

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001244-MR

CHARLES W. BIGGS

APPELLANT

v. APPEAL FROM CARTER FAMILY COURT
HONORABLE KRISTI HOGG GOSSETT, JUDGE
ACTION NO. 04-CI-00097

SANDRA BERNICE BIGGS AND
HON. MALENDIA HAYNES

APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON,¹ SENIOR JUDGE.

SCHRODER, JUDGE: This is an appeal from a judgment in a domestic case dividing the parties' property and debt, and awarding maintenance and attorney fees to appellee. Upon review of the record, we affirm the judgment in all respects except for the award of the bedroom suite and bedding to Sandra. We

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.

reverse the family court's award of the bedroom suite and bedding and remand for such property to be awarded to Charles.

Charles and Sandra Biggs were married in April of 2000 and, at the time of the marriage, Charles was 54 years of age and Sandra was 55. Charles petitioned for dissolution of marriage in 2004. At the time of the divorce, Charles was retired from AK Steel and was receiving \$1,122 per month in pension benefits. He was also employed by his son at Tri State Auto Mart earning \$3,000 a month. Additionally, Charles receives \$833 month for properties sold under land contract. The family court found Charles' gross monthly income to be \$4,950, and his monthly expenses to be \$4,193.

At the time of the marriage, Sandra was working two days a week at a hospital. Due to work injuries, Sandra retired from her job in September of 2000 and receives a total of \$858 per month in social security disability benefits and retirement income from her previous employer. This is Sandra's sole source of income. Since the date of the marriage, Sandra has also been diagnosed to be suffering from dementia. The court found Sandra's monthly expenses to be \$1,345.

In the court's findings of fact, conclusions of law, and judgment entered on February 9, 2005, the family court awarded Sandra \$14,082 for her interest in the marital residence valued at \$276,000 with a mortgage of \$193,651. Sandra was also

awarded \$25,000 for her interest in certain golf course property valued at \$100,000 with no mortgage. As for personal property, Sandra was awarded a 1995 Chrysler vehicle, a curio, the parties' bedroom suite and bed linens. Charles was ordered to pay \$8,801 in credit card debt, \$3,000 in attorney fees for Sandra, and \$350 a month in maintenance for a period of 3 years. Charles thereafter filed a motion to alter or amend the judgment. On May 18, 2005, the court entered an order modifying the February 9, 2005 judgment, reducing the amount of Sandra's interest in the marital residence to \$11,004. This appeal by Charles followed.

At the outset we note that no appellee brief was filed by Sandra in this case. Accordingly, pursuant to CR 76.12(8)(c)(i), this Court must accept Charles' statement of the facts and issues as correct. Whicker v. Whicker, 711 S.W.2d 857 (Ky.App. 1986). However, where the appellant's statement of facts conflicts with the findings of fact by the trial court, this Court may accept the appellant's statement of facts only if it adjudges the trial court's findings to be clearly erroneous. Id.

Charles' first argument is that the family court erred in awarding Sandra a marital interest in the golf course property. The property was purchased by Charles in 1996 along with his then wife, Christine. When Charles and Christine

divorced, the property remained in both of their names. After Charles and Sandra were married, Charles purchased Christine's interest in the property for \$56,000. The title to the property was then put in Charles' and Sandra's names. After this purchase, the bank required the golf course loan to be rolled over into a mortgage on the marital residence. The family court valued the property at \$100,000 (with no indebtedness since the loan was rolled over into a loan on the marital residence) and found that the one-half interest in the property purchased after the marriage was marital since this one-half interest was purchased with marital funds. Accordingly, the court awarded Sandra \$25,000 for her interest in the property.

Charles argues that Sandra was not entitled to an interest in the property because she did nothing to improve the property or increase its value during their marriage. This argument is without merit. Pursuant to KRS 403.190(3), all property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property unless it was acquired by one of the methods in KRS 403.190(2). Charles does not deny that marital funds were used to purchase Christine's one-half interest in the property after he and Sandra were married. Hence, Sandra has an interest in the property by virtue of the fact that a one-half interest in the property was purchased during the marriage with marital funds,

not because of anything she did to increase the value of the property pursuant to KRS 403.190(2)(e).

In the alternative, Charles argues that even if Sandra had a marital interest in the property, it is inequitable for Sandra to receive the full \$25,000 for her interest because Charles is essentially still paying the loan on the golf course property since it was rolled over into the mortgage on the marital residence. We disagree. In computing Sandra's interest in the marital residence, all the debt on that property (including the amount rolled over from the golf course loan) was subtracted to determine the amount of equity in the marital residence. Hence, this debt was considered in reducing her interest in that property. To allow Charles to subtract this debt in determining the equity in both properties would amount to double-dipping relative to the debt on Charles' part.

Next, Charles argues that the court erred in allowing Sandra to have the bedroom suite and the bedding. Charles maintains that Sandra admitted that this personalty was purchased prior to the marriage, so he was entitled to retain this property as his nonmarital property under KRS 403.190(2). The court did not make a specific finding as to the marital or nonmarital nature of this property. The court merely stated, "In light of the relative circumstances of the parties the court finds that these items should be awarded to Respondent." Sandra

testified that Charles would say that these items were purchased before the marriage, but that she and Charles both picked out the items. A receipt in the record in Charles' name shows that he purchased the bedroom suite on January 23, 2000, several months before the marriage. Hence, under KRS 403.190(2), the trial court erred in awarding Sandra this property.

