

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000639-MR

GINA RENEE LAWRENCE

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 00-FC-006353

DAVID W. LAWRENCE

APPELLEE

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

BEFORE: BAKER, GUIDUGLI, AND KNOPF, JUDGES.

KNOPF, JUDGE: David and Gina Lawrence were married on August 12, 1995. Two children were born of the marriage. In August of 2000, David filed a petition for dissolution of the marriage. On February 29, 2001, the Jefferson Family Court entered a decree dissolving the marriage and reserving the additional issues of division of property and debt, maintenance, child custody and visitation, and attorney fees for further adjudication. After a period of extensive discovery, these matters came before the court for trial on November 1, 2001.

The trial court entered its judgment on January 2, 2002. Gina asserts that the trial court erred by assigning the marital residence and a closely-held corporation to David as his non-marital property. She also argues that the trial court abused its discretion in setting the amount and duration of maintenance, and in failing to require David to pay all of her attorney fees. We agree with Gina that the evidence did not support the trial court's finding that David had traced his non-marital assets into the purchase of the marital residence. Consequently, the trial court should not have assigned the residence to David without an offsetting award of other marital property to Gina. However, the trial court's finding that the corporation had no equity to be divided was supported by substantial evidence. Furthermore, the trial court did not abuse its discretion in its award of maintenance and attorney fees to Gina. Hence, we affirm in part, reverse in part, and remand for additional proceedings.

The court awarded sole custody of the children to David, with structured visitation by Gina. The trial court also ordered Gina to pay David \$187.00 per month in child support. Gina does not contest this portion of the trial court's judgment. Rather, Gina first argues that the trial court erred in its characterization and division of the marital property. Specifically, she contends that the trial court erred in finding

that David adequately traced his non-marital assets into the purchases of both Lawrence Aluminum Company and the marital residence. In the absence of documentary evidence, and in the face of other evidence showing considerable co-mingling of marital and non-marital assets, Gina asserts that the corporation and the residence should have been deemed marital and divided accordingly.

The facts surrounding the acquisition of these assets are not seriously in dispute. At trial, David testified concerning the source of the funds used to purchase the most-recent marital residence. In early 1995, before the parties were married, David purchased 100 shares of a company known as Kentuckiana Pizza, Ltd. In December 1995, David sold those shares of stock to Papa John's International in exchange for 9,337 shares of that corporation. David sold that stock, and, after payment of taxes, he realized a net profit of \$360,439.00.

In March 1996, the parties purchased a home in Florida for \$388,000.00. David testified that he used \$80,000.00 from the proceeds for the down payment on that house. He also testified that he contributed \$200,000.00 for improvements to that house, and that he used the remainder of the proceeds from the stock sale for living expenses. The parties also executed several mortgages to finance the purchase and the renovation of the Florida house. In July of 1998, the parties sold the

Florida house for \$890,000.00. After payment of the real estate commissions, mortgages and other expenses, they realized a net distribution of \$91,034.00 from that sale. David and Gina then returned to Louisville, and in November of 1998, they purchased the latest marital residence for \$322,000.00. As of the date of the judgment, the appraised value of the residence was \$340,500.00, and the total mortgages against the property were \$280,000.00, leaving a total equity of approximately \$60,500.00.

The trial court found that David had adequately traced his non-marital property to the purchase of the marital residence. As a result, the court found that any marital equity in the residence is insignificant, and it ordered Gina to execute a quit-claim deed to transfer her interest in the property to David. Gina argues that the trial court should have required David to present documentary evidence to support his tracing claim. In the absence of such evidence, and in the face of other evidence showing considerable co-mingling of marital and non-marital assets, Gina asserts that the corporation and the residence should have been deemed marital and divided accordingly. We agree.

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.¹

Essentially, the tracing requirement simply means that "[w]hen the original property claimed to be non-marital is no longer owned, the non-marital claimant must trace the previously owned property into a presently owned specific asset."² 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 the non-marital contribution as a factor when it makes a just division of the parties' marital property.³

¹ KRS 403.190(3), Brosick v. Brosick, Ky. App., 974 S.W.2d 498 (1998).

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

³ 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).

