

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001755-MR (DIRECT APPEAL)  
AND  
NO. 2000-CA-001857-MR (CROSS-APPEAL)

JOHN EDWARD HALLORAN

APPELLANT/CROSS-APPELLEE

v. APPEALS FROM BOONE CIRCUIT COURT  
HONORABLE LINDA R. BRAMLAGE, JUDGE  
ACTION NO. 99-CI-01026

KAREN JANE HALLORAN

APPELLEE/CROSS-APPELLANT

### OPINION AFFIRMING

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BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

McANULTY, JUDGE: John Edward Halloran appeals from a judgment of the Boone Circuit Court with respect to division of the parties' marital property. Karen Jane Halloran cross-appeals challenging the trial court's finding that John did not dissipate marital assets and its failure to award her maintenance. We affirm.

The parties were married in 1966 and had three sons, none of whom are minors. In September 1999, John filed a petition for dissolution of marriage. At that time he was 53 years old and employed as the President and Chief Executive Officer of International Knife & Saw, Inc. (IKS). Karen was 52 years old and a housewife. During the marriage, the couple

accumulated approximately \$4-5 million in assets including houses in Kentucky and South Carolina, retirement assets, life insurance, investment accounts, IKS stock, and miscellaneous personal property.

Shortly after filing the petition, John resigned his position at IKS and started to establish a new company named The Knife Source (TKS), which manufactured industrial cutting knives used in the lumber industry. It was anticipated that the parties' three sons would be employed by and eventually become minority owners of TKS. John contributed \$475,000 as start-up capital with 50% ownership in the new venture, which was made up of two corporations, TKS, the manufacturing entity, and JEH Properties, which owned the real estate connected with the business. John estimated he would receive approximately \$200,000 in salary in the first year of operations of the new business. During the proceedings, Karen became employed at Dillard's Department Stores as a sales clerk earning \$10.00 per hour or \$10,000 per year.

On May 9, 2000, the trial court conducted an evidentiary hearing on the property division, at which John and Karen were the only witnesses. At the hearing, the parties substantially agreed on the valuation of the marital property of approximately \$4,376,000, but they disagreed on the proper allocation. John desired an equal division of the total assets but did not object to Karen receiving a larger percentage of the liquid assets. Whereas, Karen sought a slightly higher percentage of the total assets and wanted most of the liquid

assets. Karen testified that her monthly expenses were approximately \$5,500. John testified that in response to two margin calls precipitated by a significant decline in the stock market, he liquidated the parties' investment account with Robert Baird & Co. (Baird Account) in March 2000, which had a net value of approximately \$200,000 at that time.

On May 25, 2000, the trial court entered its Findings of Fact and Conclusions of Law awarding John and Karen net assets of \$2,075,015 and \$2,432,803, respectively. John received his new business (TKS and JEH), his life insurance policies, 58% of the IKS stock, two automobiles, 50% of the proceeds from the liquidated Baird Account, 50% of the proceeds from the sale of the Kentucky residence, and miscellaneous cash and jewelry. Karen received all of John's and her retirement plan monies, 42% of the IKS stock, all of the proceeds upon sale of the South Carolina house, 50% of the proceeds from the liquidated Baird Account, 50% of the proceeds from the sale of the Kentucky house, her automobile, and miscellaneous cash and jewelry. The court also held that John did not wrongfully squander the money in the couple's Baird Account and the parties did not enter into a binding agreement to make a gift to each of their three sons of a 10% interest in TKS.

On June 5, 2000, John filed a CR 59.05 motion to alter, amend or vacate the judgment challenging the larger amount of total assets awarded to Karen, the division of the liquid assets, and the ruling that there was no agreement between the parties to make a gift of an ownership interest in TKS to their sons. John

also moved for additional findings of fact pursuant to CR 52.02. On June 26, 2000, the trial court entered a judgment restating the property division set out in its May 2000 Findings of Fact and Conclusions of Law. The trial court denied the motions and entered no additional factual findings. This appeal followed.

