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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001315-MR

SHANNON DOYLE-FORTWENGLER APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DONNA L. DELAHANTY, JUDGE
ACTION NO. 09-CI-500277

JEFFREY B. FORTWENGLER APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** ** ** **

BEFORE: MOORE, NICKELL, AND THOMPSON, JUDGES.

MOORE, JUDGE: Shannon Doyle-Fortwengler appeals from an order distributing property and dividing debt in an action for dissolution of marriage. On appeal, Shannon raises allegations of error regarding the classification of marital and nonmarital property, the division of debt, and the court's refusal to award

attorney's fees pursuant to an agreed order. Upon a thorough review of the record, we affirm in part, reverse in part, and remand.

History

Shannon and Jeffrey Fortwengler were married on July 13, 2002. Shannon was primarily a homemaker for the parties' children during the marriage, and Jeffrey worked outside the home for Brown and Williamson. In 2003, Brown and Williamson was bought by Reynolds American. Jeffrey remained employed by Reynolds American until he lost his position with the company in 2005. After a period of unemployment, Jeffrey gained employment with Kindred Healthcare as a director of corporate accounting.

Shannon and Jeffrey separated in November of 2008, and the marriage was dissolved by a decree of dissolution in the Jefferson Family Court in October of 2009. Per the decree, several issues were reserved for trial, including: (1) the division of Jeffrey's Reynolds American 401(k) and his nonmarital interest in the same, (2) an alleged debt owed to Jeffrey's parents, and (3) the award of costs and attorney's fees. After a trial on these issues, the court entered its findings of fact and conclusions of law regarding the same.

With respect to the Reynolds American 401(k), the trial court found that the value of the 401(k) at the time of dissolution was $151,260.48. The trial court further found that $65,422.74 represented the value of the account at the time of the marriage. The court found $65,422.74 was Jeffrey's nonmarital contribution and that $29,600 in marital contributions had been made over the course of the

marriage. The court awarded Jeffrey $104,067 of the 401(k) as his nonmarital property by awarding him his nonmarital interest and the growth thereon (by dividing the growth on the account pro rata according to the marital and nonmarital contributions).

The trial court found that the parties owed a $20,000 debt to Jeffrey's father. The court deemed the debt marital and ordered that each party was responsible for fifty percent of the debt, or $10,000.

The trial court found that because of Jeffrey's greater ability to pay, he was required to pay for 75% of the custodial evaluation. Shannon was required to pay for 25%. With respect to attorney's fees, the court had to interpret a provision of an agreed order between the parties. The agreed order stated that Jeffrey was limited to paying $8,000 of Shannon's attorneys fees, unless he filed "any motion concerning any issue . . . not dealt with [in the agreed order] and said motion does not concern a material issue that is remaining, and [Jeffrey] is not successful on the motion."

The court found the terms of the agreed order were simply too subjective to be enforceable. After criticizing the "continuous motions" filed by both parties in the action, "which could be construed as both necessary and frivolous," the trial court found that Jeffrey was not liable for any more of Shannon's attorney's fees, other than the $8,000 already agreed to in the order.

Shannon now appeals to this Court.

Standard of Review

Upon review of a court's division of marital property, we defer to the considerable discretion of the trial court. *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). However, we review the court's findings of fact for clear error and its conclusions of law *de novo*. CR 52.01; *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky.App. 2003). A trial court's classification of property as marital or nonmarital involves the resolution of a matter of law and is subject to *de novo* review. *Wilder v. Wilder*, 294 S.W.3d 449, 452 (Ky.App. 2009). With respect to the award of attorney's fees, the determination of whether to award costs and fees, and in what amounts, is a matter within the sound discretion of the trial court. *Moss v. Moss*, 639 S.W.2d 370, 373 (Ky.App. 1982).

Discussion

On appeal, Shannon argues: (1) that the trial court erred by concluding that $65,422.74 of the Reynolds American 401(k) was Jeffrey's nonmarital contribution and further erred in its calculations of the growth thereon; (2) that the trial court erred in finding the parties owed Jeffrey's father $20,000 and holding Shannon responsible for one-half of that amount; and (3) that the court erred by refusing to award attorney's fees under the terms of the agreed order between the parties.

The Reynolds American 401(k)

We first address Shannon's arguments with respect to the Reynolds American 401(k). Shannon argues that the trial court erred by finding *any* amount

of the 401(k) was nonmarital. Shannon bases this argument upon the fact that the Reynolds American 401(k) did not exist at the time of the marriage, but rather a Brown and Williamson account existed.

