

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001605-MR

DOUGLAS KERR GOSSMAN

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KEVIN L. GARVEY, JUDGE
ACTION NO. 99-FC-006627

MARGARET E. GOSSMAN

APPELLEE

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

BEFORE: BARBER, GUDGEL, AND KNOPF, JUDGES.

KNOPF, JUDGE: Douglas Kerr Gossman (Douglas) appeals from a judgment of the Jefferson Family Court dissolving the marriage between him and Margaret E. Gossman (Beth). In particular, he argues that the trial court improperly allocated all of the marital debt to him. He contends that this burden, coupled with his obligation to pay Beth for half of the marital assets awarded to him as well as maintenance and child support, was manifestly unfair. Under the circumstances, we find that the trial court's findings of fact and conclusions of law were supported by substantial evidence and its allocation of marital assets and

debt does not constitute an abuse of discretion. However, we agree with Douglas that the trial court did impose an unduly high standard for him to trace his non-marital property into the purchase of the marital residence. Hence, we affirm in part, reverse in part, and remand for further findings to restore Douglas's non-marital contribution.

Douglas and Beth were married in 1984. One child was born of the marriage. Douglas is a self-employed businessman whose primary source of income has been a restaurant and catering business known as the Bristol Bar & Grille, Inc. (the Bristol). He has also been involved in a number of other business ventures and partnerships both before and during the marriage. While Beth earns income as a free-lance artist, she has not formally worked outside of the home since early in the marriage.

Beth filed a petition for dissolution of the marriage on July 1, 1999. Following extensive discovery and a hearing, the trial court issued findings of fact, conclusions of law, a judgment and a decree of dissolution on February 2, 2001. The trial court's order set out its findings regarding division of marital property and debt, restoration of non-marital property, child support, custody, and maintenance. In summary, the bulk of the marital assets consisted of the marital share of various business interests, including the Bristol. The trial court awarded all of these assets to Douglas, but it also ordered him to pay Beth a total of \$619,554.47 to equalize the division of

assets.¹ The trial court further directed that Douglas would be responsible for all of the debt accumulated during the marriage. In addition to child support, the court awarded Beth rehabilitative maintenance on a declining schedule over a period of five-and-one-half years.² Both parties filed motions to alter the findings of fact and conclusions of law, which the trial court substantially overruled. Douglas now appeals to this Court.

Douglas raises three issues on appeal. First, he argues that the trial court abused its discretion in assigning all of the debt to him without a corresponding adjustment to the division of marital property. According to the evidence submitted, the total amount of debt owed to various individuals and businesses is \$1,068,071.00. A large portion of this debt was incurred in a free-range-chicken business known as Wilson Fields. Douglas started Wilson Fields in 1993 with the support of outside investors. However, at a critical point in 1994, several potential investors withdrew and Douglas was forced to incur a substantial amount of personal debt to maintain the business. Ultimately, Wilson Fields became insolvent, and Douglas remained liable for approximately \$1,500,000.00. By selling off portions of his other businesses (including 18% of

¹The trial court allowed Douglas to make these payments over a period of six years, although it imposed interest at the post-judgment rate until it is paid in full.

² The court ordered Douglas to pay Beth \$2,000.00 per month for a period of six months from entry of the judgment. Thereafter, he must pay maintenance as follows: \$1,500.00 per month for a period of one year; \$1,000.00 per month for a period of two years; and \$500.00 per month for a period of four years.

his interest in the Bristol), Douglas was able to reduce this debt by about \$700,000.00. Much of the remaining debt is directly attributable to Douglas's other business ventures, and a considerable amount of that debt is owed to various partnerships involving Douglas's father.

In assigning all of the debt to Douglas, the trial court substantially relied on Bodie v. Bodie.³ In Bodie, this Court held that the presumption contained in KRS 403.190 that all property acquired during the marriage is marital does not apply to debts. Rather, the party claiming that a debt is marital has the burden of proof. In considering the nature of a debt, trial courts should look to factors such as receipt of benefits and the extent of participation.⁴

Several later cases by this Court came to the opposite conclusion, holding that the presumption contained in KRS 403.190 applies to marital debt as well as property.⁵ However, after the trial court's decision in this case, the Kentucky Supreme Court addressed the issue in Neidlinger v. Neidlinger,⁶ Specifically, the Supreme Court stated that this Court "got it right in Bodie v. Bodie", and held that there is no presumption that debts

³ Ky. App., 590 S.W.2d 895 (1979).

⁴ Id. at 896.

⁵ See Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992); and Daniels v. Daniels, Ky. App., 726 S.W.2d 705, 706-07 (1986).

