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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000301-MR
&
NO. 2007-CA-000368-MR

GEORGE REID GLASS

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FAYETTE CIRCUIT COURT
v. HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 05-CI-04736

NANCY ELLIS GLASS

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CAPERTON, KELLER, AND WINE, JUDGES.

WINE, JUDGE: This is an appeal and a cross-appeal from a judgment of the Fayette Circuit Court dissolving the marriage between George Reid Glass (“Reid”) and Nancy Ellis Glass (“Nancy”). In his direct appeal, Reid argues that the trial court clearly erred in its characterizing assets and real property as Nancy’s non-marital property, and that the court abused its discretion in dividing the marital

property. In her cross-appeal, Nancy argues that the trial court clearly erred in finding that a portion of her engagement ring was marital property and subject to division. Finding no clear error or abuse of discretion, we affirm.

Reid and Nancy Glass were married in 1963 and separated in 2005. Two children were born of the marriage, both of whom are now adults. Reid filed a petition for dissolution of the marriage on November 1, 2005. The parties disputed a number of property issues, including: (1) Nancy's claims that a percentage of proceeds from the sale of a marital residence were non-marital; (2) Nancy's claims to a significant non-marital interest in the increase in value of her non-marital property; and (3) Nancy's claims that three rings received during the marriage were non-marital gifts from Reid.

Following an evidentiary hearing, the trial court issued findings of fact, conclusions of law and a decree of dissolution on November 30, 2006. In pertinent part, the trial court first found that \$124,974.40 of the \$132,257.00 received from the sale of the marital residence was Nancy's non-marital property. The court evenly divided the remaining \$7,282.60. Next, the trial court found that Nancy's claimed non-marital expenditures of \$226,090.61 toward the improvement of her non-marital property, which had increased that property's value, should be reduced by 10%, resulting in a non-marital contribution of \$203,481.55. The court restored Nancy's non-marital interest and divided the marital portion of the increase in value of that property 65% to Nancy and 35% to Reid. Regarding the rings, the trial court found that Nancy had used non-marital

funds for one-half of the cost of her largest engagement ring. Consequently, the court found that the ring is 50% Nancy's non-marital and 50% marital. The court awarded the ring to Nancy, and ordered her to pay Reid \$6,875.00, representing his share of the marital interest in the ring. The court found that the other two rings were entirely marital and have a value of \$3,600.00. The court awarded the rings to Nancy and ordered her to pay Reid \$1,800.00 for his interest in the bands. Finally, the court equally divided the remaining marital property.

Both parties filed motions to alter, amend or vacate the judgment. Kentucky Rules of Civil Procedure ("CR") 59.05. After considering the briefs and arguments, the court denied Reid's motion, but partially granted Nancy's motion with respect to the two smaller rings. The court found that the parties had agreed that each party would keep their respective rings with no money to offset any additional marital interest. This appeal and cross-appeal followed.

In his direct appeal, Reid primarily challenges the trial court's characterization of certain assets as Nancy's non-marital property. While these assets are mostly distinct, several of the issues involving these assets are related. Therefore, it is necessary to set out some of the context surrounding the acquisition of these assets.

For most of the marriage, Nancy remained at home with the children while Reid worked. However, Nancy received substantial gifts and income from inheritances during the marriage. Nancy also inherited property in Eminence, Kentucky, and a one-fourth interest in a home in Florida.

In 1973, the parties moved to Memphis, Tennessee, and purchased a home. In 1983, they sold the Memphis residence and purchased a new home in Germantown, Tennessee. The parties agree that Nancy contributed \$49,400.00 in non-marital funds toward the down payment, and an additional \$16,000.00 down payment came from the proceeds of the sale of the Memphis house. The parties financed the remaining \$166,000.00 of the purchase price with a conventional mortgage.

Thereafter, in late 1993 and early 1994, Reid and Nancy became silent partners in an engine rebuilding business. Although they did not put up any capital at that time, Reid guaranteed the liabilities of the business with his retirement accounts, and Nancy signed a guarantee for \$51,000.00 in loans to the Small Business Administration. Two years later, the business failed and filed for bankruptcy. Since Reid's retirement accounts could not be liquidated without substantial tax penalties, the parties agreed that Nancy would use \$75,555.40 of her non-marital funds to pay the outstanding obligations of the business.

