

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001634-MR

THOMAS P. GOGAN

APPELLANT

v. APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE ELISE GIVHAN SPAINHOUR, JUDGE
ACTION NO. 10-CI-01600

CARLA O. GOGAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, TAYLOR, AND THOMPSON, JUDGES.

CAPERTON, JUDGE: Thomas P. Gogan appeals from the trial court's orders involving the distribution of the parties' property and the award of maintenance to Carla Gogan following the dissolution of their marriage. Finding no error, we affirm.

The parties were married on April 7, 1990, and separated on June 5, 2009. The court entered the decree of dissolution of marriage on October 11,

2011. During the majority of their marriage, the parties were both employed full time. Carla worked for the Robert Bosch Company (“Bosch”) and Tom worked for General Electric (“GE”). Tom received an early retirement buyout because his position was eliminated in February 2009.¹ At the time the petition for dissolution of marriage was filed on October 10, 2010, Carla and Tom earned monthly incomes of \$4,100.00 and \$7,200.00² respectively.

In October of 2010, Carla filed a petition for temporary maintenance in anticipation of losing her job. Her employment with Bosch was scheduled to end on December 31, 2010, as a result of the office closing. Carla received a severance package from Bosch in the amount of \$28,915.42. On February 16, 2011, the trial court awarded Carla temporary maintenance in the amount of \$1,680.00 per month, retroactive from the October filing. At the time of the February 16, 2011, order, Carla was unemployed and receiving \$415 per week in unemployment benefits. Carla became employed with Humana in October of 2011 and the court terminated temporary maintenance thereafter.

The court held a two-day hearing concerning the disposition of the parties’ property and maintenance. Both parties testified at the hearing, as did their respective expert witnesses regarding the valuation of the rental property owned by

¹ Tom had been with GE 35 years, of which he was married to Carla for 21 years.

² Tom received his pension in addition to \$830.00 per month in unemployment benefits and \$1,385.00 per month in rental income. Tom claims that at the time the petition was filed Carla earned approximately \$58,000 per year and he earned \$60,168.60 per year from his GE pension.

the parties. Thereafter, the court entered its findings of fact, conclusions of law, and judgment on October 11, 2011, amended August 23, 2012.

After considering the evidence presented by the parties, the court first allocated the parties' retirement and pension benefits. Carla had a pension plan at GE that will pay \$347.44 per month at the age of 60. Both parties agreed that it is solely her nonmarital property and, thus, the court did not divide it. Carla also had a pension plan with Bosch which will pay her \$615.30 per month at the age of 65. Tom's pension plan with GE was determined to be partially marital property, i.e., 54% of the pension was marital in nature. The court determined that from this Carla was entitled to \$1,353.78 per month until Tom draws social security. Thereafter, Carla would be entitled to \$1,077.00 per month. The trial court ordered both parties to maintain the status quo and keep the other spouse as the survivor beneficiary on their respective pensions.

The court divided the remaining retirement accounts. Carla had a 401(k) plan with Bosch of \$159,725.12 on May 31, 2011, which the parties agreed was marital. The parties had a marital IRA account which the court divided equally. Tom had a GE savings and security plan of \$268,994.12. Tom claimed a \$22,000 premarital contribution but could not account for an allocation of earnings, gains or losses to this sum. The court ordered that Tom be restored his \$22,000 contribution and then divided the remaining retirement accounts equally.³

³ Tom also had an IRA of \$45,024.47, which the court split in the same manner as his pension plan.

Throughout their marriage, Carla and Tom resided in three different houses, selling one home and using the profits from it to fund the next purchase. After hearing the evidence of the parties, the court below found that Tom was unable to trace his claim of nonmarital property.

Prior to marriage, Tom owned a residence at 2124 Bogard Lane, Mt. Washington, Kentucky. No proof was tendered as to its original cost. After the parties were married, thirteen house payments were made with marital funds prior to the house being sold in May 1991. While testimony was provided that Tom worked constantly to improve the home, there was no evidence provided as to how much principal on the house was paid before or after the marriage or how much the nonmarital money improved the home compared to the improvements made with marital money. There was no testimony as to whether the improvements increased the home's value or the value increased due to market conditions. The house was sold for \$59,000, with the payoff of \$31,392.74 on the mortgage of \$34,000. Testimony was provided that the lot of the house, two acres, was worth \$6,500, out of the 4-acre tract owned by Tom and purchased for \$13,000. The sale of the house netted \$26,932.48 after the sales cost.

