

Commonwealth Of Kentucky

Court Of Appeals

NOS. 2000-CA-001146-MR AND 2000-CA-001246-MR

MARLENE STINNETT JOHNS

APPELLANT/CROSS-APPELLEE

V. APPEAL AND CROSS APPEAL FROM JESSAMINE CIRCUIT COURT
HONORABLE C. HUNTER DAUGHERTY, JUDGE
ACTION NO. 96-CI-00351

BILLY JOE JOHNS

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING IN PART, AND VACATING AND REMANDING IN PART

* * * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and TACKETT, Judges.

GUDGEL, CHIEF JUDGE: This is an appeal and cross appeal from a judgment entered by the Jessamine Circuit Court in a dissolution proceeding. For the reasons stated hereafter, we affirm in part, and vacate and remand in part.

While detailed facts will be fleshed out as we resolve the various issues raised on appeal, we initially note that appellant/cross-appellee Marlene Johns (Marlene) and appellee/cross-appellant Billy Joe Johns (Billy Joe) married in 1983 and separated in 1996. Multiple property and maintenance issues were litigated during the next several years, and a trial was finally conducted in December 1999. The outgoing circuit court judge issued an order on December 29, 1999, resolving all

pending issues. Both parties made posttrial motions, and the new circuit judge scheduled the matter for a full hearing on March 1, 2000. However, after reviewing the record the new judge determined that the March 1 hearing was unnecessary. Instead, the judge entered an amended order readdressing all of the issues previously resolved by his predecessor. The court assigned nonmarital property, divided marital property, and awarded attorney's fees to Marlene. Further, the court determined that Marlene was entitled to maintenance in the amount of \$750 per month for a period of twelve months, and \$500 per month for the succeeding twelve months, pending her return to employment. This appeal and cross-appeal followed.

First, Marlene contends on direct appeal that the trial court abused its discretion in regard to the amount and duration of maintenance. For the reasons stated hereafter, we agree.

Conflicting evidence was adduced below regarding the existence and the extent of Marlene's disability. In its judgment, the trial court briefly summarized the medical evidence before it. The court then specifically and heavily relied on Dr. Royse's testimony, stating in pertinent part as follows:

In the Court's opinion, the most important medical testimony came from Respondent's [sic] general practitioner, who she has seen for a period of eleven years. Dr. Royce [sic] indicated that if Mrs. Johns would loose [sic] weight, quit smoking and exercise according to his instructions, that she should be able to return to gainful employment within two years. In fact, he said it would benefit her mental health if she did return to work.

However, based upon our review of Dr. Royse's testimony, we cannot say that it supports the court's findings in this vein.

The record shows that Billy Joe's counsel asked Dr. Royse whether Marlene's primary problem was fibromyalgia, and whether that condition and her chronic pulmonary problems were within Marlene's control. Dr. Royse clearly responded that fibromyalgia was only one of the several major chronic conditions which Marlene faced. More specifically, Marlene also suffered from depression, anxiety, chronic back pain, sacroiliac dysfunction, and chronic obstructive pulmonary disease. According to Dr. Royse, Marlene had a long history of psychotic depression, and her lower back pain appeared to be related to a 1975 automobile accident. While increased physical activity and the cessation of smoking typically would be helpful in treating the conditions of fibromyalgia and pulmonary disease, Dr. Royse specifically and repeatedly indicated that Marlene's situation was complicated by her additional chronic conditions. Thus, for example, he noted that increased physical activity was likely to worsen the sacroiliac pain. Finally, Dr. Royse was of the opinion that Marlene was permanently disabled as a result of the 1975 accident, and that she was unable to be gainfully employed.

Given the evidence in the record, we are compelled to conclude that it simply does not support the trial court's finding that Dr. Royse definitively indicated that Marlene should be able to return to gainful employment within two years if she exercised, quit smoking, and lost weight. Indeed, in our opinion such a finding is clearly erroneous. Moreover, since that evidence was specifically cited as being crucial to the court's determination as to the maintenance issues relating to Marlene's ability to be self-supporting, we must vacate so much of the

trial court's judgment as addresses issues as to the amount and duration of maintenance. On remand, the trial court should reexamine the totality of the evidence, including Dr. Royse's testimony, in light of the factors set out in KRS 403.200(2). The court should then make appropriate findings, and should award a fair and just amount and duration of maintenance.

