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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000142-MR

JULIE ROSE DENTON — APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 99-FC-007997

THOMAS G. ROSE, SR. — APPELLEE

AND

NO. 2003-CA-000143-MR

THOMAS G. ROSE, SR. — CROSS-APPELLANT

CROSS-APPEAL FROM JEFFERSON FAMILY COURT
v. HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 99-FC-007997

JULIE C. DENTON; DIANA SKAGGS
AND B. MARK MULLOY — CROSS-APPELLEES

AND

NO. 2003-CA-000545-MR

JULIE DENTON APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH O'REILLY, JUDGE
ACTION NO. 99-FC-007997

THOMAS G. ROSE, SR. APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: SCHRODER AND TACKETT, JUDGES; EMBERTON, SENIOR JUDGE.[1]

EMBERTON, SENIOR JUDGE. This case arises from an action for dissolution of marriage. Both parties appeal the trial court's division of the sizable marital estate. Thomas Glenn Rose also appeals the trial court's award of attorney's fees to Julie Denton. We affirm.

The parties were married on August 13, 1983, and were divorced in November 2000. Three children born of the marriage are in Julie's custody by agreement. Tom works at Coin Phone Management, a business owned by the parties, and in 2001 earned

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

approximately $235,000. Julie is a State Senator and is employed part-time as a dental hygienist earning approximately $38,885 per year.

DISSIPATION OF MARITAL ASSETS

Shortly after the parties' separation, on October 11, 1999, an order was entered in Jefferson Family Court restraining Tom from disposing of, or damaging, any property of the parties. On February 22, 2000, the parties confirmed in court their agreement that $126,000 of their assets transferred by Tom to a Morgan Keegan account would not be transferred without the joint signature of the parties or a court order. In March of that same year, another order was entered prohibiting either party from dissipating, disposing of, or encumbering any asset of any kind or character in which either party has an interest. Despite these orders, Tom moved marital assets, encumbered marital property, gave money to charity and family, and invested on margin accounts resulting in significant losses to the marital estate. Specifically, the family court found he dissipated marital assets through stock trading in the following amounts and assigned the amounts to Tom's share of the marital assets:

Morgan Keegan Acct. #16072076 - $116,471.94
First Alliance/Westminister - $40,140.36
Morgan Keegan IRA/Am. Funds - $12,095.93
Kaufman Brothers Stock - $4,502.00
National Electronics Tech. - $17,845.00

Tom contends that the trial court erred when it found he dissipated marital assets. Although he does not deny that marital funds were transferred to his sole name and that he unilaterally invested and lost the amounts as found by the family court, he counters that he did so to support Julie and the children. He points out that the business was struggling for financial survival and on the advice of his stockbroker he invested in what turned out to be a struggling stock market. A court may find dissipation when marital property is expended:

> (1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one spouse of her proportionate share of the marital property.[2]

In Brosick, the court rejected the contention that a party must show dissipation by clear and convincing evidence. Instead, the spouse alleging dissipation is required to present evidence establishing dissipation and then the burden of going forward with the evidence is on the spouse charged with dissipation.[3]

The assets Tom dissipated were not expended on support of his family. Although he might have been motivated to increase his net worth, this does not legally excuse the act of

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[2] Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 500 (1998).

[3] Id. at 502.

intentionally violating previous court orders and unilaterally investing marital assets that decreased the amount to which Julie is entitled. The family court's findings are supported by substantial evidence.

There is also sufficient evidence to support the finding that non-marital expenses were paid, not from his income, but from marital assets. He gave $11,446 in marital funds to Southeast Christian Church, $6,038 in excess of the couple's customary donation; spent $11,578.60 on a private investigator; and, paid $4,681.62 to his sister's attorney. Additionally, the evidence revealed that Tom received various investment proceeds without informing Julie. These amounts were properly included in Tom's marital share.

Julie argues that the family court, while correctly finding that Tom dissipated the assets specified, failed to include $110,000 traceable to a 1999 marital tax refund. The family court found that there was a $170,000 refund for a 1999 tax overpayment. Although Tom contends that this was a Coin Phone Management Company asset, it was paid to him. He placed it in a personal Morgan Keegan investment account, and lost all but $60,000. The Coin Phone Management Company is a marital asset owned exclusively by the parties and is a Subchapter S corporation taxed on Tom and Julie's return. The tax refund was

marital property.[4] Julie contends that Tom dissipated the marital asset and that in addition to receiving one-half of the remaining $60,000, the family court should also have assigned the $110,000 loss to Tom's share of the marital property division. The loss of the $110,000 was the result of Tom's engaging in risky margin trading, the same conduct that the court held dissipated other marital assets. But the question remains whether the family court, having found that Tom dissipated $110,000 of marital funds, was required to include the amount in his marital share or retained discretion to divide it as marital property in just proportions.[5] In Robinette v. Robinette,[6] the court noted that although KRS 403.190 does not make reference to the dissipation of marital assets, the courts have recognized a court's discretion in fashioning an equitable remedy, but that in dividing marital property dissipation is only a factor to be considered.[7] The same principle was recognized in Brosick, supra, where the court held that the court has "authority to fashion equitable relief where a party has dissipated marital property. . . ."[8] The dissipation of assets is a factor to be considered by the court in the division

[4] Kentucky Revised Statutes (KRS) 403.190(3).

[5] KRS 403.190(1).

[6] Ky. App., 736 S.W.2d 351 (1987).

[7] Id. at 354.