The equity of the prior house was used to construct a new home on the remaining two acres located at 2096 Bogard Lane. Carla contributed \$7,621.00 of her nonmarital money to construct the new home.⁴ The remaining funds came

⁴ The trial court found Carla's evidence concerning the use of the funds to be convincing. Tom claims that Carla gave him this money for the wedding as opposed to Carla's claim that the money was used for the house.

from construction loans and mortgages. The \$30,000-construction loan was paid off in February 1992 with marital funds. This home was sold in October 2002 for \$186,000.00 with a payoff on the mortgage and a line of equity,⁵ leaving \$20,111.07, which was used to construct the third residence.

The parties then owned the last marital residence at 1931 Armstrong Lane, Mt. Washington, Kentucky. The parties originally borrowed \$275,000.00 to build the home and later refinanced the debt. There was a line of equity on this home that was used to purchase two timeshares and two big screen television sets. This home was sold during the pendency of this action with proceeds of \$127,365.58. The court found that the parties have traced in a limited manner some of the nonmarital claims: namely, Carla had contributed \$7,621.00 to the construction of the homes while Tom contributed \$13,000, the cost of the lots on Bogard Lane. The court restored these amounts as nonmarital property and divided the remainder of the proceeds as marital in equal proportions. The court noted that there was a failure to sufficiently prove or trace any other nonmarital claim or to distinguish how these amounts increased the value of the home.

Last, the court addressed Carla's request for permanent maintenance. The court noted that she had received temporary maintenance when she did not have access to her share of the pension income. Through the court's division of property, Carla would then receive her share of the pension income per month. The court reiterated that Tom was required to keep Carla as his designated survivor

⁵ This line of equity was used on such things as improvements of rental property. The division of the rental property is not contested on appeal.

beneficiary on his pension. The court ordered this in lieu of maintenance. The court found that the parties' income was substantially equal and that Carla's needs would be met with the guaranteed continuation of the pension income through the survivor benefit. After entry of this order, Tom filed a motion to alter, amend, or vacate.

The court entered an amended judgment on August 23, 2012. In addressing Tom's motion to alter, amend, or vacate the order of October 11, 2011, the court noted Tom's argument that keeping Carla as his survivor beneficiary on the GE pension lessened the amount he receives per month. The court declined to change its order in this regard as the parties had made a joint decision during the marriage to economically protect Carla should Tom predecease her. The court noted that if Carla was not guaranteed of this ongoing income, then she would be entitled to maintenance given the economic disparity between the parties. Additionally, the court reiterated that Tom failed to sustain his burden of proof regarding his claimed nonmarital property in the parties' residence because the court found Tom's tracing of his claim unconvincing. It is from these orders that Tom now appeals.

On appeal Tom presents two arguments, which he contends require reversal. First, Tom argues that the trial court failed to apply the statutory and precedential requirements of Kentucky law regarding the tracing of nonmarital property to the facts in evidence. In support thereof, Tom asserts that he was entitled to an award of his entire nonmarital interest in real property and the trial

court erred by failing to so order. In addition, Tom claims that Carla failed to trace her asserted nonmarital interest in 2095 Bogard Lane, yet the court awarded her the entire amount she requested. Second, Tom argues that the court failed to apply the statutory and case law regarding maintenance to the facts in evidence when awarding Carla both temporary and permanent maintenance. In support thereof, Tom argues that at all times Carla had sufficient resources to support herself, and that he was unable to meet his own reasonable needs because of the court's temporary maintenance award to Carla. Additionally, Tom argues that Carla is not entitled to survivors benefits as an indirect form of permanent maintenance because she has sufficient property and income to support her needs and that she is not entitled to a lifetime award of maintenance because she does not qualify for same under the requirements of Kentucky Revised Statutes (KRS) 403.200(2).

In response, Carla argues that the trial court did not err regarding the tracing of nonmarital property given the evidence before it; that the court correctly awarded her temporary maintenance to which she was entitled; and the court properly awarded the survivors benefit as marital property. With these arguments in mind we turn to our applicable standard of review.

In dividing marital property a trial court has wide latitude, and absent an abuse of discretion we shall not disturb the trial court's ruling. *See Smith v. Smith*, 235 S.W.3d 1 (Ky. App. 2006), and *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Similarly, in maintenance awards, the trial court is afforded a wide range of discretion, which is reviewed under an abuse of discretion standard.

See Platt v. Platt, 728 S.W.2d 542, 543 (Ky. App. 1987). Abuse of discretion is that which is arbitrary or capricious, or at least an unreasonable and unfair decision. *See Sexton v. Sexton*, 125 S.W.3d 258, 272 (Ky. 2004). However, the trial court's conclusions of law are reviewed *de novo*. *Stipp v. St. Charles*, 291 S.W.3d 720, 723 (Ky. App. 2009). We now turn to the issues raised by the parties.

As his first basis for appeal, Tom argues that the court erred in dividing the marital property in regard to claimed nonmarital interests by the parties. The division of marital property, in this case marital residence, is controlled by KRS 403.190(1) which states:

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.