Next, Marlene contends that the trial court also erred in dividing the marital value of the parties' business. Once again, we agree.

KRS 403.190(2) defines marital property, for purposes of KRS Chapter 403, as including "all property acquired by either spouse subsequent to the marriage except . . . [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." KRS 403.190(1)(a) requires trial courts to divide marital property in just proportions after considering all relevant factors including each spouse's contribution to the marital property's acquisition, "including contribution of a spouse as homemaker."

Here, the trial court concluded that the business operated by Billy Joe had a fair market value of \$28,619 at the time of the marriage, and a fair market value of \$71,166 on December 31, 1996. The court indicated that the latter value included \$70,151 in notes payable to Billy Joe, representing corporate earnings which he had "simply elected not to distribute until after the parties had separated" but which, "if distributed, would clearly have been marital property."

The court discussed whether the business's increase in value during the marriage resulted from the parties' joint efforts. However, we need not address that point since, unlike the situation in Goderwis v. Goderwis, Ky., 780 S.W.2d 30 (1989), here the court in effect determined that the business's entire increase in value during the marriage constituted marital property, as demonstrated by the fact that the outstanding note, evidencing the reinvestment of marital earnings into the business, greatly exceeded the business's increase in value during the marriage.

Once the court determined the business's marital value, it bore the task of dividing all the marital property in just proportions between the parties. In doing so, the court found that Marlene

admitted that she had done little since the time of the marriage to contribute to the marital estate. Because of her disability she said she had been unable to do much housework and that, in fact, the Respondent had done the majority of the housework. She indicated that she had done some gardening "at her own pace" and had done some grocery shopping and cooking. She had apparently attempted at one time to help Mr. Johns in his business, but whatever attempt was made was unsuccessful.

. . . .

. . . The Petitioner claims that she and the Respondent had an agreement that she did not have to work in the business but would stay home and contribute to the marriage as a homemaker. . . .

. . . .

. . . [H]er efforts were minimal, and she made no effort at promoting the business by entertaining clients or getting involved in any civic organizations. She also

contributed very little to the marriage as a homemaker.

The court concluded that although Marlene indicated "that her lack of effort was due to her disability, . . . she could have overcome that disability had she made significant effort." However, as noted above, the court's conclusion regarding Marlene's ability to improve her physical functioning was based on findings unsupported by Dr. Royse's testimony. Hence, we are compelled to find that the record does not support the court's findings regarding the lack of Marlene's abilities, efforts, and contributions to the marriage. That being so, the court's division of the marital value of the business must be set aside. On remand, the court should redivide that value in a manner consistent with the factors set out in KRS 403.190.

Next, Marlene contends that the trial court denied her due process by considering the testimony of Billy Joe's expert business valuation witness, who at trial altered several of her own calculations on a previously-prepared corporate tax return after discovering errors in those calculations. Although the amendments did not affect that witness's valuation of the business, they did materially affect the valuation testimony previously given by Marlene's expert witness. There was no evidence of intentional wrongdoing relating to the error, but Marlene asserts that Billy Joe's expert witness was not competent to value the business, and that the witness's errors should not have been permitted to materially affect the valuation evidence presented by Marlene's expert witness. We disagree, however, as such errors or discrepancies clearly went to the issue of the

probative weight to be accorded that evidence and the witness's underlying assumptions, rather than to issues of admissibility. Thus, no error in this vein occurred.

Next, Marlene contends that the trial court abused its discretion in dividing the parties' marital personal property. We disagree.

The trial court assigned to Billy Joe as nonmarital property the "bedroom suite and most of the farm equipment." Further, the court found:

As for the other marital personal property, Petitioner testified that she spent three days taking the things she wanted from the marital residence. She stated that she left the items that were still owed on, that she felt like the division was fair at the time, and that because of her anger at the situation she even pulled up a number of plants in the garden. She indicated that there were some new items that she did not feel were appropriately divided, but she mentioned only the new T.V. and refrigerator. The evidence indicated that Petitioner's Exhibit #3 overstated the value of the weed eaters and other items and included Respondent's non-marital property. Petitioner presented copies of Respondent's financial statements submitted for bank loans, but based on Petitioner's Exhibit #3 the Court finds that they also overstate the value of the personal items.

