

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001514-MR
and
NO. 2006-CA-001525-MR

J. BAYARD RICE

APPELLANT/
CROSS -APPELLEE

v.
APPEAL AND CROSS-APPEAL
FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 02-CI-504961

SUSAN RICE (NOW MOLONEY)

APPELLEE/
CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; LAMBERT, JUDGE; KNOPF,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: J. Bayard Rice appeals and Susan Moloney Rice cross-appeals from the Jefferson Family Court's division of property, award of maintenance, and award of attorney's fees in this action for dissolution of marriage. The parties were divorced on December 19, 2003, in an interlocutory decree reserving for later

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

adjudication the issues related to the equitable distribution of property and of maintenance. Following a period of discovery and a two-day hearing, the court entered its findings of fact, conclusions of law, and judgment on February 27, 2006. An order with respect to the parties' motions to alter, amend, or vacate that judgment was entered on July 3, 2006. We affirm the family court's judgment and its subsequent order in all respects.

Bayard and Susan married in May 1985. One child, Elizabeth, was born of the marriage. During the course of the marriage, Bayard adopted Susan's eldest daughter, Alix. Both children are now emancipated. They were married for more than eighteen years, and the family was accustomed to an extraordinarily high standard of living.

Both parties enjoyed successful careers. Susan worked as an interior designer for her mother's design firm, Moloney-Smith, and she was involved in numerous real estate ventures. Bayard, a physician, was employed throughout the marriage by Norton Healthcare, Inc. He earned additional income from his work as director of case management with Kindred Healthcare and as medical director for Churchill Downs. At the time of trial, the family court calculated Bayard's net income to be more than \$40,000.00 per month. The court imputed income to Susan amounting to more than \$4,000.00 per month.

The family court valued the couple's joint interests in real property at more than \$1.5 million. This figure did not include Susan's separate holdings because the court found that she had adequately traced her own real estate interests in portions of the

marital property. Consequently, it awarded her more than \$535,000.00 as her non-marital interest in the real estate. However, the court rejected the remainder of Susan's tracing evidence and characterized all of the increase in value of the real property as marital property. The marital interest in the real property was divided equally between the parties.

The family court also divided the couple's personal property, bank accounts, Bayard's retirement accounts, and the marital debt. Susan was awarded maintenance of \$10,000.00 per month for five years and \$5,000.00 per month for the two years following. She was also awarded attorney's fees in the amount of \$25,000.00. Both parties now appeal.

Bayard contends that the court erred in numerous respects: by awarding Susan maintenance; by allocating their entire joint tax liability to him alone; and by awarding Susan a portion of her attorney's fees. Susan urges this court to refuse to consider the issues raised by Bayard because he failed to describe them properly in his pre-hearing statement filed pursuant to the provisions of Kentucky Civil Rules of Procedure (CR) 76.03. Susan also argues that the family court erred by refusing to strike the proposed findings of fact and conclusions of law tendered by Bayard. Her remaining substantive arguments allege that the court erred in its characterization and division of the marital property; in failing to recognize Bayard's fraudulent transactions related to the real property; in assigning to her much of the debt associated with the real property that was awarded to her; in underestimating Bayard's monthly earnings while imputing to her

an excessive amount of income; and in failing to order Bayard to make a larger contribution toward her attorney fees.

We have carefully considered Susan's objections as to the contents of Bayard's pre-hearing statement. After reviewing his "brief statement of the facts and issues proposed to be raised on appeal," we are persuaded that Bayard's arguments were sufficiently preserved for our review. CR 76.03(4)(h). Consequently, we will proceed to review the record and the contents of the parties' briefs.

First, we consider Bayard's contention that the court erred by awarding Susan maintenance. On the basis of her real estate holdings, Bayard argues that the court should have concluded that Susan is independently wealthy and that, therefore, she does not qualify for an award of maintenance. We disagree.

The family court's decision whether to award maintenance is governed by the provisions of Kentucky Revised Statutes (KRS) 403.200. The statute permits the court to order maintenance if it finds that a dependent spouse lacks sufficient property to provide for his reasonable needs and is unable to support himself through appropriate employment. [KRS 403.200\(1\)\(a\) and \(b\)](#). The family court restored to Susan a substantial portfolio of real estate as her non-marital property. It also imputed to her a salary and benefits valued at more than \$4,000.00 per month. Nevertheless, the court determined that the estimated income was insufficient to meet Susan's reasonable needs, which she assessed at more than \$13,500.00 per month. After that determination was made, the court considered various factors in setting the amount and the duration of the

maintenance award. It properly considered the nature of Susan's financial resources, the standard of living established by the parties during the marriage, the duration of the marriage, and the ability of Bayard to meet his own reasonable needs. [KRS 403.200\(2\)\(a\)-\(f\)](#).