The parties sold the Germantown residence in 2000, from which they received net proceeds of \$138,302.74. These proceeds were deposited into Nancy's non-marital Vanguard Money Market account ("the Vanguard account"). Nancy alleges that the parties had agreed that she would be repaid for her \$49,400.00 down payment on the Germantown residence and for her \$75,555.40 payment toward the bankruptcy debt. Reid agrees that Nancy is entitled to recover her non-marital down payment, but he contends there was insufficient proof of any

agreement to reimburse Nancy for her payment of the bankruptcy debt. Reid further testified that he and Nancy had agreed only that the proceeds from the sale of the Germantown residence would go toward the improvement of the Eminence property.

As Reid correctly points out, Kentucky Revised Statutes (“KRS”) 403.190(3) starts with the presumption that all property acquired after marriage is marital property. Thus, the proceeds from the sale of the Germantown residence generally would be considered marital property. However, this presumption does not apply to property acquired in exchange for non-marital property, or property excluded by a valid agreement of the parties. KRS 403.190(2)(b) and (d). The party claiming the non-marital interest must present clear and convincing evidence to overcome the presumption. *Brosick v. Brosick*, 974 S.W.2d 498, 502 (Ky. App. 1998); *Browning v. Browning*, 551 S.W.2d 823, 825 (Ky. App. 1977).

There is very little Kentucky case law on the proof necessary to establish an agreement to exclude property from the marital estate. Unlike in *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000), the parties in this case did not make the alleged agreement after separation or during circumstances when they were contemplating divorce. Consequently, their agreement is not subject to the requirements for separation agreements under KRS 403.180. *Id.* at 799.

Furthermore, the proof necessary to trace non-marital assets depends upon the particular circumstances of the parties. In some cases, tracing to a mathematical certainty is not always possible, and may promote marital disharmony. *Chenault*

v. Chenault, 799 S.W.2d 575, 578 (Ky. 1990). But in other cases, the party claiming the non-marital interest should reasonably be expected to maintain detailed records about the transaction. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 821 (Ky. 2002).

Under the circumstances of this case, we conclude that the agreement may be proven by oral testimony. Both parties testified that Nancy paid the bankruptcy debt from her non-marital funds due to the tax consequences of withdrawing funds from Reid's retirement accounts. The proceeds from the sale of the Germantown residence were deposited into the Vanguard account. The parties' conduct at the time is more consistent with Nancy's version of the agreement than Reid's.

Furthermore, Nancy's testimony was corroborated by the testimony of the parties' adult sons, Byron and Brent. Byron spoke with Nancy at the time she paid the bankruptcy debt, and she told him that the proceeds from the sale of the Germantown residence would be used to repay her for the bankruptcy debt. Brent also testified that he was present at the time his parents discussed this agreement.

The trial court found Nancy's testimony about the parties' agreement to be more credible than Reid's. Reid contends that his testimony was more credible than that of Nancy, Byron or Brent. However, we must defer to the considerable discretion of the trial court unless it has committed clear error or has abused that discretion. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). The trial court as finder of fact is in the best position to determine the credibility of the

witnesses and to resolve conflicting evidence. CR 52.01. *See also Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky. App. 1999). An appellate court “cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous.” *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (Ky. App. 1988). While the evidence would have supported a different conclusion, the trial court did not clearly err in finding that the parties intended that Nancy would be repaid for the bankruptcy debt with the proceeds from the sale of the Germantown residence.

Reid next argues that the trial court erred in its determination that Nancy was entitled to recover most of her non-marital contributions to the Eminence property. The parties agree that the Eminence property was worth \$70,000.00 at the time Nancy inherited it, and was worth \$385,000.00 at the time of separation. However, they disagree about the status of the remaining \$315,000.00 in equity.