⁶ Ky., 52 S.W.3d 513 (2001).

created during marriage are marital.⁷ Rather, the party claiming that a debt is marital has the burden of proof.⁸ In assigning debts incurred during the marriage, Neidlinger suggests that trial courts should consider receipt of benefits, the extent of participation, whether the debt was incurred to purchase assets designated as marital property, whether the debt was necessary to provide for the maintenance and support of the family, and any economic circumstances bearing on the parties' respective abilities to assume the indebtedness.⁹

Neidlinger specifically considered the status of a debt incurred between the time of separation and the entry of the decree of dissolution. However, the Court went further, holding that the same standards should apply to determining the status of all debts incurred during a marriage. The problem with this approach is that it conflates the issue of the nature of the debt with allocation of the debt. If a debt is non-marital, it is automatically assigned to the party who incurred it. Allocation becomes an issue only if the debt is marital. However, Neidlinger directs trial courts to consider, among other factors, "the economic circumstances of the parties bearing on their respective abilities to assume the indebtedness."¹⁰ Yet if the debt is otherwise marital in nature, a party's ability to pay

⁷ Id. at 522-23.

⁸ Id. at 523.

⁹ Id.

¹⁰ Id.

should not render it non-marital. This factor is relevant only to the allocation of the debt.

Neidlinger further holds that the allocation of marital property and debts is committed to the sound discretion of the trial court. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.¹¹ Abuse of discretion is considered to be an error of law, which the appellate court considers de novo.¹² Nevertheless, the discretionary decisions of the trial court must be accorded substantial weight, and are presumed to be correct if supported by some reasonable basis.

We have some reservations about the trial court's reasoning behind its allocation to Douglas of all of the Wilson Fields debt. The trial court did not make an express finding that the debt was marital or non-marital. However, the court did state that it was applying the now-overruled presumption that all debt incurred during a marriage is marital. In its initial order, the trial court stated that Douglas had agreed to take sole responsibility for all the debt without contribution from Beth. Yet somewhat inconsistently, the court stated in its order overruling Douglas's motion to reconsider that it assigned the debt to Douglas because Beth did not actively participate in the operation of Wilson Fields. Nevertheless, the trial court also stated:

¹¹ Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999). See also Kuprion v. Fitzgerald, Ky., 888 S.W.2d 679, 684 (1994); and City of Louisville v. Allen, Ky., 385 S.W.2d 179, 182 (1964).

¹² City of Louisville v. Allen, 385 S.W.2d at 184.

It was clear from the evidence submitted that, while Petitioner [Beth] may have acquiesced with the business ventures in general, she did not actively participate in them. There is no question that Respondent [Douglas] is a skilled businessman, and, at the very least, Petitioner put her trust and support in her husband's ability to initiate and maintain a successful business.

Contrary to the trial court's decision, Bodie does not hold that mere acquiescence is not enough to cause one party to bear the burden of sharing in the acquisition of a substantial amount of debt. Rather, Bodie and Neidlinger both emphasize that the court should consider the receipt of benefits and the extent of participation. On this latter element, the trial court measured Beth's participation in Wilson Fields as if she and Douglas were involved in a joint venture or a partnership. Thus, it deemed her lack of active participation in the business as evidence that she merely acquiesced in the investment or in Douglas's business decisions.

However, marital decision-making can seldom be evaluated using a business model. It is not unusual for one party to a marriage to defer to the other in financial matters. Moreover, had the business succeeded, it clearly would have been a marital asset. The trial court's holding seems to imply that the risk of a failed business investment is non-marital, but the benefit of a successful business investment is marital. Although Beth contends that she opposed Douglas's decision to assume large amounts of debt to maintain Wilson Fields, the trial court expressly found that Beth acquiesced in his business decisions. This finding strongly suggests that the debt was

marital despite the trial court's statement that Beth did not actively participate in the operation of the business.

Yet even assuming this debt to be marital, we cannot conclude that the trial court's allocation of the debt was arbitrary, unreasonable, or unsupported by sound legal principles. Although Beth acquiesced in Douglas's business decisions, he assumed the debt in his own name. Furthermore, the court awarded Douglas all of the income-producing property as well. Indeed, Douglas conceded that he is in the best position to ensure that the debt is paid.

Ultimately then, the central issue in this case involves the lump-sum amount which the trial court ordered paid to Beth to equalize the division of assets. In dividing the other marital property, the trial court considered and rejected the option of giving Beth an interest in Douglas's ongoing business concerns, such as the Bristol. The trial court concluded that giving Beth such an interest would subject her marital share to an unreasonable level of risk, and it would require the parties to entangle their financial affairs following the dissolution of their marriage. By requiring Douglas to make a lump-sum payment to compensate Beth for her marital interest, the trial court ensured that Beth would receive her fair share of the assets accumulated during the marriage without exposing her to unnecessary risk or to significant entanglements with Douglas's future business affairs.