In Chenault v. Chenault,⁴ the Kentucky Supreme Court recognized that tracing to a mathematical certainty is not always possible, noting that: "[w]hile such precise requirements for non-marital 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."⁵ As a result, the Chenault court held that testimony alone may be sufficient to satisfy the 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.⁶ 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 non-marital assets into marital property.⁷

The trial court did not clearly err by accepting David's testimony regarding the source of the funds used to purchase the Louisville residence. The more fundamental problem is that David's testimony did not adequately trace his non-

⁴ Ky., 799 S.W.2d 575 (1990).

⁵ Id. at 578.

⁶ Terwilliger v. Terwilliger, Ky., 64 S.W.3d 816, 821 (2002).

⁷ Id.

marital contribution to that purchase. First, there was a substantial marital contribution made to the Florida residence. Although David contributed \$80,000.00 to the down payment and another \$200,000.00 for renovations, the parties jointly incurred additional mortgage loans of more than \$500,000.00. Mortgage loans that are incurred during the marriage and as a joint obligation of the parties constitute a marital contribution to the acquisition of real property. When the property acquired during the marriage includes an increase in the value of an asset containing both marital and non-marital components and the increase in value is the result of the joint efforts of the parties, generally the increase in value will be deemed to be marital property.⁸

However, the trial court held that all of the proceeds from the sale of the Florida residence could be traced to David's non-marital contribution. At most, David was entitled to be restored to a share of those proceeds which was equivalent to a proportionate share of his non-marital contribution. Furthermore, we agree with Gina that David substantially co-mingled his non-marital contribution in the Florida residence with the marital contribution. Indeed, the mortgage loans against that property far exceeded David's contributions, and

⁸ See Travis v. Travis, Ky., 59 S.W.3d 904, 909-11 (2001).

the net proceeds from the sale amounted to about a third of his contributions. As a result, it is difficult to trace any of those proceeds to David's contribution of non-marital property.

Finally, David testified that he used \$55,000.00 for a down-payment on the Louisville residence, and used the remaining \$40,000.00 for living expenses. Thus, even if some portion of the proceeds from the sale of the Florida residence could be traced to David's non-marital contributions, that non-marital portion cannot be clearly traced into the purchase of the Louisville residence. Consequently, the trial court erred in awarding the marital residence to David as his separate, non-marital property.

We also agree with Gina that the trial court erred in finding that David used non-marital assets to purchase Lawrence Aluminum Company. While living in Florida, David acquired a 19% stock interest in a company known as Peninsula Pizza. He sold that stock in January of 1999 for \$148,000.000. When the parties returned to Louisville, David purchased all of the stock of his family's business, Lawrence Aluminum Company, for \$25,000.00. Thereafter, he made personal loans to the corporation in the amount of \$165,500.00. David testified that he used the proceeds from the sale of the Peninsula-Pizza stock for both the purchase and the loans. David also testified that the corporation repaid most of these loans prior to the parties'

separation. After the parties separated, the corporation became insolvent and filed for bankruptcy

Clearly, the stock which David acquired during the marriage was marital property. The proceeds from the sale of that stock were likewise marital, as were the funds which David used to invest in the company. Consequently, the trial court erred in finding that David's investment in Lawrence Aluminum was non-marital

Nevertheless, the trial court's error in this respect was harmless. The trial court also found that Lawrence Aluminum Company was in Chapter 11 bankruptcy and had no equity which could have been divided. Although Lawrence Aluminum was still operating and it still employed David, there was no evidence that David's ownership interest had any value. Consequently, there was no marital equity for the trial court to divide.

Gina next takes issue with the trial court's award of maintenance. The trial court ordered David to pay Gina maintenance in the amount of \$500.00 per month until the death of either party, Gina's re-marriage or co-habitation, the expiration of eighteen months, or until further order of the court. Gina asserts that this amount and duration of this award was inadequate as a matter of law.

Under KRS 403.200, a court awarding maintenance must find that the recipient has insufficient income, either from

property or employment, to meet his or her reasonable needs. In determining the amount and duration of maintenance, the court must consider the factors set out in KRS 402.200(2). Our standard of review regarding an award of maintenance is that of abuse of discretion. In particular, the amount and duration of maintenance is within the sound discretion of the trial court.⁹ As an appellate court, this Court is not authorized to substitute its own judgment for that of the trial court on the weight of the evidence, where the trial court's decision is supported by substantial evidence.¹⁰ In this case, the trial court's factual findings support its determination of the amount and duration of maintenance.