John challenges the trial court's valuation and distribution of the couple's marital assets. Under KRS 403.190(1), a trial court must divide marital property "in just proportions" considering the relevant factors including: (a) the contribution of each spouse including the contribution of a spouse as homemaker; (b) the value of property set apart to each spouse; (c) the duration of the marriage; and (d) the economic circumstances of each spouse when the property division becomes effective. A trial court is not required to divide marital property equally, but has discretion as long as the division is in just proportions given the relevant factors. See Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 503 (1998); Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994). A trial court's decision regarding the proper proportional division will not be reversed absent an abuse of discretion. Russell, 878 S.W.2d at 25; Herron v. Herron, Ky., 573 S.W.2d 342, 344 (1978). An abuse of discretion involves a decision that is arbitrary, unreasonable, unfair or unsupported by sound legal principles. Goodyear Tire and Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000) (citing Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999)); Clary v. Clary, Ky. App., 54 S.W.3d 568, 570 (2001). Meanwhile, a trial court's valuation of marital property will not

be disturbed unless it is clearly erroneous and contrary to the weight of the evidence. Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 443 (1992); Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 893 (1992); Drake v. Drake, Ky. App., 721 S.W.2d 728 (1986).

John contends the trial court's property division was unreasonable and unfair especially with respect to awarding Karen the entire proceeds from the sale of the South Carolina house. He asserts that being awarded only 25% of the liquid assets renders him "unnecessary (sic) cash poor" and without sufficient cash assets to fund his new business. He states that the trial court's allocation failed to weigh adequately the factor dealing with the economic circumstances of each spouse and was not supported by the evidence.

In fact, the trial court's allocation mirrored John's recommended division in most respects, except for the South Carolina house. He received a total of \$2,073,015 in assets, \$563,178 of which were liquid assets. John proposed a 65%/35% division of liquid assets, while the trial court's order resulted in a 75%/25% allocation. Karen was 53 years old with only a high school education, no training, and no work experience in the past 33 years. John was a highly paid executive who had earned between \$948,000 and \$305,000 between 1996-1999. He clearly has a much higher earning potential than Karen. John voluntarily embarked on the risky business venture of starting his own business and has already invested heavily in it. While a discussion of the factors in KRS 403.190 and of the facts

supporting the court's decision would have been helpful, we cannot say the trial court abused its discretion in awarding Karen the entire proceeds from the sale of the South Carolina house or that additional factual findings were necessary for proper review.

John also argues the trial court erred by failing to take into consideration in its property division the various tax consequences and the fact that the couple's three sons were to receive a 30% ownership interest in TKS. He states that his testimony that the children would receive an ownership interest and he would have to pay \$60,000-\$70,000 in capital gains tax should he cash in his life insurance policies was unrebutted and would reduce his share of the property division. The trial court rejected John's claim of a legal contract between the parties related to giving the sons a 30% interest in TKS and said John was free to make a gift to the children. John failed to establish the existence of a binding agreement, but merely testified the parties discussed the matter prior to the divorce proceedings. He points to a letter "which Karen helped to type promising" the oldest son a 10% interest in TKS, but the letter was never produced or introduced into evidence at the hearing. Absent a legal agreement, Karen should not be required to assume an equal share of any burden for transferring an interest to the children in TKS affecting the marital estate. As for the tax issue, any tax liability on the life insurance policies arises only if they are surrendered, which John testified he did not intend to do. Moreover, John advocated that Karen could take

early withdrawals from the retirement accounts, which would likewise cause negative tax consequences. Given the equivocal nature of any agreement on the children's interest in TKS and any tax liabilities, we do not believe the trial court was clearly erroneous or abused its discretion in failing to factor these issues into the valuation and distribution of the marital assets.

