

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002101-MR
and
NO. 2004-CA-002111-MR

MAMDOUH ALI

APPELLANT/CROSS-APPELLEE

v. APPEAL AND CROSS-APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JO ANN WISE, JUDGE
ACTION NO. 03-CI-01827

FATEN SAFI (ALI)

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND
REMANDING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹
BUCKINGHAM, SENIOR JUDGE: Mamdough Ali appeals and Faten Safi cross appeals from a divorce decree entered by the Fayette Circuit Court, Family Division, on August 10, 2004. The issues relate solely to the disposition of the property. We affirm in part, reverse in part, and remand.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Both Ali and Safi are from Jordan. They were married on September 24, 1995. During their marriage, the couple had two children. On April 28, 2003, Ali filed a petition for dissolution of marriage in the Fayette Circuit Court, Family Division.

Ali came to the United States many years prior to meeting Safi. He developed various business interests both prior to the marriage and after the marriage. His occupation involves operating his business enterprises. Safi, who has difficulty speaking English, was involved in running the Ali household and raising the children.

The parties reached agreements as to child custody, child support, and visitation. They did not arrive at an agreement as to the extent or division of the marital estate. The dispute revolved around the various business interests Ali developed and ran both prior to and during the marriage.

In March 1993, Ali and two other individuals created AAM, Inc. Each of them owned a one-third interest in the corporation. Through AAM, the parties operated Subway franchises in the Lexington area. Prior to Ali's marriage to Safi in 1995, AAM acquired three Subway stores.

After Ali and Safi married, Ali and one of the two AAM shareholders bought out the third shareholder's one-third interest. Ali presented no evidence as to the source of the

funds used to purchase his share of that interest. In light of this transaction, Ali held a one-half interest in AAM at the time he and Safi divorced.

In addition to his business interests in Lexington, Ali and one of his associates acquired Subway franchises in Cleveland, Ohio. Setting up a new corporation, Ali and his associate purchased their first Subway in Cleveland in 1994. This was prior to his marriage to Safi. In 1996, following his marriage to Safi, Ali and his associate purchased a second Subway franchise in Cleveland. In order to oversee the operation of the Cleveland Subway franchises, Ali established his residence in Cleveland.

Although Ali and Safi married in 1995, Safi did not move to the United States until 1997. At that time, she joined Ali in Cleveland. Thereafter, the couple decided to move to Lexington. By 1999, Ali had sold his interests in both Cleveland Subway franchises. He and Safi then purchased their home in Lexington. Ali contends that the \$63,000 down payment on the residence was derived from the sale of his interests in the Cleveland Subway franchises.

After filing his petition for dissolution of marriage in April 2003, Ali claimed nonmarital interests in several pieces of property. First, he claimed the \$63,000 down payment on the residence should be treated as nonmarital when dividing

the equity in the marital home. Second, he argued that AAM should be treated as a nonmarital asset in its entirety.

Safi alleged that Ali dissipated marital funds by sending large sums of money home to Jordan. The court found that Ali sent over \$164,000 to Jordan during the period from 1996 to 2003. Safi also presented evidence contesting Ali's claim as to his yearly income. The court determined Ali's income to be \$64,720 a year.

In the decree of dissolution, the court determined that Ali did not have a nonmarital interest in AAM. The court also concluded that Ali did not have a nonmarital interest in the marital residence. As for Safi's dissipation claim over the funds Ali sent home to Jordan, the court found "there has been no dissipation of marital assets due to the overseas transfers." As a result of the court's distribution of property, Ali received \$122,465 of the marital estate, and Safi received \$116,893.² After the court denied Ali's motion to alter, amend, or vacate, Ali filed an appeal and Safi filed a cross-appeal from the decree.

Ali's first argument is that the court erred in determining that AAM was entirely marital property and that he had no nonmarital interest in it. As we have noted, AAM was

² Safi also received a maintenance award, which was not appealed by either party.

established as a corporation in March 1993. The assets of the corporation consisted of three Subway stores in the Lexington area, all of which were owned by the corporation prior to the marriage of Ali and Safi in 1995. Further, while Ali owned a one-third interest in the corporation when it was formed, he and one of the shareholders purchased another one-third interest from another shareholder in 1997, subsequent to the marriage. Ali presented no evidence concerning the details of this transaction, nor did he present any evidence as to the source of the funds used to purchase his share of this additional interest in AAM. Further, neither party presented evidence as to the value of Ali's interest in AAM at the time of marriage.

In dividing marital property, a trial court must characterize each item of property as marital or nonmarital, assign each party's nonmarital property to that party, and equitably divide the marital property between the parties. See Sexton v. Sexton, 125 S.W.3d 258, 264-65 (Ky. 2004). When an item of property has both marital and nonmarital components, the court must determine the parties separate nonmarital and marital interests on the basis of the evidence before it. Id. at 265, quoting Travis v. Travis, 59 S.W.3d 904, 909 (Ky. 2001).

Ali clearly had a nonmarital interest in AAM. The evidence was uncontested that he owned a one-third interest in AAM when he married Safi and that the corporation owned three

stores at that time. Therefore, we agree with Ali that the court erred in not separating the value of his nonmarital interest as of the date of marriage and assigning that value to him as nonmarital property. See Sexton, supra.

As we have noted, however, the record demonstrates that the parties did not offer evidence as to the value of Ali's interest in AAM on the date of marriage. Yet the trial court is charged with determining a value of this asset at the time of marriage and assigning that value to Ali as his nonmarital property. This court addressed this dilemma in Robinson v. Robinson, 569 S.W.2d 178 (Ky.App. 1978), *reversed in part on other grounds by* Brandenburg v. Brandenburg, 617 S.W.2d 871, 873 (Ky. 1981). This court held in Robinson that:

If the parties come to the end of their proof with grossly insufficient evidence on the value of the property involved, the trial court should either order this proof to be obtained, appoint his own experts to furnish this value, at the cost of the parties, or direct that the property be sold.