We find this argument to be without merit. While the Brown and Williamson account was no longer in existence at the time of dissolution, Jeffrey's testimony established that the money from that account was clearly rolled over into the Reynolds American account. Jeffrey testified that (1) the Brown and Williamson account essentially changed hands to Reynolds American when Brown and Williamson was bought out in 2003, and (2) Jeffrey testified that he took no action himself to make this switch, but that the switch was automatic.

While Kentucky Revised Statute(s) (KRS) 403.190(3) creates a presumption that all property acquired during the marriage is marital, KRS 403.190(2)(b) exempts any "property acquired in exchange for property acquired before the marriage." Further, the trial court is the finder of fact and due regard must be given to its ability to adjudge the credibility of the witnesses. CR 52.01. With respect to KRS 403.190(2)(b), the trial court apparently believed Jeffrey's testimony that the Brown and Williamson account rolled over into the Reynolds American account. Given the record, we cannot say this was error.

We now turn to Shannon's second argument regarding the 401(k), that the trial court erred in its method of calculating the growth on the nonmarital portion of the account. The trial court found that Jeffrey had a balance of

$65,422.74 in the account at the time of the marriage.[1] This amount was found to be Jeffrey's nonmarital contribution. The court found that $29,600 had been deposited into the account over the course of the marriage and, thus, $29,600 was the marital contribution.[2] The total balance in the account at the time of dissolution was $151,260.48.[3] The trial court added the marital and nonmarital contributions and divided the difference (growth), pro rata, according to the marital and nonmarital percentages.

It is problematic that the trial court found a nonmarital contribution of $29,600, given that the only evidence of the nonmarital contribution was Jeffrey's testimony that $29,600 had been invested over the course of the marriage. No documentation was provided to the court to support this assertion. Jeffrey testified that he arrived at this amount by adding up the employee contributions he made during the marriage.

A review of the 401(k) documentation in the record reveals that only *one* statement was provided evidencing *any* contributions to the 401(k) after the marriage, and that was only for one three-month period. During that period, $2,862.12 in employee contributions were made. There was absolutely no other

[1] This contribution was documented by a Brown and Williamson statement for the three-month period following the date of the parties' marriage.

[2] There was no documentation in the record to support this finding, however.

[3] This amount was documented in the record by a statement showing the balance during the month the divorce decree became final.

documentation of marital contributions, other than Jeffrey's own self-serving testimony that only $29,600 of the $151,260.48 balance was marital.

Further, it is apparent from the aforementioned 401(k) statement in the record that Brown and Williamson had a substantial matching plan whereby the company matched a portion of the voluntary contributions made by the employee. Jeffrey testified that he arrived at the $29,600 calculation by adding up his employee contributions, but he made no mention of employer contributions.

In light of the forgoing, it was clearly erroneous for the trial court to find that the marital contribution to the 401(k) was only $29,600. It is well-settled that the party making a nonmarital claim bears the burden of proof. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002). Although Jeffrey cites *Chenault*[4] for the proposition that tracing need not be shown with mathematical certainty and precise documentation, the only evidence concerning marital contributions in the present case came from Jeffrey's own testimony. This does not meet even the relaxed burden espoused in *Chenault*. *See, e.g., Smith v. Smith*, 235 S.W.3d 1, 9, (Ky.App. 2006); *Terwilliger*, 64 S.W.3d at 820.

Hence, we reverse and remand to the Jefferson Circuit Court for further proceedings consistent with this opinion.

Division of Debt

We now turn to the trial court's finding that the parties owed Jeffrey's father a debt of $20,000 and that each party was liable for one half of this debt.

[4] *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990).

There is no statutory authority for the assignation of debts in an action for dissolution of marriage. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Rather, debt is assigned as a matter of common law in divorce actions. *Neidlinger*, 52 S.W.3d at 522. Further, there is no presumption as to whether debts incurred during the marriage are marital or nonmarital. *Id*.; *Bodie v. Bodie*, 590 S.W.2d 895 (Ky.App. 1979). Moreover, there is no presumption that debts be divided in any particular way. Debts incurred during the marriage are generally assigned, however, by considering such factors as who received the benefits of the credit or loans, and the extent of each party's participation in incurring the debt. *Neidlinger*, 52 S.W.3d at 523.