After the sale of the Germantown residence, the parties lived either at Nancy’s non-marital Florida home or at the Eminence home. Since the Eminence property had fallen into disrepair, the parties undertook to renovate the property. Nancy used \$226,090.61 from her Vanguard account to finance the renovation, but both Reid and Nancy worked extensively on the project. As previously noted, the trial court found that Nancy’s non-marital expenditures toward the improvement of her non-marital property had increased that property’s value by \$203,481.55, and restored that amount to her as her non-marital interest.

Reid agrees that Nancy invested the non-marital funds into the renovation of the Eminence property, but he contends that Nancy failed to conclusively demonstrate that those funds actually increased the value of the property. KRS 403.190(2)(e) provides the increase in value of property acquired before the marriage is non-marital “to the extent that such increase did not result from the efforts of the parties during marriage.” When the property includes an increase in the value of an asset containing both marital and non-marital components, the trial court must determine from the evidence why the increase in value occurred. *Travis v. Travis*, 59 S.W.3d 904, 910 (Ky. 2001). In this case, the evidence is undisputed that the increase in value of the Eminence property can be attributed in part to Nancy’s non-marital investments and in part to the joint efforts of the parties.

We agree with Reid that the party asserting that she should receive an appreciation on a non-marital contribution carries the burden of proving the portion of the increase of value attributable to the non-marital contribution. *Id.* Nevertheless, it is elementary that, when a party to a marriage acquires property or an interest therein with non-marital funds, the property or interest is properly classified as non-marital property, and property includes equity in property. *Schoenbachler v. Minyard*, 110 S.W.3d 776, 786 (Ky. 2003). Thus, Nancy may recover her investment of non-marital funds for the renovation of the Eminence property to the extent that those funds actually increased the equity in the property.

Reid maintains that Nancy could only meet her burden of proof by specifically tracing each non-marital expenditure to a corresponding increase in the value of the property. We disagree. Nancy presented evidence that she spent \$226,090.61 toward improvements on the Eminence property. Given the significant increase in the value of the Eminence property above Nancy's initial non-marital interest and subsequent non-marital investment, there was no reason for the trial court to conclude that the improvements did not contribute to the increase in the property's value. While the trial court found that some of those expenditures were insufficiently documented, the court also noted that Reid had agreed that "the 'vast majority' of the improvements set forth on Nancy's exhibit detailing the expenditures were in fact made to the property." Consequently, the trial court reduced the value of the improvements by 10% to \$203,481.55. This conclusion was reasonable based upon the evidence presented in this case.

The trial court characterized the remaining \$111,518.45 equity in the Eminence property as marital. However, the trial court awarded 65% of that equity to Nancy and 35% to Reid. Reid argues that the evidence did not support an unequal division in favor of Nancy.

KRS 403.190(1) provides that a trial court

shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

(a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;

- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective

A trial court is to divide marital property in just proportions considering all relevant factors. KRS 403.190(1). *See also Wood v. Wood*, 720 S.W.2d 934 (Ky. App. 1986); *Herron v. Herron*, 573 S.W.2d 342 (Ky. 1978). However, just proportions do not necessarily mean equal proportions. *Wood, supra*. We review the trial court's division of marital property under an abuse of discretion standard. A court abuses its discretion when it relies on clearly erroneous findings of fact, when it improperly applies the law or uses an erroneous legal standard. *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003).

We cannot find that the trial court abused its discretion by dividing the marital equity in the Eminence property in favor of Nancy. There is no question that the \$111,518.45 in equity above Nancy's non-marital contributions is marital. Although the court separately gave credit to Nancy for those contributions, the court also recognized that the majority of the increase in the value of the property was attributable to Nancy's non-marital contributions. The trial court attempted to give Reid credit for his "sweat equity" in the improvements to the property. However, the court did not entirely accept his testimony regarding the amount of time he spent working and improving the home. Under the circumstances, the trial court's division of the marital equity was reasonable and supported by the evidence.

By the same token, we disagree with Reid's position that the evidence compelled a division of the marital property in his favor. Reid points out that Nancy has substantial non-marital property which was restored to her. Furthermore, this was a long-term marriage of 40 years, during most of which Reid worked and provided income for the family. Reid also testified that he helped to manage Nancy's investments of her non-marital property.