[8] Id. at 501.

of marital assets. On review, this court must look at the entire marital distribution to determine if the factors contained in KRS 403.190 have been applied and whether the resulting division is equitable. We find that although Tom's marital share could have included the $110,000 lost from the Morgan Keegan account, we find nothing that mandated the court to make such a finding, and in view of the entire property distribution, it was not an abuse of discretion.[9]

CAPITAL LOSS CARRY FORWARD

Related to the dissipation of assets, Julie contends that she should have been awarded the value of a capital loss carry forward in the amount of $40,000 created by stock trading losses incurred by Tom in 2000. We agree with Julie that the tax benefit created by the stock losses is a marital asset.[10] But under the applicable provisions of the Internal Revenue Code, tax loss carryovers cannot be split between former spouses once they begin filing separately and must be deducted only on the return of the spouse who actually had the loss, in this case Tom.[11] We find no error.

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[9] Ghali v. Ghali, Ky. App., 596 S.W.2d 31 (1980).

[10] See Finkelstein v. Finkelstein, 701 N.Y.S.2d 52 (N.Y. App. Div. 2000), holding that a capital loss carry forward is a marital asset.

[11] Calvin v. U.S., 354 F.2d 202 (10th Cir. 1965).

SALE OF THE MARITAL RESIDENCE

Julie contends that the trial court erred when it ordered the marital residence sold to a third party. The house sold for $365,000, $30,000 less than appraised. After Julie's remarriage in December 2000, the marital residence was ordered to be listed for sale and prior to the hearing, an offer was made and the property placed under contract. Julie contends that she offered to purchase the residence and would have paid the entire appraised amount but cites to no order in the record denying her offer and we can find none. The marital residence was heavily encumbered and Julie remarried shortly after the dissolution decree was entered. Julie was awarded all the equity in the residence and Tom the property tax debt. Under the circumstances, we find no abuse of discretion in ordering the sale of the residence.

AWARD OF ATTORNEY'S FEES AND COSTS

Both parties have heavily litigated this case resulting in large attorney's fees and costs. As of September 2001, Tom had incurred $84,972.12 and Julie $154,634.03, with $66,402.65 being owed her first attorney, Mark Mulloy. The family court ordered that Tom pay $40,000 toward the fees of Mulloy and $40,000 toward the fees of her second attorney, Diana Skaggs. It further ordered that Tom pay 83% of the attorney's fees for the children's Guardian Ad Litem.

The family court, in listing the parties' marital debts and assets, listed the $40,000 owed Mulloy as a marital debt. Julie argues that an award of attorney's fee is separate from a marital debt and the court's characterization constitutes reversible error. Contrary to Julie's claim there is no indication that the court's inclusion of this amount as a marital debt negated its intent to achieve a just distribution of the property. The court, for purposes of clarity, summarized the entire property distribution in a table. It is apparent from the court's finding in conformity with KRS 403.220 it understood the nature of an award of attorney's fees and costs as a consideration separate from the division of marital property. Any error is harmless.

Tom was ordered to pay $80,000 in attorney's fees and costs and 83% of the Guardian Ad Litem fee. The trial court found that Tom's income greatly exceeded Julie's and much of the litigation expenses were incurred as a result of Tom's resistance to discovery requests. An award of attorney's fees and costs is within the broad discretion of the trial court.[12] Relative to Tom's income, Julie has little employment income but was awarded over one million dollars in assets. We find no abuse of discretion in the amount of attorney's fees awarded.

[12] Neidlinger v. Neidlinger, Ky., 52 S.W.3d 513 (2001).

FINAL DIVISION OF MARITAL PROPERTY AND DEBT

A trial court is required to divide marital property without regard to marital misconduct in just proportions considering all relevant facts.[13] The statute does not require that the marital property be divided equally.[14]

Julie contends that the award of $1,161,172.74 to Tom and $1,106,681.77 to her in marital assets is an abuse of discretion. Tom contends that Julie's figures are inaccurate and the difference in the estates is only $11,975. The discrepancy in the parties' relative calculations arises from Julie correctly including the amount of the assets dissipated as assets; from Tom's erroneous classification of these amounts as debt; and from mathematical miscalculation. Even using Julie's proposed figure, $60,000, given the evidence and the complexity and size of the total estate we cannot say that the court abused its discretion. Although Tom's margin trading activities and accumulation of debt during the pendency of this action is not condoned, over $200,000 of the assets attributable to his marital property award is the result of the dissipation of assets and no longer exists. And he is responsible for the majority of the parties' debt. We find no abuse of discretion.

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[13] KRS 403.190; Brosick, supra.

[14] Russell v. Russell, Ky. App., 878 S.W.2d 24 (1994).

There is no merit to Tom's argument that the family court should have used the June 2000 purchase price when valuing a home he purchased at 4502 Wolf Spring Drive. It was within the court's discretion to accept the appraisal produced by Julie valuing the property at $290,000, $30,000 over the purchase amount as of the date of the hearing.[15]

MISCELLANEOUS FACTUAL ISSUES

This has been a vigorously fought dissolution action by both parties and involves a sizeable marital estate and significant debt. In conformity with the history of this case, the parties have raised numerous issues in an attempt to deprive each other of as much property as possible. We find no merit in the remaining issues. The objective of our property division statute is to obtain a just distribution. We have reviewed the record and find that the family court properly applied the law and its factual findings are not clearly erroneous.

The judgment in all respects is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT JULIE ROSE DENTON:	BRIEF FOR APPELLEE THOMAS G. ROSE, SR.:
Diana L. Skaggs Sandra Ragland DIANA L. SKAGGS & ASSOCIATES Louisville, Kentucky	Victoria Ann Ogden OGDEN & OGDEN Louisville, Kentucky

[15] Culver v. Culver, Ky. App., 572 S.W.2d 617 (1978).