

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000125-MR

LEE J. WEBER

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE O. REED RHORER, JUDGE
ACTION NO. 06-CI-01796

RHONDA S. WEBER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CAPERTON AND STUMBO, JUDGES; KNOPF,¹ SENIOR JUDGE.

STUMBO, JUDGE: Lee J. Weber appeals from the Findings of Fact, Conclusions of Law and Order of the Franklin Circuit Court distributing marital property in a dissolution of marriage action filed by his now former wife, Rhonda S. Weber.

Lee maintains that the circuit court erred in failing to order the restoration of his non-marital interest in the parties' marital residence. Because Lee was entitled

¹ Senior 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.

to the restoration of this interest, we reverse the Order on appeal and remand the matter for additional Findings of Facts and Conclusions of Law on this issue.

Lee and Rhonda were married on December 31, 1999, in Franklin County, Kentucky. The marriage produced two children, who are now 9 and 10 years old. Rhonda and Lee separated in 2006. In 2008, Rhonda filed a petition in Franklin Circuit Court seeking to dissolve the marriage. At the time of the filing, Lee was about 41 years old and was employed as an electrician. Rhonda worked as a teaching assistant.

The matter proceeded in Franklin Circuit Court, and on November 17, 2008, the court rendered Findings of Fact, Conclusions of Law and Order dissolving the marriage and addressing custody issues and property division. Of relevance to the instant appeal, the circuit court made a finding that prior to the marriage, Lee purchased an unimproved parcel of real property upon which the marital residence was later constructed. The court found that the unimproved lot was valued at \$38,500 at the time of the marriage, and was encumbered by a \$30,800 mortgage which also pre-dated the marriage. The court also found that Lee borrowed \$24,000 from his 401(k) retirement plan to aid in the construction of the residence, and that this loan also pre-dated the marriage.

After making these and other findings, the circuit court awarded Rhonda the marital residence, in part for the benefit of the minor children. The court ordered the parties to divide the cost of the monthly mortgage payment and maintenance. It also held that when the children reached the age of majority, the

residence would be sold and any profit or loss would be divided equally between the parties. Lee's subsequent Motion to Alter, Amend or Vacate was denied after a hearing conducted on December 23, 2008. In denying the motion, the court stated that it "considered the equitable division of all assets and debts and the relative position of the parties in making its determination in the Court's Order of November 17, 2008." This appeal followed.

Lee now argues that the Franklin Circuit Court erred in failing to order the restoration of his non-marital interest in the marital residence. He notes that the circuit court expressly found that he had a \$7,700 interest in the real property prior to the marriage, and also found that he made a contribution of \$24,000 in non-marital assets to the construction of the residence. Lee directs our attention to KRS 403.190 and its supportive case law, which he argues requires the trial court to assign to him his non-marital property upon dissolution. He maintains that there is no dispute as to the non-marital nature of the assets at issue, and it is clear that the court is required to return those assets to him upon dissolution. As such, he seeks an Opinion reversing the Order on appeal and restoring to him the \$7,700 and \$24,000 non-marital assets. In contrast, Rhonda maintains that Lee never demonstrated that he purchased the unimproved real property with \$7,700 in non-marital funds. She also contends that Lee failed to provide the trial court with the balance that was due on the \$24,000 note, and whether any marital assets were used to pay the note.

property. It states that,

(1) In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also 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, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

(2) For the purpose of this chapter, "marital property" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;

(b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation;

(d) Property excluded by valid agreement of the parties;
and

(e) 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 marriage.

(3) All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

Thus, the Legislature has determined that: 1) non-marital property includes property acquired before the marriage, as well as property acquired in exchange for property acquired before the marriage; and 2) “the court shall assign each spouses’ property to him.” KRS 403.190. This directive has been integrated into the case law. See generally, *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007), which, together with its predecessor cases, requires a spouse asserting a non-marital interest in property to demonstrate that interest by “tracing” it to its origin. *Id.*

In the matter at bar, the Franklin Circuit Court made findings that prior to the marriage, Lee purchased the unimproved realty upon which the marital residence was later built; and, that it was valued at \$38,500 and was encumbered by a note and mortgage in the amount of \$30,800. The court also found that prior

to the marriage, Lee borrowed \$24,000 from his 401(k) retirement plan to aid in the construction of the residence. Rhonda has not appealed from the entry of these findings, and as such they may properly be regarded as conclusive.

In applying KRS 403.190 and its progeny to these findings, we must conclude that Lee was entitled to have any non-marital assets restored to him at such time the marital residence is sold. We base this conclusion on the Legislature's unambiguous statutory requirement that upon dissolution, "the court shall assign each spouse's property to him." KRS 403.190(1). The circuit court, having found that Lee was vested with non-marital property at the time of marriage, was therefore required to order the return of those assets upon dissolution.

We recognize that the circuit court properly undertook to make an equitable division of all assets and debts based on the relative positions of the parties at the time of dissolution. The factors the court considered, for example, included the disparity in the parties' incomes, and the fact that Rhonda was designated as the primary residential custodian of two children with special needs. The equitable division of assets, however, is only applicable to marital assets, which the Legislature has determined must be divided "in just proportions." KRS 403.190, *supra*. Marital assets must be divided justly, but not necessarily equally. *Wood v. Wood*, 720 S.W.2d 934 (Ky. App. 1986). Non-marital assets, however, must be returned to the spouse who brought them into the marriage. KRS 403.190, *supra*. Because the circuit court found that Lee brought non-marital assets into the

marriage, but it did not expressly restore those assets to him, we must reverse and remand on this issue. On remand, the Franklin Circuit Court shall make any additional findings necessary to supplement its determination that Lee brought non-marital assets into the marriage, and shall expressly restore those assets to him at such time the marital residence is sold. Because the Order on appeal made no distinction between marital and non-marital assets, and in light of our determination that Lee is entitled to the restoration of his non-marital assets, the circuit court may adjust, if necessary, its division of marital assets to ensure that the division comports with the “just proportions” provision of KRS 403.190.

For the foregoing reasons, we reverse the Findings of Fact, Conclusions of Law and Order of the Franklin Circuit Court, and remand the matter for proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Kevin P. Fox
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Michael L. Judy
Frankfort, Kentucky