Our courts have interpreted KRS 403.190 to require a three-step process. As stated in *Hunter v. Hunter*, 127 S.W.3d 656, 659-660 (Ky. App. 2003), “The trial court's division of property involves a three-step process: (1)

characterizing each item of property as marital or nonmarital; (2) assigning each party's nonmarital property to that party; and (3) equitably dividing the marital property between the parties.” (Internal citations omitted). The equitable division of property is not necessarily equal. *See Lawson v. Lawson*, 228 S.W.3d 18, 21 (Ky. App. 2007) (KRS 403.190 requires a court to divide the marital property in “just proportions” which is not necessarily equally.).

The party claiming that the property acquired during the marriage is nonmarital has the burden of proof and must establish this by clear and convincing evidence. *Sexton* at 266-267, n.31. “Clear and convincing proof does not necessarily mean uncontradicted proof. It is sufficient if there is proof of a probative and substantial nature carrying the weight of evidence sufficient to convince ordinarily prudent-minded people.” *Rowland v. Holt*, 253 Ky. 718, 70 S.W.2d 5, 9 (Ky. 1934). This is accomplished with the concept of tracing.

Tracing allows the party claiming a nonmarital interest in property to prove its nonmarital character. The “source of funds rule” is often used to achieve tracing when the property before the court includes both marital and nonmarital components. *See 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, nonmarital, or both, is determined by the source of the funds used to acquire property.” *Travis* at 909, n.10 (internal citations omitted). Moreover, “[i]n the context of tracing nonmarital property, when the original property claimed to

be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.” *Sexton* at 266.⁶

The concept of tracing does not require mathematical certainty. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990). Instead, the party claiming such an interest may persuade the family court through testimony how the property owned at the time of the dissolution had been acquired. *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002). This often requires showing that the nonmarital asset was spent in a traceable manner during the marriage. *Kleet v. Kleet*, 264 S.W.3d 610 (Ky. App. 2007).

Pertinent to the case *sub judice*, comingling of assets presents two related issues for the party claiming a nonmarital interest in the property to overcome. First, did the nonmarital property lose its exempt status; and second, has the commingling of assets rendered tracing ineffective. *See Bischoff v. Bischoff*, 987 S.W.2d 798 (Ky. App. 1998), and *Travis* at 910.

The question before this Court is not whether we would have decided it differently, but whether the findings of the family court are clearly erroneous, whether it applied the correct law, or whether it abused its discretion. *See B.C. v. B.T.*, 182 S.W.3d 213, 219–20 (Ky. App. 2005). *See also Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974). The family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions

⁶ *Sexton* explains that tracing “arises from KRS 403.190(3)’s presumption that all property acquired after the marriage is marital property unless shown to come within one of KRS 403.190(2)’s exceptions.” *Id.* at 266.

regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007).

Sub judice the trial court was presented evidence from Tom that he had purchased the land prior to marriage where two out of the three homes the parties resided in were built. Tom testified that he had constructed the first house prior to marriage and that only thirteen of the mortgage payments were made with marital funds. The equity from this house was then used to construct the parties' second marital home on Bogard Lane, the second house in which they resided. The court was then presented testimony that Carla provided funds for the construction of this home.⁷ This home was eventually sold and the proceeds were invested into the third home.

Tom claims that the source of funds of all these homes originated with the first home, which he built himself prior to marriage. Tom provided a 1991 Property Valuation Administrator's valuation and a HUD's Settlement Statement. The court found Tom's evidence to be insufficient to prove tracing of any nonmarital claim, other than that invested in the land and specifically found Tom's evidence to be lacking regarding how any nonmarital funds increased the value of the home. We agree with the court that Tom did not sustain his burden of proof regarding the claimed nonmarital funds. Tom failed to provide evidence regarding

⁷ Tom takes issue with the trial court's acceptance of Carla's testimony regarding this matter. We remind Tom that the trial court, as the finder of fact, is free to believe or disbelieve a witness's testimony. We have reviewed Carla's proffered evidence and must conclude that the trial court did not err in relying on this evidence in making its findings.

the value of the residence prior to marriage, thereby leaving the trial court to speculate as to the value of the nonmarital asset; this it declined to do. We cannot say that the trial court's findings are clearly erroneous in light of the evidence presented by the parties *sub judice*. Accordingly, we affirm the trial court on this ground.

As his second basis for appeal, Tom argues that the court failed to apply the statutory and case law regarding maintenance to the facts in evidence when awarding Carla both temporary and permanent maintenance. In support thereof, Tom argues that at all times, Carla had sufficient resources to support herself and that in awarding temporary maintenance, the court rendered Tom unable to meet his own reasonable needs. Additionally, Tom argues that Carla is not entitled to survivors benefits as an indirect form of permanent maintenance because she has sufficient property and income to support her needs and that she is not entitled to a lifetime award of maintenance because she does not qualify for same under the requirements of KRS 403.200(2).