On cross-appeal, Karen objects to the trial court's failure to award her permanent maintenance. She contends that she was not awarded sufficient funds to maintain the standard of living established during the marriage. In deciding whether to award maintenance, a trial court must conduct a two-stage evaluation based on the requirements set out in KRS 403.200. First, the court must determine whether maintenance is justified in the first instance based on a lack of sufficient property including the marital property to be received upon dissolution, and the recipient's ability to support herself through appropriate employment. KRS 403.200(1)(a) and (b); Russell, supra; Weldon v. Weldon, Ky. App., 957 S.W.2d 283 (1997). The second stage involves determining the amount and duration of any award. KRS 403.200(2). A trial court has broad discretion in deciding whether to award maintenance in the first instance, as well as in determining the amount and duration of a maintenance award. Leveridge v. Leveridge, Ky., 997 S.W.2d 1, 2 (1999); Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990).

Karen received a total of \$2,432,803 with approximately \$1,658,490 being liquid assets available to her. She maintains the South Carolina house, valued at \$463,604, is not a liquid

asset because it was still unsold at the time of the hearing. Nevertheless, Karen had purchased a new house and she had received and rejected an offer of \$429,000 for the South Carolina house, so conversion of that asset into monetary funds was only a matter of time. John presented several scenarios showing that with prudent investment of the assets she received upon dissolution, Karen could generate an income sufficient to cover her stated monthly expenses. She is in good health, retains some earning potential, and will have access to a significant amount of retirement funds either immediately under 26 U.S.C. § 76(t) or within a few years after reaching age 59 1/2. We agree with the trial court that Karen has sufficient property to provide for her reasonable needs and is not entitled to maintenance.

Karen also challenges the trial court's finding that John did not dissipate or act wrongfully with respect to his handling of the Baird Account. She notes that the value of this investment account declined from a net value of \$785,000 in October 1999 to \$230,000 in March 2000. Her primary complaint is that John liquidated the account without her prior approval.

Dissipation is an equitable doctrine designed to protect persons from being deprived an equal share of the marital estate by spouses who wrongfully diminish it by spending or wasting marital assets for non-marital purposes. See generally 15 Graham & Keller, Kentucky Practice: Domestic Relations Law § 15.86 (2d ed. 1997); Robinette v. Robinette, Ky. App., 736 S.W.2d 351 (1987). The party alleging dissipation bears the ultimate burden of persuasion to show an intent by the dissipator to

improperly deny the other spouse of marital assets. See, e.g., Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998); Bratcher v. Bratcher, Ky. App., 26 S.W.3d 797 (2000).

John testified that he decided to liquidate the Baird Account because of its precipitous decline in value that occurred in conjunction with a general decline in the overall stock market. He said there had been several margin calls that forced him to either infuse additional funds or sell portions of the account to maintain the required debt ratio. Karen does not assert that John should have liquidated the account earlier, but rather, alleges his unilateral decision to liquidate depleted an asset of securities that should have been divided between the parties. Karen, however, presented no evidence that John's conduct resulted in a lower value for the account assets at the time of the hearing. Indeed, the value of the account had declined 34% at a steady rate in the prior six months with little indication of change. There was no evidence that John's decision conflicted with any advice from the broker handling the account. Rather than waste marital assets, John's action served to preserve the assets of the account. Karen has not shown that John intended to deprive Karen of marital assets by liquidating the Baird Account. The trial court correctly found that John did not dissipate or wrongfully waste marital assets.

Finally, Karen argues the trial court should have awarded her attorney fees. The award of attorney fees is left to the sound discretion of the trial court. Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 520 (2001); Gentry v. Gentry, Ky., 798 S.W.2d 928, 938 (1990); KRS 403.220. The primary

consideration in the decision on attorney fees is the disparity in the parties' financial resources. Gentry, supra; Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675 (1993). In this case, Karen received over \$2.4 million in assets, \$350,000 more than John, and approximately 75% of the liquid assets. The trial court did not abuse its discretion in denying Karen's request for an award of attorney fees. Cf. Beckner v. Beckner, Ky. App., 903 S.W.2d 528 (1995) (wife entitled to attorney fees due to gross imbalance in parties' income and lack of income producing property); Lampton v. Lampton, Ky. App., 721 S.W.2d 736 (1986) (award of attorney fees improper where resources of parties approximately equal).

For the foregoing reasons, we affirm the judgment of the Boone Circuit Court.

ALL CONCUR.

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