First, the trial court found that Gina has no income or income-producing property. Furthermore, the court found that Gina is not currently employable in her profession as a registered nurse. Accordingly, the trial court declined to impute any income to her. However, the court also found that Gina is not actually incurring many of the living expenses which she claimed. In addition, the court assigned all of the marital debt to David. The court also granted David sole custody of the

⁹ Gentry v. Gentry, Ky., 798 S.W.2d 928, 937 (1990); Combs v. Combs, Ky. App., 622 S.W.2d 679, 680 (1981), *citing* KRS 403.200(2), Browning v. Browning, Ky. App., 551 S.W.2d 823 (1977), and Russell v. Russell, Ky. App., 878 S.W.2d 24, 26 (1994).

¹⁰ Leveridge v. Leveridge, Ky., 997 S.W.2d 1 (1999).

children, with only a minimal contribution of child support by Gina. Thus, the trial court could not precisely determine the amount of Gina's reasonable needs.

Moreover, Gina presented no expert testimony substantiating her claim of mental illness. While the trial court accepted Gina's testimony on this matter, it also found that she was unemployable in her chosen profession due to her chemical dependency problem and her recent convictions for drug-related offenses. Rather than award Gina maintenance for an indefinite period of time, the court limited its award to eighteen months. However, the court reserved the right to extend this award ("or until further order of court") should Gina demonstrate that additional maintenance will assist in her rehabilitation and not simply enable her drug dependency. Under the circumstances, we cannot conclude that the trial court abused its discretion in setting the amount and duration of Gina's maintenance.

Finally, Gina argues that the trial court's allocation of attorney fees was inadequate as a matter of law. The trial court ordered David to contribute \$2,400.00 toward her attorney fees, out of a total of \$3,400.00. Gina notes that David has an annual income of \$70,000.00, while she has no income or other resources. Given the substantial disparity in resources, Gina

asserts that the trial court should have ordered David to pay all of her attorney fees.

David first responds that the issue of attorney fees is not properly before this Court because Gina failed to name her attorney as a party to this appeal. However, the attorney is an indispensable party to an appeal only when the trial court has ordered the fees to be paid directly to the attorney.¹¹ In this case, the trial court ordered David "to contribute the sum of \$2,400.00 toward [Gina's] attorney's fees", and not directly to Gina's attorney. Consequently, Gina's attorney is not a necessary party to this appeal.¹²

KRS 403.220 authorizes a trial court to order one party to a divorce action to pay a "reasonable amount" for the attorney fees of the other party, but only if there exists a disparity in the relative financial resources of the parties in favor of the payor. But even if a disparity exists, the amount of fees is within the sound discretion of the trial judge.¹³ The trial court is in the best position to observe conduct and

¹¹ Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513, 518-19 (2001).

¹² Id. at 519.

¹³ Id. citing Wilhoit v. Wilhoit, Ky., 521 S.W.2d 512, 514 (1975). "If there had ever been any doubt regarding the discretionary authority of the trial court to allocate court costs and award an attorney's fee, KRS 403.220 laid that doubt to rest once and for all. As matters now stand, an allocation of court costs and an award of an attorney's fee are entirely within the discretion of the court".

tactics which waste the court's and attorneys' time and must be given wide latitude to sanction or discourage such conduct.¹⁴ Given the circumstances of this case, we cannot find that the trial court abused its discretion by requiring Gina to assume responsibility for some of her attorney fees.

Gina also asserts that the trial court abused its discretion in allowing David to pay her attorney fees in monthly installments of \$150.00 for sixteen months. However, we find no indication in the record that Gina raised this objection while she was before the trial court. Consequently, this issue is not preserved for review.

Accordingly, the trial court's judgment of January 2, 2002, is reversed insofar as it awarded the marital residence to David without compensating Gina for her marital interest. This matter is remanded to the Jefferson Family Court for a re-allocation of the marital assets as set out in this opinion. In all other respects, the trial court's judgment is affirmed.

ALL CONCUR.

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¹⁴ Gentry v. Gentry, Ky., 798 S.W.2d 928, 938 (1990).