Jeffrey's father testified at trial that the parties owed him $20,000. Jeffrey also testified that this amount was owed to his father. Proof of a debt is not held to the same high standard or burden as a claimant wishing to prove a nonmarital interest. Under CR 52.01, due regard must be given to the trial court's ability to judge the credibility of the witnesses. The trial court found Jeffrey's father's testimony concerning the debt to be credible and we will not reverse this finding on appeal.

With respect to the division of the debt on an equal basis, we note that the trial court is afforded broad discretion to divide debts in a manner it sees fit and just. In the present case, it was not unreasonable or arbitrary for the trial court to find that the parties bear equal responsibility for a debt incurred during the

marriage and used for general living expenses of the family. Finding no abuse, we affirm on this ground.

Attorney's Fees per the Agreed Order

We now turn to the final issue presented for our review: whether the trial court erred by failing to award attorney's fees under the terms of the agreed order between the parties.

Although an agreed order of the trial court is not a contract or statutory provision, the rules governing the interpretation of contracts and statutes apply. *Crouch v. Crouch*, 201 S.W.3d 463, 465 (Ky. 2006). Provisions should be "liberally construed according to the fair import of their terms, to promote justice, and to effect the object of the law." *Id*. (quotation omitted). Further, agreed orders are to be strictly enforced according to their terms, absent ambiguity. *Id*.

However, the interpretation of an agreed order differs from statutory and contractual interpretation "to the extent that instead of construing the intent of the legislature or the intent of the parties, we must determine the intent of the ordering court." *Id*. The legal significance of any trial court order is always subject to interpretation by a reviewing court. *Id*. Thus, where the language of an agreed order is plain and unambiguous, we will construe the order according to its terms. *Id*. at 466. However, where an order is ambiguous and open to interpretation, we will construe the order so as to effectuate the intent of the trial court. *Id*.

The relevant portion of the agreed order reads as follows:

> Due to the disparity of income between the parties, Jeff shall make a contribution of $8,000.00 toward [Shannon's] attorney fees. Said amount shall be paid directly to [Shannon's counsel] within seven (7) days of the signing of this agreement. . . . In consideration of . . . the advance $8,000.00 payment, and also acknowledging that said monies are being paid out of Jeff's income by an agreed attorney's lien, [Shannon] agrees to seek no other contribution toward her attorney's fees except for the following, to wit: . . . If [Jeff] files any motion concerning any issue that is not dealt with herein and said motion does not concern a material issue that is remaining, and he is not successful in his motion, then Jeff shall be responsible for paying for all work incurred by [Shannon's] counsel in defending said motion.

The trial court, upon interpreting this provision below, found as follows:

> [The] terms as set forth in the Agreed Order are simply too subjective. A review of the motions at issue reveal elements which could be construed as both necessary and frivolous. The continuous motions filed in this matter has [sic] slowed the process of this Court dealing with the issues which were originally presented to this Court at the outset of trial as the only remaining issues between the parties but for those issues dealing with the children.
>
> This Court concludes that [Jeffrey] shall not be responsible for any fees sought by [Shannon] herein.

Upon review of the agreed order, we agree with the trial court that the terms are too subjective, thus creating an ambiguity. It is unclear how this Court would determine what constituted a "material issue." Typically, the term "material fact" is used in summary judgment practice to describe an issue of fact that goes to whether a party may prevail on their claims (as opposed to a question of law, which may be resolved on summary judgment). *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 482 (Ky. 1991). On the other hand, "material

evidence" is a term used to describe "[t]hat quality of evidence which tends to influence the trier of fact because of its logical connection to the issue." BLACK'S LAW DICTIONARY (6th ed. 1990). Neither of these concepts is applicable in the present case.

Given that "material issue" is not a term of art, and this Court has no way of analyzing the "materiality" of any after-filed motions by Jeffrey, we will affirm the trial court's denial of the additional $409.00 in attorney's fees. As previously stated, where ambiguity exists, it is our job upon review to attempt to effectuate the intent of the trial court. *Crouch*, 201 S.W.3d at 465. That intent was made clear here when the trial court stated that it did not find Shannon lacked the means to pay the additional $409.00 in fees she was requesting. The court's intent was to avoid Shannon being charged with attorney's fees for which she lacked the means to pay.

Accordingly, we affirm the Jefferson Family Court on this ground.

Conclusion

For the foregoing reasons, we affirm the findings of fact and conclusions of law of the Jefferson Circuit Court with respect to the issues of the division of debt and attorney's fees, but reverse and remand to the trial court for further proceedings consistent with this opinion on the issue of the Reynolds American 401(k).

ALL CONCUR.

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