Douglas contends that total annual payments set out by the trial court for property distribution, maintenance, and child

support significantly exceed his annual gross income. The trial court, however, was not convinced that Douglas's total obligations exceeded his income and other resources. In particular, the court expressed skepticism at his valuation of his business assets and his estimate of their potential profitability. The court stated that much of this evidence contradicted the values which Douglas originally submitted. The trial court was also unconvinced that the amount of debt which it assigned to Douglas was unduly onerous:

The Court notes that over one-half of the total debt is owed to Respondent's father. Testimony and evidence at trial established that there has been little movement to this point to pay down this debt. It was also clear to the Court that some of these debts are not necessarily new. Respondent testified to many instances of borrowing money from both his father and the business. Typically he would borrow more to pay off a previous debt, thereby creating even more indebtedness. Debts have been wrapped into other debts, as well as some being written off the books through the business as bad business debts. Taking all of this into consideration, the Court finds that Respondent's financial position pursuant to the court's Findings of Fact and Conclusions of Law is not so dismal as he would like us to believe.

The lump-sum payment which the trial court ordered places a significant burden on Douglas. However, the trial court found that this burden is not unreasonable given Douglas's resources, and we are bound by that determination absent a showing of abuse of discretion. Furthermore, Douglas's proposal - that he be awarded the bulk of the marital assets with only a minimal equalizing payment to Beth - fails to adequately compensate her for her interest in the marital property. Thus,

we must conclude that the trial court's decisions regarding allocation of marital debt and property were within its discretion given the evidence.

Nor do we find any error with the trial court's decision to require Douglas to pay the mortgage on the marital residence. At Douglas's request, the court awarded the marital residence to him. Obviously, he has the benefit of that asset as well as any equity which it accrues. The trial court did not clearly err in requiring him to assume sole responsibility for the mortgage as well.

Likewise, we find that the trial court did not abuse its discretion in awarding maintenance to Beth. Douglas does not dispute that Beth was entitled to maintenance based upon the requirements set out in KRS 403.200(1). Where a trial court's findings are supported by substantial evidence and sufficiently address the relevant factors set out in KRS 403.200(2)(a)-(f), an appellate court may not substitute its judgment for the trial court's regarding the amount and duration of maintenance.¹³

Douglas next argues that the trial court erred in declining to fully restore his non-marital property. Douglas first takes issue with the trial court's decision to disallow any credit for his non-marital interest in the marital residence on Middle Way. In 1976, before the parties were married, Douglas purchased a house on Alta Avenue in Louisville. He testified that he made a down payment of \$7,600.00 and financed the balance with a mortgage of \$30,400.00. He also made seven and one-half

¹³ Leveridge v. Leveridge, Ky., 997 S.W.2d 1, 2 (1999).

years of payments before the marriage. The parties resided there after their marriage in 1984.

In September 1990, the parties purchased the marital residence on Middle Way for \$203,000.00. Their down-payment of \$53,000.00 was made with a bridge loan, leaving the remaining mortgage of \$150,000.00. Douglas testified that they used the \$65,051.47 proceeds from the sale of the Alta Avenue house to pay off the bridge loan. In denying Douglas's request for a non-marital credit, the trial court found sufficient evidence to establish Douglas's non-marital interest in the Alta Avenue residence. However, the court concluded that there was insufficient evidence to trace those proceeds to the Middle Way residence. Douglas contends that he adequately traced his non-marital interest in the Alta Avenue house into the marital residence on Middle Way.

The concept of "tracing" is not expressly created by statute, but it is strongly implied. KRS 403.190(3) establishes a presumption that all property acquired during the marriage is marital property. The marital presumption, however, is rebuttable and may be overcome by a showing that the property was acquired by a method listed in KRS 403.190(2). A party claiming that property acquired during the marriage is other than marital property bears the burden of proof.¹⁴

Essentially, the tracing requirement simply means that "[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously

¹⁴ KRS 403.190(3), Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998).

owned property into a presently owned specific asset."¹⁵ If the claimant does so, then the trial court assigns the specific property, or an interest in specific property, to the claimant as his or her non-marital property. On the other hand, a claimant cannot meet the tracing requirement simply by showing that he or she brought non-marital property into the marriage without also showing that he or she has spent his or her non-marital assets in a traceable manner during the marriage. Under such circumstances, the trial court will not assign the property to the claimant as non-marital property, but it may consider non-marital contribution as a factor when it makes a just division of the parties' marital property.¹⁶

In Chenault v. Chenault,¹⁷ the Kentucky Supreme Court recognized that tracing to a mathematical certainty is not always possible, noting that: "[w]hile such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skill or persons who are imprecise in their record-keeping abilities."¹⁸ As a result, the Chenault court held that testimony alone may be sufficient to satisfy the

¹⁵ L. Graham & J. Keller, 15 Kentucky Practice, Domestic Relations Law § 15.10, p. 512 (2nd ed. West Group 2000).

