974), our Supreme Court held that, under this statute, the trial court is to determine whether the spouse seeking maintenance lacks sufficient property to meet her reasonable needs and is unable to support herself through appropriate employment according to the standard of

living established during the marriage. In Perrine v. Christine, Ky., 833 S.W.2d 825, 826 (1992), the Court further explained that,

[u]nder this statute [KRS 403.200], the trial court has dual responsibilities: one, to make relevant findings of fact; and two, to exercise its discretion in making a determination on maintenance in light of those facts. In order to reverse the trial court's decision, a reviewing court must find either that the findings of fact are clearly erroneous or that the trial court has abused its discretion.

Roy is correct in noting that marital fault is not to bear on the maintenance determination except in limited circumstances to prevent a windfall to the party seeking maintenance whose fault contributed significantly to the break up of the marriage. Platt v. Platt, Ky. App., 728 S.W.2d 542 (1987). We are not persuaded, however, that the trial court's decision contravened this principle. As the commissioner repeatedly explained in response to Roy's objections to Connie's testimony, evidence of Connie's mental state was directly relevant to the issue of her claimed inability to work, and evidence of Roy's alleged mistreatment of her was directly relevant to the issue of her mental state. The commissioner assured the parties that she would consider the disputed evidence for no other purpose; the record suggests nothing to the contrary. The medical evidence amply supports the finding that Connie is disabled,⁴ and the relatively modest maintenance award,

⁴Indeed, apparently Connie has since qualified for Social Security Disability benefits of approximately \$280.00 per month. What bearing, if any, her disability award might have on her entitlement to maintenance is a matter that must be addressed in the first instance by the trial

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considerably less than Connie requested and half the amount of her temporary maintenance, refutes Roy's assertion that he has been subjected to a punitive ruling. The trial court did not abuse its discretion, therefore, by awarding too much maintenance.

Nor are we persuaded that it awarded too little. On cross-appeal, Connie asserts that the trial court abused its discretion by awarding maintenance in an amount insufficient to meet her reasonable needs. She notes that she was awarded \$1,000.00 per month temporary maintenance and maintains that her insurance and medical expenses have increased since that award was determined. She acknowledges that, as noted above, maintenance awards have been entrusted to the sound discretion of the trial court. Weldon v. Weldon, Ky. App., 957 S.W.2d 283 (1997). But relying on Beckner v. Beckner, Ky. App., 903 S.W.2d 528 (1995) and Leitsch v. Leitsch, Ky. App., 839 S.W.2d 287 (1992), she insists that this discretion is abused unless the maintenance award is sufficient to meet the recipient's reasonable needs as established during the marriage.

Temporary maintenance, of course, is usually an unreliable guide to permanent maintenance because, as in this case, it is typically awarded without consideration of the final property settlement. Connie's citation of Beckner and Leitsch, moreover, underscores the difficulty of comparing cases in this area of the law, where myriad different factors may bear on the

⁴(...continued)
court.

decision and consequently where each case is to a large extent unique. Beckner involved the denial of any maintenance to a relatively young former spouse from a marriage that had not yet accumulated any significant marital property and who had sacrificed the development of her career in order to raise the couple's children and maintain their home. One of the fundamental purposes of maintenance being to provide such homemaker spouses with the opportunity to become meaningfully self-supporting, this Court ruled that the trial court's failure to provide *at all* for that opportunity was an abuse of discretion. Connie, unlike the wife in Beckner, has been awarded substantial marital property and significant, albeit modest, maintenance. There is no indication here that the division of the marital estate is so limited as, in effect, to bar Connie financially from achieving a meaningful independence.