Accordingly, we reverse the award of the bedroom suite and bedding to Sandra and remand for said property to be awarded to Charles.

Charles also argues that the court erred in assigning him all of the \$8,801 in credit card debt. There is no statutory presumption regarding the marital or nonmarital nature of debt incurred during the marriage. Neidlinger v. Neidlinger, 52 S.W.3d 513, 522 (Ky. 2001). Debt incurred during the marriage is to be assigned on the basis of such factors as receipt of benefits and extent of participation, whether the debt was incurred to purchase marital property, whether the debt was necessary for support of the family, and the economic circumstances of the parties and their respective abilities to assume the indebtedness. Id. at 523.

Charles alleges that Sandra made charges without Charles' knowledge and used the credit cards for inappropriate uses such as paying bills for her children. The trial court specifically found that the evidence revealed that in 2002, the

parties toured the United States in their RV and often used credit cards to pay their gas, meals, and other expenses. The court then ruled that due to the disparity in the parties' incomes, Charles should be solely responsible for all of the credit card debt. The court also added the credit card payment to Charles' monthly expenses, and subtracted the payment from Sandra's monthly expenses in determining the parties' respective reasonable monthly expenses in the case. Since the trial court's findings of fact on this issue were supported by substantial evidence, they are not clearly erroneous and are binding on this Court. Ghali v. Ghali, 596 S.W.2d 31 (Ky.App. 1980). Thus, the family court did not err in assigning all of the credit card debt to Charles.

The next issue before us is that of maintenance. Charles contends that the family court erred in awarding Sandra \$350 a month for 3 years. Specifically, Charles contends that the trial court failed to consider his net income rather than his gross income, failed to consider the full amount of his claimed monthly expenses, and failed to consider his assigned credit card debt.

In reviewing the award of maintenance, we see that the court adopted its findings of fact regarding Charles' expenses from its earlier order on July 15, 2004, on temporary maintenance. The court rejected Charles' claim of \$4,943 in

expenses, finding that his reasonable expenses should not include groceries for his sister and his sister's son and daughter, and thus reduced his reasonable expenses to \$3,993. We cannot say that finding was clearly erroneous. Contrary to Charles' assertion that the court did not consider Charles' assigned credit card debt, we also see in the February 9, 2005 judgment that the court specifically added \$200 a month to Charles' expenses for the assignment of the parties' credit card debt (bringing the total to \$4,193), and subtracted that amount from Sandra's expenses.

As to the claim that the court only considered his gross income and not his after-tax net income in awarding maintenance, we agree that in looking at the parties' financial resources pursuant to KRS 403.200(2), the court should consider the parties' net income, not gross income. Powell v. Powell, 107 S.W.3d 222, 226 (Ky. 2003). While the court did initially look at Charles' gross income in its award of maintenance, the court ultimately found that Charles would have "approximately \$757 net remaining at the end of the month," although it is unclear if the court considered Charles' tax liabilities in arriving at this figure. In our view, even if the court erred in not considering Charles' after-tax income in awarding maintenance, the error was harmless because the award of maintenance was nonetheless proper given: the disparity of the

parties' financial resources (KRS 403.200(2)(a) and (f)); the standard of living established during the marriage (KRS 403.200(2)(c)); Sandra's age (KRS 403.200(2)(e)); Sandra's failing mental health and inability to work (KRS 403.200(2)(e)); and the fact that Charles is still able to work (KRS 403.200(2)(f)). At the time of the divorce, Sandra was 59 years old, on disability and had been diagnosed with dementia. As found by the family court, the parties enjoyed a comfortable standard of living during the marriage, living in a nice home and taking frequent trips. Even if Charles did not have the full \$757 in net income left at the end of the month, he is in a much better financial position than Sandra, who has \$858 in monthly income and \$1,345 in reasonable monthly expenses. Awarding maintenance is a matter within the discretion of the trial court. Browning v. Browning, 551 S.W.2d 823 (Ky.App. 1977). We cannot say that the family court abused its discretion in its award of maintenance in this case.

Charles' remaining argument is that the family court erred in awarding Sandra \$3,000 in attorney fees. An allowance of attorney fees is authorized under KRS 403.220 when there is an imbalance in the financial resources of the parties. Lampton v. Lampton, 721 S.W.2d 736 (Ky.App. 1986). The allocation of attorney fees in a domestic case is entirely within the discretion of the trial court. Underwood v. Underwood, 836

S.W.2d 439 (Ky.App. 1992), overruled on other grounds,
Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). Given the
aforementioned disparity in the parties' incomes and financial
resources, we believe the court's award of attorney fees was
justified.

For the reasons stated above, the judgment of the
Carter Circuit Court, Family Court Division is affirmed in part
and reversed in part, and the matter remanded for further
proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEES

Phillip Bruce Leslie
Greenup, Kentucky