The Court finds that the personal items have been nearly equitably divided, but orders Respondent to pay to Petitioner \$500.00 for the slightly inequitable division of the "new" personal property referred to by Petitioner.

The videotape record includes testimony by Marlene that Billy Joe told her to take whatever items she wanted, that she spent three days removing items from the marital residence, and that she did not take certain large recently-purchased items

because she did not think she could pay the remaining credit card debts on those items. She was unsure whether bedroom furniture was purchased before or after the marriage, the evidence did not indicate the amount of the remaining debt on new items left behind, and no probative evidence was adduced to support Marlene's valuation of various pieces of personal property. As a result, we cannot say that the court erred when it concluded that some personal items were overvalued, or that it abused its discretion in dividing the marital personal property.

Next, Marlene contends that the trial court abused its discretion in assigning liability for debts which she incurred during the parties' separation. We agree.

The court addressed the issue of the parties' debts in pertinent part as follows:

Both parties have accumulated various assets and liabilities since separation. The Petitioner contends she has accumulated the following credit card debt since the separation, which are [sic] a direct result of not being able to meet her basic monthly needs:

G.M. Card	\$300.00
Master Card	\$300.00
Discover	\$300.00
Sears	\$ 40.00

The evidence indicated that the Petitioner continues to smoke against her doctor's advice, costing from \$50-\$70 per month, and plays bingo for recreation. She would otherwise have been able to meet her monthly bills, so the Court finds that she shall be responsible for those debts.

Marlene in fact states on appeal that at the time of trial, she "had credit card [debt] of \$3,640.00 and had accumulated medical bills in the amount of \$2,369.00."

It is undisputed that during the parties' separation, Marlene's monthly income consisted of social security disability benefits of \$480 per month, plus temporary maintenance of \$575 per month. She lived in rent-subsidized housing, and she drove an old compact car which Billy Joe provided after he confiscated her large late-model vehicle. Evidence was adduced to show that during the same time Billy Joe and his paramour constructed a \$250,000 house, drove large late-model vehicles leased through the business, and spent substantial sums of money on luxury discretionary items.

Debts which parties incur after separation but before entry of a divorce decree are rebuttably presumed to be marital debts. Underwood v. Underwood, Ky. App., 836 S.W.2d 439 (1992); Daniels v. Daniels, Ky. App., 726 S.W.2d 705 (1986). We have found nothing in the record, and appellee has cited nothing, to rebut the application of that presumption herein. Moreover, no evidence was adduced to indicate that Marlene incurred significant costs as a result of playing bingo. Instead, Marlene indicated during her deposition that she played bingo only occasionally for recreational purposes, and that in fact family members sometimes paid for the cost of such recreation. Further, while it could certainly be argued that it would be in Marlene's best interest to break her longtime smoking habit, the trial court's actions border on being punitive, especially in light of the evidence showing the wide discrepancies between the resources available to and utilized by the parties during their separation. Hence, on remand the trial court should reexamine the evidence, and should reassign liability for marital debts in light of that

evidence and its redivision of marital property. See KRS 403.190.

Next, Marlene contends that the trial court erred by failing to award her marital property to compensate for Billy Joe's dissipation of marital assets during the parties' separation. Again, we agree.

The trial court found that Billy Joe

improperly used marital assets for non-marital purposes during the period claimed. Specifically, the Court finds that Mr. Johns used corporate funds as a down payment on Ms. Moody's Chrisman Mill Road property, paid expenses related to the property, and paid interest on the note secured by the mortgage on that property. He further purchased gifts for Ms. Moody out of corporate funds and even paid \$2,000.00 for her son's orthodontic bill. Further, both expert witnesses testified that over the past three years the Respondent has, as a matter of course, disbursed monies from the corporation for personal use and has failed to deposit corporate money into the account making it virtually impossible to trace those funds. Although the disbursement of corporate funds for Respondent's own personal use does not constitute dissipation, the circumstantial evidence overwhelmingly indicates that some of the money was used for his and Ms. Moody's joint benefit.