Bayard argues that the non-marital property restored to Susan generates sufficient income to meet her reasonable needs – especially when considered along with the value of the income imputed to her. He vigorously objects to the family court's conclusion to the contrary. Bayard contends that an assessment of Susan's property interests must not be limited merely to the income or profits attributable to them. He believes that she ought to be required to invade and consume the principal by selling off at least some of the less profitable real estate in order to raise cash to meet her financial needs.

Upon review, the facts appear more complicated than Bayard's analysis. After two days of testimony, the family court was convinced that income derived from the disputed property was insufficient to meet Susan's financial needs. The court found that much of the real property eventually restored to Susan as her non-marital property was “hers in name only.” Findings, Conclusions, and Judgment at 39. The court concluded that much of the real property was equitably owned (at least in part) by Susan's mother, sister, and/or daughters and was titled in Susan's name as part of an estate plan and tax avoidance measure. Although Susan might have an expectancy in the property, she was not at liberty to sell it in order to meet her own current financial needs. Our

review indicates that the family court's findings on this point were supported by the evidence.

A maintenance award must be upheld if the findings of fact upon which the award is based are not clearly erroneous. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). If the court's findings of fact are not clearly erroneous, the amount and the duration of maintenance are within the sound discretion of the trial court. *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky.App.1994). “[W]e cannot disturb [the maintenance determinations] of the trial judge unless the discretion is absolutely abused.” *Platt v. Platt*, 728 S.W.2d 542, 543 (Ky.App. 1987). The court did not abuse its discretion nor did it err as a matter of law as to the amounts and duration of the maintenance that it awarded to Susan. Thus, the judgment cannot be reversed on this basis.

Bayard next contends that the family court erred by allocating to him alone the entirety of the parties' joint tax liability. According to Bayard, the tax liability for the years 2001 and 2002 amounted to nearly \$124,000.00. He claims that Susan was primarily responsible for incurring this liability. He believes that if Susan had complied with his requests for the necessary financial information, he would not have been forced to file returns based upon guess work and estimation. Susan denies that she withheld any necessary tax information. On the contrary, she claims that Bayard is largely responsible for the tax liability because he consistently underpaid his withholdings and incurred an enormous tax bill annually.

There is no longer a rebuttable presumption that all debt acquired prior to dissolution is marital debt. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Rather, in determining the nature of the debt, the family court must consider: (1) the extent of the parties' participation in the creation of the debt and (2) their receipt of the benefits from the debt. *Id.* The court must also weigh the respective abilities of the parties to pay the debt. *Id.* Ultimately, decisions of the family court concerning the assignment of debt are left to the court's broad discretion. We will not disturb those decisions except for an abuse of discretion.

It is not our proper role to re-assign responsibility to either party in incurring the disputed tax debt. Our role is to determine whether the court erred in that finding. We conclude that the family court did not abuse its discretion by determining that both parties participated in the creation of the debt and that Bayard was better equipped to pay it. Consequently, the court did not err by assigning the debt to him alone.

Bayard last contends that the court erred by awarding only a portion of her attorney's fees to Susan. On cross-appeal, Susan complains that the court failed to award her nearly enough. We disagree with both contentions.

If there is a disparity in the relative financial resources of the parties in a divorce action, one may be ordered to pay a reasonable amount for the attorney's fee of the other. KRS 403.220. The family court has the sole discretion as to whether to make such an assignment – and, if so, the amount to be assigned. The breadth of its discretion

in these matters was strongly reiterated by the Supreme Court of Kentucky in *Neidlinger*, 52 S.W.3d at 519:

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. (Emphasis added.)