Id. at 180. Where the circumstance is found to exist on appeal, the remedy is to vacate and remand for further evidence as to the value of the asset on the date of marriage. See Marcum v. Marcum, 779 S.W.2d 209, 211 (Ky. 1989). See also Goderwis v. Goderwis, 780 S.W.2d 39, 40-41 (Ky. 1989).

Having determined that Ali was entitled to his nonmarital interest in AAM at the time of marriage, we now turn to whether he is entitled to any increase in that interest that occurred after the marriage. KRS³ 403.190(3) provides that all property acquired by a spouse "after marriage and before a decree of legal separation is presumed to be marital property." In Terwilliger v. Terwilliger, 64 S.W.3d 816, 820 (Ky. 2002), this court held that "[a] party claiming that property acquired during the marriage is other than marital property, bears the burden of proof." Id. at 820. As Ali failed to rebut the presumption that any increase in AAM acquired after the date of marriage is marital, on remand the court shall consider this portion of the value as marital property.

The second issue raised by Ali on appeal concerns the court's division of the marital estate should this court determine, as we have, that AAM was improperly classified as a wholly marital asset. Ali argues that the trial court should be required to reconsider its distribution of the marital estate in light of the removal of the value of AAM. Safi's response rests heavily on her assertion that the court did not err in its classification of AAM as a marital asset. She also stresses that Ali failed to present sufficient evidence of tracing. However, that argument applies only to the portion of AAM's

³ Kentucky Revised Statutes.

value that was acquired after the 1995 marriage and to any increase in Ali's original one-third interest held at the time of marriage. The tracing argument does not apply to the nonmarital interest that existed at the time of marriage.

KRS 403.190(1) provides that the court shall divide marital property in "just proportions." The court found that AAM had a value of \$95,000, and it assigned that property to Ali in the property division portion of the decree. We cannot speculate as to what portion of this value the trial court might determine to be Ali's nonmarital property when it hears evidence on remand. However, after Ali's nonmarital interest in AAM is assigned to him, the property division may become skewed in favor of Safi as Ali argues. Therefore, we agree with Ali that the court must again divide the marital assets in "just proportions" after it assigns Ali his nonmarital interest in AAM.

Ali's third argument is that the court erred in not assigning him a nonmarital interest in the marital residence. He claims that the \$63,000 down-payment on the residence came from the sale of the two Cleveland Subway stores. One of the stores was purchased after his marriage to Safi. As for the other store, Ali did not submit sufficient evidence to demonstrate that any of the down-payment came from the sale of

that store. Instead, he argued that the funds had to come from that source since Safi did not work outside the home.

All property acquired by spouse "after marriage and before a decree of legal separation is presumed to be marital property." KRS 403.190(3). The burden was on Ali to prove that he had a nonmarital interest in the residence. See Terwilliger, supra. Ali argues that the tracing of nonmarital property does not need to be excessively stringent. See Chenault v. Chenault, 799 S.W.2d 575 (Ky. 1990). The court obviously determined that Ali did not meet his burden. We find no error or abuse of discretion in this regard.

In her cross-appeal, Safi argues that the court erred in failing to establish dissipation of assets relating to funds Ali sent to Jordan during the course of the marriage. As we have noted, the court found that Ali transferred \$164,000 to Jordan during the period from 1996 to 2003. The court further found that these transfers did not amount to a dissipation of assets. Ali contended that he sent money home to his family in Jordan as had been his practice well before his marriage to Safi. He stated that these transfers of money were made under the cultural and religious obligation of assisting with the support of one's extended family.

Kentucky law allows the court to require the parties "to account for marital property improvidently spent."

Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky.App. 1987).

Dissipation, the spending of marital funds for nonmarital purposes, can be established by showing that "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's spouse of his or her proportionate share of marital property." Id. Once the spouse alleging dissipation has established the above elements, the burden of going forward falls on the spouse charged with dissipation. See Brosick v. Brosick, 974 S.W.2d 498, 502 (Ky.App. 1998).

Safi presented no evidence that the transfers were made in contemplation of dissolution or during separation. In addition, she made no showing that the intent of the transfers was to deprive her of her proportional share of the marital estate. Under these circumstances, we cannot say that the court committed reversible error when it found that "there has been no dissipation of marital assets due to the overseas transfers."

Finally, Safi argues that the court erred by not including "the dissipated funds and other undisclosed assets" in the marital estate. In addition to the \$164,000 that was sent to Jordan, Safi alleges that Ali failed to account for large sums of money, including \$667,000 that she claims were advanced to him from the businesses in which he had ownership interests.

At the trial, Ali submitted tax returns suggesting that he made \$22,000 a year. Safi's expert witness presented evidence suggesting that Ali likely made over \$109,000 annually. Based on the evidence before it, the court determined Ali's annual income to be \$64,720.

As for the \$164,000, we have affirmed the court's determination that there was no dissipation of assets in this regard. As to the remaining amounts of what Safi claims to be "undisclosed assets," we fail to see where the court made a finding in this regard.⁴ Further, Safi has not noted in her brief how she preserved any error that may have been committed in this regard.⁵ Finally, Safi has not pointed to specific evidence which would compel us to reverse the trial court on this issue.

The decree of the Fayette Circuit Court, Family Division, is affirmed in part, reversed in part, and remanded.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

David N. Zorin
Lexington, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Donald D. Waggener
Lexington, Kentucky

⁴ See Kentucky Rules of Civil Procedure (CR) 52.04.

⁵ See CR 76.12(4)(c)(v).