Leitsch concerned the right to maintenance of a former husband who suffered from muscular dystrophy and whose condition had become totally disabling. Here again the marital estate had not accumulated much property, and it was established that the husband had extraordinary medical needs which were certain to be continuing. The trial court awarded no maintenance despite evidence that the husband's disability income was insufficient and that he had been relying for basic expenses on the charity of friends. Because freedom from this sort of dependency for spouses who are unable to become self-supporting is another of the fundamental purposes of maintenance, this Court held that the trial court's denial of *any* maintenance in these circumstances

was an abuse of discretion. Like the husband in Leitsch, Connie is unable, at least for the present, to be self-supporting. It is to be hoped in Connie's case that she will one day be able to resume working, but in the meantime the distribution of the real property (including the marital residence) worth approximately \$120,000.00, and the award of maintenance of \$500.00 per month is well calculated, unlike the settlement in Leitsch, to provide for Connie's basic needs. The maintenance award is modest, as we have observed, but given the modest standard of living established during the marriage, and given the limitations imposed by age and poor health on Roy's ability to earn income, particularly his ability to farm, we are not persuaded that the award was an abuse of the trial court's discretion.

Connie also maintains that the trial court inappropriately conditioned the duration of her maintenance on Roy's retirement and failed to specify what was intended by the provision in the decree terminating the award if Connie cohabits. We are not persuaded that the trial court abused its discretion. When Roy retires, Connie will become entitled to a share of his pension. It is to be hoped that that entitlement will adequately replace Connie's maintenance, but in any event Roy's retirement will mark the substantial equalizing of the parties' incomes. It is within the trial court's discretion to terminate maintenance at that point. Weldon, *supra*. It is well established, furthermore, that, to affect a maintenance regime, a recipient's "cohabitation" must amount to more than a casual or trial relationship. Cook v. Cook, Ky., 798 S.W.2d 955 (1990); Combs v.

Combs, Ky., 787 S.W.2d 260 (1990). The trial court did not abuse its discretion by declining to specify within the award itself the type or extent of cohabitation.

Finally, the trial court awarded Connie attorney fees in the amount of \$5,500.00. Connie and her attorney complain that this amount is inadequate. Legal costs prior to this appeal had exceeded \$13,000.00, they claim, and had been exacerbated by Roy's having changed counsel several times.

The trial court is accorded very broad discretion to award or deny attorney fees. KRS 403.220; Hollingsworth v. Hollingsworth, Ky., 798 S.W.2d 145 (1990). Such awards are to be based on the relative financial resources of the parties, and only when the parties' resources are grossly disparate is an award mandated. Beckner, *supra*; Glidewell, *supra*. We are not persuaded that the parties' resources are so disparate here as to mandate a greater allowance for attorney fees than the trial court awarded. The court's order provides for a substantial, basic fee. The property awarded to Connie will enable her to pay any fees in excess of that amount. The trial court having given adequate consideration to the parties' financial resources and having awarded an attorney fee reasonably based thereon, its decision will not be disturbed on appeal.

In sum, the dissolution of a long marriage is almost always a traumatic event for both parties, and the Whitlows' divorce is no exception. Trying to see the parties through their initial shock and anger and disappointment and to fashion a decree that will give them an opportunity eventually to resume

productive, independent lives is one of the hardest tasks the trial courts face. Our domestic relations statutes provide a framework for the fashioning of such decrees, but within that framework the trial courts have been entrusted with broad discretion. We are persuaded that the trial court neither disregarded the statutory framework nor abused its discretion in this case. The marital estate benefitted from the property Roy brought to the marriage, but most of the benefit derived from the parties' marital efforts added to that property later. Connie devoted herself to working within the home and to raising the couple's children and thus relied upon Roy to provide her with a retirement. Any waiver of that retirement would need to be unmistakably expressed. The trial court did not err by ruling that her purported waiver of survivorship benefits was not the complete waiver that Roy claimed. Connie's early marriage and long devotion to her home and family, to say nothing of the effect of Roy's alleged mistreatment, have left her ill prepared to support herself through employment. An award of maintenance in addition to the property settlement was therefore justified. Roy's increasingly limited earning capacity, in turn, justifies the modesty of that award. Roy's income, finally, and Connie's lack thereof, justify an award of Connie's attorney fees, but Connie's property award enables her to bear a portion of those fees herself. For all these reasons, we affirm the December 16, 1998, decree of the Allen Circuit Court.

ALL CONCUR.

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