Although there is a great disparity in the parties' income, the family court carefully considered the substantial maintenance award made to Susan and the considerable value of the real property assigned to her before comparing their relative financial positions and making the attorney's fee award. In addition, the family court was authorized to consider other relevant factors, including:

- (1) the amount and character of services rendered;
- (2) the labor, time, and trouble involved;
- (3) the nature and importance of the litigation or business in which the services were rendered;
- (4) the responsibility imposed;
- (5) the amount of money or the value of property affected by the controversy;
- (6) the skill and experience called for in the performance of the services;
- (7) the professional character and standing of the attorneys;
- (8) the results secured.

See Boden v. Boden, 268 S.W.2d 632, 633 (1954).

Susan claims that her attorney's fee escalated in proportion to Bayard's contentious behavior. However, the family court was clearly in the best position to evaluate the parties' conduct and tactics. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky.1990).

Bayard argues on appeal that the court erred in denying him a meaningful opportunity to challenge Susan's proof as to the attorney's fees that she incurred. However, the record does not reveal that he ever raised a question with respect to the detailed invoices presented to the court for its review or that he sought to depose Susan or her counsel. The trial court did not err by concluding that there was a significant disparity in the parties' relative financial resources. Its order reflects a proper exercise of its discretion with respect to the amount of the fees to be paid by Bayard. We may not disturb the court's judgment on this basis.

We shall now address Susan's arguments. She contends that the family court erred in several instances by its characterization, assignment, and division of the couple's real property.

First, Susan challenges the court's conclusion that she failed to trace adequately her investment of non-marital funds in the marital home. In October 1995, Susan deposited a check in the sum of \$28,500.00 into the couple's joint bank account. This check represented a portion of Susan's inheritance following the death of her grandmother. Susan contended at trial that she spent this sum replacing the roof of the marital home.

The division of property in a dissolution proceeding involves a three-step sequential process: (1) the court must first characterize each item of property as marital or non-marital; (2) the court must then assign each party's non-marital property to that party; and (3) finally, the court must equitably divide the marital property between the

parties. *Travis v. Travis*, 59 S.W.3d 904 (Ky. 2001). KRS 403.190(3) establishes a presumption that “all property acquired by either spouse after the marriage and before the decree of legal separation is . . . marital property.” *Id.* However, property acquired in exchange for property acquired by gift, bequest, devise or descent is characterized as non-marital. KRS 403.190(2)(b).

If property is composed of both marital and non-marital components, the court must determine the parties' respective interests in the property based on the evidence presented. *Id.* If a party claims that property (or an interest in property) acquired during the marriage is non-marital, that party bears the burden of proof. *Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004). If the original property that is claimed to be non-marital is no longer owned, the claimant must adequately trace the previously owned property into the asset presently owned. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990).

In *Chenault*, the Kentucky Supreme Court held that a wife's testimony was sufficient to trace the non-marital interest that she claimed in certificates of deposit and in other investments acquired during the marriage. However, the circumstances surrounding that decision were quite different from those before the family court in this case. In *Chenault*, the court was persuaded that the non-marital property had been adequately traced. It reasoned that since both parties had held only low-paying jobs throughout the marriage, there were no other possible sources of funds from which the CDs and other investments might have been purchased.

In contrast, in the case before us, the family court concluded that Susan did not meet her burden of proof by failing to adequately trace her inheritance into the improvements made to the marital home. In an effort to trace the proceeds of her inheritance at trial, Susan identified several checks drawn on the parties' joint bank account. These checks were made payable to roofing contractors and were negotiated close to the time that Susan had deposited the proceeds of her inheritance into the couple's joint account. It is equally plausible, however, that the source of the funds used to pay the contractors could have come from any number of the many other resources available to Susan and Bayard. The family court was persuaded from the evidence that Susan and Bayard had used insurance proceeds to pay for the improvements made to the roof.

Susan did provide evidence of her inheritance, a deposit of those funds into the parties' bank account, and evidence that the funds were used from that bank account to make some improvements to the martial home. Nonetheless, we are not persuaded that the family court was clearly erroneous in determining that her evidence was insufficient to establish her non-marital interest in the home. Even if we would conclude differently, we are not permitted to substitute our judgment for the determination of the family court. *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002). Therefore, we will not disturb its conclusion that Susan did not meet her tracing burden on this issue.

Susan also contends that the family court erred by failing to credit her non-marital contribution for any of the increase in the value of the marital home and of another property, namely 721 Eaton Street, in Key West, Florida. We disagree.

