

Commonwealth of Kentucky
Court of Appeals

NO. 2011-CA-001695-MR

JAMES ALLEN SLAVEY

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DOUGLAS M GEORGE, JUDGE
ACTION NO. 10-CI-01340

HEATHER SHAWNA SLAVEY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MAZE AND NICKELL, JUDGES.

MAZE, JUDGE: Appellant, Allen Slavey, appeals from the Pulaski Circuit Court's Order and Decree of Dissolution and from that court's order vacating its own prior order regarding property Allen inherited while married to Appellee, Heather Slavey. Having reviewed the record in this case, we find that the trial court did not abuse its discretion in the division of marital assets. Hence, we affirm.

Background

The following facts are not in dispute in this case. After more than eight years of marriage, Allen and Heather separated in July of 2009 and Heather filed for divorce in September 2010. From the date of separation, the parties had very similar income and shared equal time with their only child. Also from that time, Heather retained residence in the marital home, paying the mortgage and all maintenance on the home. The marital home was valued at between \$325,000 and \$350,000, with the couple owing approximately \$137,000 on a mortgage. In addition to the marital home, the parties had an outstanding home equity line of credit with a remaining balance of around \$3,000, which was used to purchase one of their four vehicles. The couple owed nothing on their other three vehicles.

In October 2003, Allen's father's death resulted in Allen and his sister each inheriting \$18,510.94 after a civil judgment was settled in his father's favor. Allen deposited the funds from this inheritance into his and Heather's joint account. Allen's mother, who then resided in a nursing home, took possession by survivorship of a small home she and her late husband owned in Science Hill, Kentucky. In 2004, at the advice of Medicare representatives, Allen and Heather pre-paid \$12,500 for Allen's mother's funeral and medical expenses, inducing Medicare to relinquish its claim on the property for the then-ongoing care of Allen's mother. These funds were drawn from Allen and Heather's joint account. As a result, Allen and Heather took joint title to the Science Hill property in September of 2004.

On April 1, 2011, the trial court heard evidence regarding the division of assets. As a result of that hearing, the trial court issued its Decree of Dissolution of Marriage, which ordered, in part, that the marital home should be sold, or, in the alternative, Heather could pay Allen \$64,819.00 and assume the indebtedness on the remainder of the mortgage. In determining this amount, the court found that Heather had made \$16,000 in mortgage payments during the parties' separation and assigned equal responsibility for the home equity line of credit. The court's calculation was based on Allen's agreement to a basic sale price of \$270,000 for the home. Heather later elected to purchase the home based on this calculation.

In dividing the four marital vehicles, the trial court awarded Heather around \$16,000 more in equity than Allen as reimbursement for the amount Heather contributed toward the mortgage during their separation. Finally, the trial court found the Science Hill property to be Allen's non-marital asset, reasoning that there was little, if anything, marital in nature about the property and that it was a separate and inherited property exempt from division.

As a result of the trial court's order, both parties filed Motions to Amend, Alter or Vacate. Allen requested that the court reconsider its orders regarding division of the vehicles, the assignment of the home equity loan and reimbursement for dental premiums which Allen had already paid. Heather requested that the court reconsider its orders regarding primary parenting, child support, and reimbursement for payments made on the mortgage during separations. Heather also requested that the trial court amend its finding that the

Science Hill property was non-marital. Of these seven motions, only the latter was granted. In reversing itself and declaring the Science Hill property to be marital, the trial court reasoned that the property was deeded to both Allen and Heather both and purchased from the couples funds which were co-mingled with the inherited funds in the joint account, making the asset marital. The trial court did not offset the shift in distributed property between Allen and Heather which resulted from its order.

Allen appeals the trial court's denial of his motions regarding the marital vehicles and the home equity loan, as well as the trial court's ultimate finding that the Science Hill property was marital.

Standard of Review

Allen appeals the trial court's division of assets in his divorce action. We therefore review the trial court's ruling for an abuse of discretion. To amount to an abuse of discretion, the trial court's decision must be arbitrary, unreasonable, unfair or unsupported by sound legal principle." The question of whether an item is marital or non-marital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or non-marital is reviewed *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006)(citing to *Marcum v. Marcum*, 779 S.W.2d 209, 211 (Ky. 1989).)

Analysis

We dispense first with Allen's arguments regarding the division of the marital vehicles and equal assignment of responsibility for the home equity loan. In making both arguments, Allen provides no authority in support of his arguments or claims of error, as is required under CR 76.12(4)(c)(v). The only mention of authority Allen makes regarding these two points is that "KRS 403.190(1) does not require the trial court to divide marital property equally, but rather equitably." This is insufficient to sustain an argument for reversal. Accordingly, we affirm the trial court's rulings regarding the marital vehicles and the home equity loan.

