

RENDERED: MAY 27, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002206-MR
AND
NO. 2010-CA-000401-MR

BRENDA GAIL TAYLOR (NOW PICKETT)

APPELLANT

v. APPEAL FROM FAYETTE FAMILY COURT
HONORABLE LUCINDA CRONIN MASTERTON, JUDGE
ACTION NO. 07-CI-02738

MICHAEL GREGORY TAYLOR

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: MOORE AND THOMPSON, JUDGES; LAMBERT,¹ SENIOR
JUDGE.

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

LAMBERT, SENIOR JUDGE: Brenda Taylor appeals from the final decree of the Fayette Family Court and argues that court abused its discretion with respect to division of property. We disagree and affirm.

Michael and Brenda Taylor were married on February 22, 1997. It was the second marriage for both and each had children from their prior marriages. There were no children born of this marriage. Brenda was employed as a nurse earning approximately \$43,000 per year with the additions of company paid health insurance and a retirement benefit package. Michael was employed and earned approximately \$29,000 per year along with a retirement pension and an employee savings plan. Michael additionally engaged in home construction as a side business but the year before the marriage he incurred a \$12,223 loss from that activity.

Brenda entered the marriage with an existing bank account balance of \$22,793.45. Prior to the marriage, Michael had purchased several lots for future homebuilding. One of those lots resulted in a loss that the couple recognized on their joint tax returns. During the marriage, the couple constructed homes on the building lots. Their practice was to move into a new home, then sell it, and move into another new home. Over time, Brenda put the entire balance of her nonmarital bank account into the construction business along with funds inherited from her father.

At trial, Brenda argued that sums from her premarital bank account should be restored to her along with prevailing interest. Brenda also sought an

award of spousal maintenance. She was awarded \$30,000 of her retirement fund which was found to be marital property. She additionally sought reimbursement for funds she expended maintaining the marital home and preparing it for sale.

After entry of the final judgment, the trial court denied Brenda's motion to alter, amend or vacate as well as her request for additional findings of fact with regard to a knee injury sustained by Michael. She appealed from that judgment. Thereafter, on January 4, 2010, she filed a motion to set aside the judgment pursuant to Kentucky Rules of Civil Procedure (CR) 60.02. She also filed a motion with this Court asking that we hold that appeal in abeyance pending the trial court's ruling on her motion. She included an affidavit with her motion to set aside which purported to explain a nonmarital transfer into her retirement account and details on the now defunct company which in the past had been used by her employer to manage retirement funds. The trial court overruled her CR 60.02 motion. She then filed a notice of appeal from that order and asked this Court to consolidate her two appeals into this single action. That request was granted and this appeal progressed.

Brenda first contends that the trial court abused its discretion when it failed to hold that the funds originally inherited from her father were nonmarital and, although continually used to fund additions to the respective construction homes, remained nonmarital entitling her to those funds as well as a reasonable rate of investment return. Brenda had the burden of proving that the amounts in question were nonmarital. *See Hunter v. Hunter*, 127 S.W.3d 656 (Ky.App. 2003).

An examination of the trial court's findings of fact, conclusions of law and decree reveals that the trial court thoroughly considered the issue of Brenda's nonmarital property. While Brenda is correct that *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990), relaxed some of the draconian tracing requirements found in prior caselaw, the general requirement of nonmarital asset tracing was observed.

“The trial court heard the evidence and saw the witnesses. It is in a better position than the appellate court to evaluate the situation.” *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). “The court below made findings of fact which may be set aside only if clearly erroneous.” *Id.* “When the evidence is conflicting, as here, we cannot and will not substitute our decision for the judgment of the” fact-finder. *Gates v. Gates*, 412 S.W.2d 223 (Ky. 1967). Both parties presented evidence regarding the construction of the various marital homes. We cannot say that the trial court's decision was clearly erroneous and, therefore, will not substitute our judgment.

Brenda next argues the trial court abused its discretion when it failed to award her maintenance. To determine whether maintenance is appropriate, the trial court is required to consider “[t]he ability of the spouse from whom maintenance is being sought to meet his needs while meeting those of the spouse seeking maintenance.” Kentucky Revised Statutes (KRS) 403.200(2)(f). Here, the trial court found “both parties in this case suffer from serious medical and physical constraints on their abilities to earn a living. Even if the Court were to find that Brenda is entitled to maintenance, based on her needs, the Court cannot find that

Mike is able to pay it.” After our own review of the testimony, we agree with the findings of the trial court that Mike would be unable to meet his own needs in the future. We cannot disagree with the application of the statute and discover no abuse of discretion.

After final judgment, Brenda discovered that, although she had submitted an analysis of her retirement prepared by Fidelity Investments which managed her 401(k) retirement plan, that plan had been administered by a different investment company during the first year of the marriage. The Fidelity analysis included the entire timeframe of the marriage but did not disclose that Fidelity was not managing the fund for the entire time. During the time of management by Fidelity, the value of the retirement fund had increased from approximately \$33,000 to \$71,000, but, due to market conditions, was valued at approximately \$37,000 at the time of the dissolution.

The trial court awarded Brenda \$30,000 from the retirement account as an “advance” which offset many of the marital assets awarded to Mike. Brenda argued that the newly discovered evidence should be sufficient to require the trial court to set aside the judgment. Her rationale was that, even though the records from the prior fund administrator were not available, she could now show she entered the marriage with over \$36,000 in that retirement fund and she was entitled to have it as nonmarital property. Her argument now is that the trial court abused its discretion when it denied her motion because it would have then provided her with a greater amount of the marital assets. We discover no abuse of discretion.

The trial court was faced with a situation where, because of ill health, both Brenda and Mike faced difficult financial futures. It is clear from the record that the trial court attempted to leave each in a financial position equal with the other. The value of the retirement account as presented at trial did not change because a different company managed it for a year or because it was a marital or nonmarital asset. We can find nothing to indicate the trial court abused its discretion in the manner that was used to divide the assets. Nothing in the newly discovered evidence would affect the value of the account and it was within the trial court's discretion to deny Brenda's request. There was no error.

Finally, Brenda argues the trial court abused its discretion when it failed to award her additional reimbursements for money spent to maintain the marital residence and prepare it for sale. We do not discover any error. Brenda requested reimbursement of \$4,870.86, which she claimed was one-half of the money she expended on moving expenses from the marital property and preparing the home for sale. The trial court noted that she "had exclusive possession of the home" for almost seven months. During that time, Michael continued to pay the credit card bill and made the payments on Brenda's car. The trial court further found that most of the requested claims were "actually for regular house maintenance or other recurring expenses[.]" There was no abuse of discretion.

The judgment of the Fayette Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Lisa Jean Oeltgen
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BRIEF FOR APPELLEE:

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