KRS 403.190(2)(a) addresses increases in value or income from property acquired by gift, bequest, devise, or descent. When these increases occur during the marriage, the property remains non-marital property unless there are “significant activities of either spouse which contributed to the increase in value of the property and the income derived therefrom.” In contrast, KRS 403.190(2)(b) addresses a direct exchange of an item of non-marital property for a separate piece of property. It provides that “*property acquired in exchange* for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent” remains non-marital. (Emphasis added). Finally, KRS 403.190(e) provides that the “*increase in value of property acquired before* the marriage to the extent that such increase did not result from the efforts of the parties during the marriage” remains non-marital property. (Emphasis added).

After considering the testimony at trial, the family court was persuaded that Susan made a non-marital contribution of \$83,461.21 toward the acquisition of the marital home in 1990. This non-marital contribution was apparently derived from a gift made during the marriage to Susan alone from her parents. The court assigned this sum to Susan as her non-marital property and then divided the remaining equity of the house.

However, the court declined to assign her a non-marital interest in any increase in the value of the marital home arguably attributable to her initial, non-marital contribution.

The evidence at trial also indicated that Susan made a non-marital contribution of \$126,300.00 toward the acquisition of the Eaton Street property in August 2000. This money came from Susan's inheritance. Again, the family court assigned this sum to Susan as her non-marital property and then divided the property's remaining equity. Nothing extra was assigned to her representing the appreciation that she argued was attributable to her non-marital contribution.

The family court concluded that Susan had adequately traced the exchange of her non-marital property into the marital home and into the Eaton Street residence and assigned to her the exact value of the non-marital property according to the provisions of KRS 403.190(2). However, the family court was persuaded that the increase in the properties' values was attributable to the joint efforts of the parties rather than resulting from prevailing economic conditions. Therefore, pursuant to the explicit language of KRS 403.190(2)(e), the court held that Susan had failed to prove that the increase in value was her non-marital property. The court's findings were adequately supported by the evidence.

Susan next contends that the family court erred by failing to assign two cottages located in Key West, Florida, to the parties' daughters. Susan explains that these cottages were acquired by the parties during their marriage with the understanding that one of them would be given to each of their daughters upon her graduation from college.

Susan contends that even if the cottages were characterized as marital property, the court could have assigned one of them to each of their daughters. Susan contends that she was prejudiced by the court's refusal to assign the property to the daughters. Even though the marital estate was divided equally, she nonetheless felt obligated to give the cottages to her daughters from her portion. Thus, she unilaterally diminished her marital share despite the fact that she and Bayard had an agreement on these properties pre-dating the divorce.

We have carefully considered Susan's argument, but we can find no basis for reversing the judgment of the family court. Neither of the daughters intervened in the action to assert a property right to either of the disputed cottages. The understanding between Susan and Bayard was not a legal contract susceptible of enforcement in the course of this litigation. After a large non-marital share in the value of the cottages was assigned to Susan by the court, their remaining value was properly characterized as marital property subject to equitable distribution. There was no error.

Next, Susan contends that the family court erred by failing to find that Bayard had fraudulently transferred two pieces of their property: (1) the Eaton Street property to a limited liability company known as B & S Properties, I; and (2) the property located at 939 E. Washington Street to the limited liability company known as B & S Properties, II. She also contends that Bayard fraudulently encumbered the Washington Street property and that he improperly negotiated Moloney-Smith checks – even though he was not authorized on the account and had no interest in the company, which belongs

to her mother. Susan contends that she was prejudiced by the family court's failure to recognize Bayard's bad behavior as the basis for awarding more maintenance to her and as the basis for ordering Bayard to make a larger contribution toward her attorney's fees. We disagree.

As we observed earlier, the family court was in the best position to observe the parties' conduct throughout the litigation and to assess Bayard's explanations with respect to the property transfers, the circumstances surrounding the mortgage on the Washington Street property, and the nature of his transactions with Moloney-Smith. Despite Susan's objections about these transactions, we cannot conclude that the family court abused its discretion with respect to its award of maintenance and of a portion of her attorney's fees. We have no basis for reversing the family court's judgment.

Susan also contends that the court erred by imputing \$50,000.00 to her in annual income. We disagree.

Susan received a degree in interior design from the University of Louisville in 1979, and she immediately began a successful career in her field. When her attention shifted to the care of her family in 1985, she and her mother continued to operate the design firm, Moloney-Smith, and Susan remained involved in real estate ventures.