At issue, KRS 403.200(1) provides that a court may grant maintenance only if it finds the spouse seeking it: (a) lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and (b) is unable to support himself through appropriate employment.

An award of maintenance is appropriate when a party is not able to support himself or herself in accord with the standard of living enjoyed during the marriage, and the property awarded upon dissolution of marriage is insufficient to

provide for his reasonable needs. *Russell v. Russell*, 878 S.W.2d 24, 26 (Ky. App. 1994). KRS 403.200(1)(a) and (b) set out the required findings for an award of maintenance. “There must be a finding that the spouse seeking maintenance lacks sufficient property, including marital property, to provide for his reasonable needs; second, that spouse must be unable to support himself through appropriate employment according to the standard of living established during the marriage.” *Drake v. Drake*, 721 S.W.2d 728, 730 (Ky. App. 1986). These specific findings are required so that the appellate court can determine the propriety of the award. *See Qualls v. Qualls*, 384 S.W.2d 326 (Ky. 1964).

In addition to the statutorily required specific findings, the trial court is required to consider the statutory factors in KRS 403.200(2). *See Gomez v. Gomez*, 168 S.W.3d 51 (Ky. App. 2005).

Once the trial court has decided that maintenance is appropriate, it must then consider all relevant factors in determining the amount and duration of maintenance pursuant to KRS 403.200(2). Such factors include the spouse's financial resources, the time needed to obtain sufficient education or training, the standard of living during the marriage, the duration of the marriage, the age and condition of the spouse seeking maintenance, as well as the ability of the paying spouse to meet his or her needs.

Tom takes issue with the trial court’s order of temporary maintenance, specifically in light of the severance package Carla received and for ordering temporary maintenance for two months prior to Carla losing her job, when Carla’s

motion was originally filed. We disagree with Tom that such was an abuse of the court's discretion. At the time of the award, Carla was unemployed. In awarding temporary maintenance, the court considered the severance package in its award. The court considered all statutory requirements, including the parties' economic circumstances, wherein Carla received \$415.00 per week in unemployment benefits and Tom received \$5,159.00 from his GE pension. The court noted that Carla could not meet her reasonable expenses and that Tom resided with a girlfriend so his expenses were \$780.00 per month. Thus, the court determined that Carla would receive \$1,680.00 per month in temporary maintenance, beginning from the date the motion was filed. While Carla was employed for two of those months, we disagree with Tom that this necessitates reversal given the disparity in the parties' income at the time the court held a hearing on the motion. We likewise disagree with Tom that the evidence suggests that he was unable to pay for his reasonable living expenses.⁸ Accordingly, we decline to reverse on this ground.

We disagree with Tom's characterization of the trial court's distribution of retirement benefits as permanent maintenance. Tom argues that Carla is not entitled to survivors benefits as an indirect form of permanent maintenance because she has sufficient property and income to support her needs

⁸ Tom states that his expenses were \$3,981.67, yet does not take issue with the court's finding that his expenses were \$780.00. Instead, Tom argues that he was forced to pay the mortgage on the marital home until the property was sold while Carla lived in the house without any cost to her. We note that Carla was responsible for all other costs associated with the home aside from the mortgage. Such an arrangement is within the court's discretion.

and that she is not entitled to a lifetime award of maintenance because she does not qualify for same under the requirements of KRS 403.200(2).⁹

This Court has repeatedly held that, upon divorce, retirement benefits that were earned during the marriage and have vested are to be divided as marital property. *See Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky. App. 2003); *Foster v. Foster*, 589 S.W.2d 223, 224 (Ky. App. 1979). Indeed, it appears from the record that the parties made a joint decision regarding retirement and chose to have Carla listed with the survivorship beneficiary option. We note that Tom retired in February 2009 and the parties did not separate until months later after more than twenty years of marriage. Clearly, the retirement benefits which were earned during the marriage had vested and the trial court did not err in ordering the parties to maintain the status quo, keeping each other as survivor beneficiary, and awarding Carla her portion of the retirement benefits. Accordingly, we find no error and decline to reverse on this ground.

Finding no error, we affirm.

ALL CONCUR.

⁹ While the trial court noted that *if* Carla were not to receive the retirement benefits, *then* she would be entitled to maintenance, we do not believe this transforms the retirement benefits into permanent maintenance. Instead, we believe that the trial court was simply informing Tom that it had considered Carla's financial position and that the distribution of the vested retirement benefits put Carla in a position where she was not entitled to maintenance and, thus, the court did not order maintenance.

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