The Petitioner, however, has requested that the Court make a finding as to dissipation of assets and, at the same time, grant to her a portion of the appreciation of the corporation from the time of marriage up until at least the date of separation. Her expert has given testimony as to the value of the corporation on December 31, 1996, for that specific purpose. Although each of those requests may be appropriate individually, if both are granted it essentially allows the Petitioner a double recovery in that the same funds that are being dissipated are the ones that are resulting in the reduction of the value of the corporation from December 31, 1996, until the date of divorce. Because the Court has

decided to use December 31, 1996, as the appropriate date to value the corporation it finds in [sic] unnecessary to address the issue of dissipation of assets.

As the parties raise no issues on appeal regarding the date for valuing the corporation, we will treat December 31, 1996, as having been used by agreement even though it was three years prior to the final decree of dissolution. Nevertheless, the fact remains that Billy Joe had unlimited access to all profits, interest, and other benefits of the corporation throughout the three-year period between the date of valuation and the date of the court's judgment. Marlene, on the other hand, had no access to the portion of the business's value which was awarded to her, to interest on that value during the three-year delay, or to any part of the business's proceeds proportionate to her undivided share of the business for the three-year period. While we can appreciate the trial court's efforts to prevent Marlene from being afforded a double recovery, the end result of the court's action unfortunately was to allow a windfall to Billy Joe at Marlene's expense. On remand, therefore, after reexamining the division of other marital property and the dissipation of assets by Billy Joe, the trial court should make an appropriate allocation of marital assets to equitably compensate Marlene for the value of her share of the assets between December 31, 1996, and the final date of dissolution.

Next, Marlene contends that the trial court abused its discretion by awarding her an inadequate amount for attorney's fees and costs, while Billy Joe contends on cross appeal that the

court's award was excessive and that the court erred by ordering him to pay a portion of Marlene's expert witness fees. We disagree with the contentions of both parties.

Not only are Marlene's attorneys not named as parties to the appeal and cross appeal, but in fact the trial court was vested with great discretion in awarding court costs and fees, limited only by the requirement that it make the award "after considering the financial resources of both parties." KRS 403.220. See Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993); Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986). Having reviewed the record, we simply cannot say that the court abused its discretion in any way in regard to its award of costs, attorney's fees, or expert witness fees.

Finally, Billy Joe contends on cross appeal that the trial court abused its discretion by ordering him to repay a \$9,700 "loan" to Marlene. We disagree.

It is undisputed that Marlene received a \$29,000 lump sum social security settlement during the marriage. Marlene asserted that she loaned Billy Joe \$20,000 of that amount upon his promise to repay the loan. She adduced evidence of \$9,700 in checks which she wrote to him, and Billy Joe's former accountant testified that he indicated the checks constituted loans from Marlene. Billy Joe asserted, by contrast, that Marlene's actions simply amounted to the payment of joint marital debts or, alternatively, that he repaid any loan amounts. However, the court was not persuaded by Billy Joe's assertion that he repaid any loan, and it ordered him to pay Marlene \$9,700.

Billy Joe asserts on appeal that this court's holding in Vanover-May v. Marsh, Ky. App., 793 S.W.2d 852 (1990), compels us to find that the trial court erred by ordering him to repay \$9,700 to Marlene. Unlike the matter now before us, however, in Vanover-May the nonmarital funds in question were deposited into a bank account used by both parties for the payment of everyday business, farm, home and personal expenses. The funds were not readily traceable, and the Vanover-May court declined to believe that the funds were loans since they "were so commingled and other evidence of a loan was lacking." Id. at 855. Here, by contrast, the evidence clearly supported the court's findings regarding the existence of a loan between the parties. In short, based upon our review of the evidence, we cannot say that the trial court abused its discretion by directing Billy Joe to repay \$9,700 to Marlene.

For the reasons stated, the court's judgment is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed herein. The court should readdress the property issues as directed above, and should then determine an amount and duration of maintenance consistent with the dictates set out in KRS 403.200.

ALL CONCUR.

BRIEF FOR APPELLANT/
CROSS-APPELLEE:

Anita M. Britton
Crystal L. Osborne
Lexington, KY

BRIEF FOR APPELLEE/
CROSS-APPELLANT:

David Russell Marshall
Nicholasville, KY