¹⁶ See Brunson v. Brunson, Ky. App., 569 S.W.2d 173, 176 (1978); and Angel v. Angel, Ky. App., 562 S.W.2d 661, 664-665 (1978).

¹⁷ Ky., 799 S.W.2d 575 (1990).

¹⁸ Id. at 578.

tracing requirement. More recently, however, the Court has held that while Chenault relaxed the more draconian requirements for tracing, it did not do away with the tracing requirements altogether.¹⁹ Where the party claiming the non-marital interest is a skilled business person with extensive record keeping experience, the courts may be justified in requiring documentation to trace nonmarital assets into marital property.²⁰

In this case, there is no dispute that the equity which Douglas had accrued in the Alta Avenue house at the time of the marriage was non-marital. In its order denying Douglas's motion to reconsider, the court stated that, while Douglas's testimony alone might be sufficient to trace the proceeds of the Alta Avenue house into the Middle Way residence, it did not accept his testimony as credible without documentation. As a general rule, an appellate court must defer to such credibility determinations.²¹

Nonetheless, we have difficulty understanding the court's reluctance to believe that Douglas used the sale proceeds from the Alta Avenue house to pay the bridge loan on the Middle Way residence. In Terwilliger v. Terwilliger,²² there were specific reasons to doubt the husband's veracity. In that case, the husband claimed as non-marital \$200,000.00 which he had invested in his corporation. He testified that the funds

¹⁹ Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 821 (2002).

²⁰ Id.

²¹ CR 52.01.

²² *Supra.*

originated from the settlement of a lawsuit which arose prior to the marriage. However, he provided no documentation which directly showed the source of the funds used for the investment.²³

Although the trial court in that case found the evidence sufficient to trace the non-marital property into the corporation, the Supreme Court reversed. The Court noted that the lack of documentation was problematic considering the husband's business experience and the nature of the investment. In addition, the wife had testified that her husband had told her that the bulk of the settlement proceeds had been paid to another party. Furthermore, the Court noted that the husband had money flowing in and out of his various corporations from any number of sources, any of which could have been the source of the funds for the investment. Finally, the trial court in that case had already found that the husband had fraudulently concealed assets from the wife. Given this evidence, the Supreme Court was convinced that the setting aside of the \$200,000.00 to the husband was the result of a misconception by the trial court of the tracing requirements, rather than a finding that the husband was more credible than the wife in their conflicting testimony over the origin of the \$200,000.00.²⁴

Both Chenault and Terwilliger make it clear that the proof necessary to trace non-marital assets into marital property is dependent upon the facts and circumstances presented in the

²³ Id. at 819-20.

²⁴ Id. at 820-21.

particular case. In some situations, the imposition of strict tracing requirements "may promote marital disharmony by placing a premium on the careful maintenance of separate estates."²⁵ This concern may be overcome where the party claiming the non-marital interest reasonably would be expected to keep separate records of his or her business transactions. While we are reluctant to second-guess the trial court on this matter, we must conclude that this case falls into the former category.

Although Douglas is an experienced businessman, the transaction at issue was not the type about which a married couple would be expected to keep separate records. The parties were selling the Alta Avenue house, which Douglas had purchased before the marriage, and were purchasing a new residence together. It is common to use the proceeds from the sale of one residence to make the down-payment on another residence. Indeed, the trial court expressly found that the sale proceeds from the Alta Avenue house were used to pay off various loans, presumably including the bridge loan. Unlike the wife in Terwilliger, Beth did not contest Douglas's testimony regarding the source of the funds used to pay off the bridge loan. Finally, while the trial court had reason to be suspicious of Douglas's conflicting testimony and evidence regarding the value of other assets, the court gave no reason to doubt his testimony regarding the marital residence.