In December 2003, the family court entered a maintenance order, *pendente lite*, that imputed to Susan a regular income of \$3,000.00 per month. Susan does not dispute that she earns \$3,000.00 per month as an interior designer, but she objects to the family court's conclusion that she could earn approximately \$4,166.00, per month. She

contends that the family court's conclusion with respect to her income was arbitrary and capricious.

The evidence at trial indicated that aside from the \$36,000.00, the annual salary that Susan recently had begun to earn from Moloney-Smith, she was also provided an expensive company car, insurance, and fuel. This evidence alone was adequate to support the court's finding that Susan could earn more than \$4,000.00 per month. We find no error as to imputation of income to Susan.

Susan argues next that the family court underestimated Bayard's annual income. Bayard testified at length and introduced some documentary evidence with respect to his income. Although Susan disputes the court's calculations, there is nothing to suggest that the family court erred in finding that Bayard earned more than \$40,000.00 per month. We cannot conclude that Susan can show that she was prejudiced by the court's determination. Thus, there is no reversible error.

Susan also contends that the family court erred by determining that she made significant financial decisions with respect to the real property acquired and improved during the marriage. Because of this error, she argues that the family court mistakenly assigned to her a greater proportionate share of the debt related to some of that property. We disagree.

There is no statutory authority for assigning debts in an action for dissolution of marriage. Susan contends that it is “manifestly unfair” to burden her with a larger share of the debt. However, there is no presumption that debts must be divided

equally or in the same proportions as the marital property. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Instead, debts are allocated equitably and discretionarily based on a consideration of numerous factors – including a party's receipt of the benefits associated with the debt and the extent of the parties' participation in incurring the debt. After reviewing the evidence presented at trial, we are satisfied that the family court relied upon substantial evidence in assigning to Susan a greater share of some of the debt related to the couple's real property interests. There is no reversible error.

Susan contends that the court erred by refusing to order the parties to repay loans from her mother for improvements to the Eaton Street property. Again, we disagree.

Susan's mother, Sue Clay, testified that she had loaned the parties approximately \$263,000.00 for improvements at Eaton Street. Based upon the documentary evidence presented at trial, the family court was persuaded that the parties owed Ms. Clay approximately \$85,000.00 for those renovations. Susan was assigned 60% of the debt, and Bayard was assigned the remaining 40% of the debt. The court expressly found that Susan failed to prove that the other claimed expenses were attributable to improvements made at Eaton Street. Ms. Clay was not a party to the proceedings, and the family court's findings were supported by the evidence. We find no error.

Susan contends that the family court erred by refusing to order Bayard to reimburse her for a greater portion of the expenses incurred at several of their rental properties following the separation. We disagree.

In its judgment, the court concluded that Bayard would be responsible for 78% of the shortfall between the income earned and the expenses incurred at the Key West cottages in the interval between the date of the separation and the date of the divorce (December 2003). With respect to the Washington Street property, the court concluded that Bayard would be responsible for 78% of the shortfall that accrued in the interval between the date of the separation and the date of trial (February 2006). Susan contends that the court's conclusions contradicted its order of December 2003, in which it had ruled that *all* of the shortfalls would be divided between the parties. To recapitulate, the court entered a decree of dissolution in December 2003, reserving for later ruling the property issues now before us on appeal. Susan complains that the court created a hardship for her by not requiring Bayard to be responsible for the post-decree shortfalls at the Key West cottages during the three-year interval between the date of dissolution and the date of the trial. Susan also contends that the court erred by failing to address the shortfalls that accrued at Eaton Street.

To the extent, if any, that the court's *pendent lite* orders remained relevant after the trial proceedings, the family court's final judgment superseded them. Pursuant to the provisions of CR 54.02, interlocutory orders may be revoked or modified at any time. Consequently, the family court was not compelled to render a judgment consistent

with the provisions of its earlier, temporary orders. The court's division of the debts associated with the rental properties was encompassed within its broad discretion. There is no reversible error.

Finally, we have also considered Susan's contention that the family court erred by refusing to strike Bayard's proposed findings of fact and conclusions of law. However, it does not appear that this ruling affected the substantial rights of the parties. Therefore, we shall treat it as harmless error – if any. No relief is warranted.

For the foregoing reasons, we affirm the judgment of the Jefferson Family Court in all respects.

ALL CONCUR.

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