Given Nancy's substantial non-marital estate, Reid contends that the trial court should have awarded a greater portion of the marital estate to him. However, Nancy also submitted evidence that she contributed a large amount of non-marital funds during the marriage which were not restored to her. And while the trial court did not discuss each of the statutory factors, the court stated that it considered all of the factors under KRS 403.190(1)(a)-(d) in dividing the marital property. Under the circumstances, we cannot find that the trial court abused its discretion by equally dividing the remaining marital property.

In her cross-appeal, Nancy argues that the trial court clearly erred in its division of the rings. At the time of the marriage, Reid gave Nancy an engagement ring with a one-half carat diamond. Fifteen years into the marriage, Reid and Nancy decided to replace the one-half carat ring with a larger one carat diamond ring. The one-half carat stone was used to make a pinky ring for Nancy.

Thereafter, in 1982, the parties decided to replace the one carat ring with a larger diamond. They purchased a 3.06 carat diamond for \$10,000.00. One-half of the cost of the diamond came from Nancy's non-marital funds and

one-half came from marital funds. The one carat diamond was used to make a pinky ring for Reid.

Sometime thereafter, Nancy lost her one-half carat pinky ring. Reid agreed to give his one carat ring to make another pinky ring for her. In return, Nancy bought a one and one-half carat diamond for a replacement ring for Reid.

At the time of separation, the 3.06 carat diamond ring was appraised at \$27,500.00, and the one carat ring was appraised at \$3,600.00. Reid did not have his one and one-half carat ring appraised and he did not know its value. On cross-examination, Nancy's counsel questioned Reid about the value of the rings and the circumstances surrounding their acquisition. At one point, he stated that the value of the rings should be considered a "wash" – that is, he would keep his ring and Nancy would keep her rings without any offsetting payment. After Reid made this statement, Nancy's counsel moved on to another line of inquiry.

While the trial court attempted to clarify this statement, it is not clear whether Reid was willing to offset his one and one-half carat diamond against Nancy's one carat diamond, or against both of Nancy's rings. In its supplemental judgment, the trial court concluded that he had agreed only to the former. Thus, the court modified its prior order requiring Nancy to pay Reid for his interest in the smaller rings, but maintained its order requiring Nancy to pay Reid for his interest in the 3.06 carat ring.

Nancy argues that the court clearly erred in its interpretation of Reid's statement. But on reviewing the record, we find that the trial court's interpretation

of Reid's testimony was reasonable. Furthermore, since the value of the two smaller rings was entirely offset against each other, any issue regarding Reid's failure to have his ring appraised is now moot.

The primary issue in Nancy's cross-appeal concerns the status of the 3.06 carat diamond. Nancy points out that each of the "upgraded" rings was to replace the smaller rings with a larger diamond. Consequently, she contends that each ring should retain the earlier rings' status of gifts from Reid, and thus be considered her non-marital property. But since Nancy kept each of the smaller rings, there was no evidence to support a finding that those gifts were exchanged for the larger diamond.

Furthermore, the trial court's determination concerning the gift or non-gift status of an item must be upheld unless there is clear error. *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. App. 1980). In determining whether an item is a gift, the court must look to: 1) the source of the money with which the item was purchased, 2) the intent of the donor at that time as to the intended use of the property, 3) the status of the marriage relationship at the time of the transfer, and 4) whether there was any valid agreement that the transferred property was to be excluded from the marital property. *Clark v. Clark*, 782 S.W.2d 56, 62 (Ky. App. 1990), *citing O'Neill v. O'Neill*, 600 S.W.2d 493 (Ky. App. 1980). In this case, the evidence could have supported a finding that the 3.06 carat diamond was a gift, but it did not compel such a finding.

As Nancy points out, the parties were buying a new engagement ring for Nancy, which typically is a gift. But on the other hand, Nancy used non-marital funds to pay half the cost of the diamond. Such conduct is not entirely consistent with a gift. Furthermore, Reid testified that the parties had discussed buying the diamond as an investment. While Nancy contends that this testimony was not credible, the trial court was within its discretion to accept Reid's version of events. Therefore, we cannot find that the trial court clearly erred in finding that one-half of the diamond ring was marital and subject to division.

Accordingly, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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