Consequently, we conclude that the trial court clearly erred in finding Douglas's testimony insufficient to trace his

²⁵Chenault, 799 S.W.2d at 578.

non-marital interest in the Alta Avenue house into the Middle Way residence. Douglas was entitled to a restoration of his non-marital property which he contributed to the purchase of the marital residence. This amount clearly includes the \$7,600.00 down payment, as well as any principal which Douglas paid on the Alta Avenue mortgage between the date of purchase and date of his marriage to Beth. However, any payments made on the Alta Avenue house after the date of the marriage would have been made with marital funds. Furthermore, Douglas did not assert before the trial court that any of the overall appreciation in value of the Alta Avenue house resulted from his non-marital contribution rather than general economic circumstances. Under the circumstances, therefore, he was not entitled to have any appreciation of the reduction of the mortgage payment on the Alta Avenue house included as his non-marital property.²⁶ On remand, the trial court shall calculate the non-marital credit to which Douglas is entitled and adjust the lump-sum payment accordingly.

Finally, Douglas argues that the trial court erred in its determination of his non-marital interest in the Bristol. At the time of the marriage, Douglas owned fifty percent of the Bristol. In 1988, he purchased the other fifty percent of the Bristol for \$515,535.90. And as discussed above, in 1998, the parties sold 18 percent of their interest in the Bristol. The parties stipulated that the value of the eighty-two percent interest in the Bristol is \$1,100,000.00. Of that amount, the

²⁶ See Travis v. Travis, Ky., 59 S.W.3d 904 (2001); and Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981).

court found that Douglas was entitled to a credit for his non-marital interest at the time of the marriage. The court found that the best evidence of this latter value was the amount paid by the parties in 1988 for the remaining fifty percent of the business - \$515,535.90. Of this amount, however, the court concluded that only \$377,433.06 was paid to the remaining partner for the actual value of the fifty percent interest in the Bristol. The remaining sums totaling \$138,102.84 were for such items as a covenant not to compete, a vehicle, and cancellation of debts. Based on these amounts, the trial court valued the marital interest in the Bristol at \$722,566.94. As a result, \$361,283.47 of the lump-sum payment represents Beth's interest in the Bristol.

Douglas asserts that this calculation does not adequately compensate him for his non-marital interest in the Bristol. However, upon reviewing the record, we cannot find that Douglas raised this issue while he was before the trial court. In his motion to alter, amend, or vacate the findings of fact and conclusions of law, he merely argued that the trial court should have included the additional \$138,102.84 to show the value of the Bristol at the time of the marriage. On appeal, he now asserts, essentially, the increase in value of his non-marital interest in the Bristol should remain his non-marital property.²⁷ Because

²⁷ Douglas correctly notes that the stipulated \$1,100,000.00 represents only 82% of the total value of the Bristol. If this amount is divided by 82%, a one-percent ownership of the Bristol would be worth \$13,414.63, and the total value of the Bristol would come out to \$1,341,463.41. Douglas contends that half of this amount (\$670,731.71) represents his 50% non-marital interest. Thus, he asserts that only the remaining \$429,268.29 value of the Bristol is

(continued...)

Douglas failed to request specific findings on this issue, we find that it is not properly preserved for appeal.²⁸

In conclusion, while we take issue with some of the trial court's reasoning regarding allocation of marital debts and assets, overall we cannot find any abuse of discretion in this aspect of the trial court's decision. The trial court's findings were supported by substantial evidence of record and will not be disturbed on appeal. Similarly, based upon the findings made by the trial court, we find that the total amount which Douglas must pay to Beth is not manifestly unreasonable. However, we conclude that the trial court did err in requiring Douglas to present documentary evidence to trace his non-marital interest in the Alta Avenue house into the Middle Way residence. As a result, we remand this matter to the trial court to determine the amount of the non-marital interest to which Douglas is entitled, and to adjust appropriately its division of the marital assets.

Accordingly, the judgment of the Jefferson Family Court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

ALL CONCUR

²⁷(...continued)
marital and subject to division.

However, Douglas does not contest the trial court's finding that the value of his 50% of the Bristol at the time of the marriage was \$377,433.06. In contrast, Douglas's calculation is based upon the current value of the Bristol. The increase in value of his non-marital interest could remain non-marital if it occurred through his sole efforts or general economic conditions rather than through the joint efforts of the parties. Travis v. Travis, 59 S.W.3d at 910-11. Because Douglas did not request such a finding, there was no reason for the trial court to disregard the presumption that the increase in the value of the asset was marital. Id. at 911-12.

²⁸ CR 52.04.

BRIEF FOR APPELLANT:

Richard H. Nash, Jr.
Richard H. Nash, Jr., PSC
Nash, Nash, Stoess & Chauvin
Louisville, Kentucky

BRIEF FOR APPELLEE:

B. Mark Mulloy
Mulloy & Mulloy
Louisville, Kentucky