Allen's remaining argument pertains to the Science Hill property, which the trial court, after reversing its prior order, deemed to be marital property. In finding the property to have been purchased with marital funds, the trial court reasoned, "[t]he property was deeded to both parties (2004) prior to [Allen's] mother's death in 2007. There was no proof that this was a gift to one party and not to both. Also, the co-mingling of funds and the repairs and improvements made to the property would make it marital." Allen argues that he, as a minimal record keeper, is the type of individual the Supreme Court in *Chenault v. Chenault* sought to protect by relaxing the tracing requirements for non-marital property. 799 S.W.2d 575 (Ky. 1990). Allen also contends that the trial court erred in finding title of the Science Hill property relevant to its ultimate decision.

The presumption in Kentucky is that all property acquired during the course of the marriage is marital property, unless the property can be shown to have originated in one of the excepted ways outlined in KRS 403.190(2).

Terwilliger v. Terwilliger, 64 S.W.3d 816, 820 (Ky. 2002). One such exception is, “[p]roperty 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[.]” KRS 403.190(2)(a). A party claiming that property acquired during the marriage is other than marital property bears the burden of proof. KRS 403.190(3), *Brosick v. Brosick*, 974 S.W.2d 498 (Ky. App. 1998).

Kentucky courts have typically applied the “source of funds” rule to characterize property or to determine parties' non-marital and marital interests in such property. *See Smith, supra*, at 5 (citing *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky. 2001)). The “source of funds” rule “simply means that the character of the property, i.e., whether it is marital, non-marital, or both, is determined by the source of the funds used to acquire property.” *Id.* While the word does not appear in the statute, judicial construction of KRS 403.190 has given rise to the concept of “tracing.” *See Chenault, supra*, at 578. In *Chenault*, this Court recognized that tracing to a mathematical certainty is not always possible, noting that: “While such precise requirements for non-marital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skill or persons who are imprecise in their record-keeping abilities.” *Id.*

In *Terwilliger v. Terwilliger*, the Supreme Court distinguished the case before them from the facts in *Chenault*. 64 S.W.3d 816 (Ky. 2002). Unlike Ruby Chenault, who brought considerable assets to her marriage and made little money during it, Mr. Terwilliger ran several corporations which required the management of large assets and liabilities and which produced a generous income for him during the marriage. Therefore, the Court found, Mr. Terwilliger was subject to the more stringent tracing requirements, not the relaxed standard under *Chenault*, as he was the “skilled businessman” of whom the Court deemed precise accounting was required.

While Allen’s business experience is not quite that of Mr. Terwilliger, it is clear from the record on appeal that he is capable of keeping diligent financial records, despite his claims to the contrary. As the court-appointed Guardian over his mother’s financial and personal matters, Allen filed several annual reports detailing, to the penny, income and expenditures necessary for his mother’s long-term medical care. We do not accept the premise that Allen was capable of this, but simultaneously incapable of keeping even minimal documentation of the connection between the funds he inherited from his father and the Science Hill property. We hold that Allen should be held to the more stringent tracing requirements under Kentucky law.

Notwithstanding the issue of Allen’s fitness for protection under *Chenault*’s relaxed standard, the record before us is devoid of any specific evidence which demonstrates that even a minimal effort was made to trace the

funds inherited from Allen's father's estate directly to the purchase of the Science Hill property. Allen presents not a single piece of evidence in the record, other than his statement to the contrary, that the \$12,500 necessary to purchase the Science Hill home, and drawn from the joint account, was any part of the \$18,510.94 he inherited from his father. Even if Allen were held to the more lenient standard in *Chenault*, some tracing must still occur. *See Polley v. Allen*, 132 S.W.3d 223, 229 (Ky. App. 2004). "Speculation and conjecture will not suffice to meet even a relaxed burden" to show that the funds used to purchase the Science Hill property were non-marital. *Smith v. Smith*, 235 S.W.3d 1, 9 (Ky. App. 2006). Therefore, we find that Allen has failed to meet his burden of proving the Science Hill property to have been purchased with non-marital funds, and therefore non-marital.

Conclusion

We find that the trial court did not abuse its discretion and we affirm, in their entirety, the findings of the Pulaski Circuit Court in this case.

ALL CONCUR

BRIEFS FOR APPELLANT:

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