

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001586-MR

ANTONIO MONTANO

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 11-CI-504144

CATHY MONTANO, NOW MILLER

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, DIXON, AND JONES, JUDGES.

CLAYTON, JUDGE: This is an appeal from Findings of Fact and Conclusions of Law (“Findings and Conclusions”) entered by the Jefferson Circuit Court, Family Division, regarding the distribution of assets in a divorce action. Based upon the following, we reverse the decision of the trial court and remand for further findings and conclusions.

BACKGROUND INFORMATION

The parties, Antonio Montano and Cathy Miller (formerly Cathy Montano), initiated divorce proceedings in Jefferson Circuit Court, Family Division. The trial court entered Findings of Fact and Conclusions of Law on July 11, 2013. During the trial regarding the distribution of property, testimony was entered which set forth that Miller had withdrawn from her Procter and Gamble 401K retirement account, the sum of \$191,718.

There was also testimony that the couple invested \$70,000.00 from this money with Montano's brother's business, Downtown Properties, LLC. In its Findings and Conclusions, the trial court held as follows:

...[O]n January 21, 2011, about fifteen (15) months after leaving Procter & Gamble [Miller] took a \$191,718.40 early distribution from her Procter & Gamble Profit Sharing Trust retirement account. (Respondent's Exhibit #24.) Again, Ms. Miller failed to provide the Court with the value of assets held in her Procter & Gamble Profit Sharing Trust retirement account immediately before or after she took the \$191,718.40 distribution.

Based on the only evidence placed into the record by either party, the Court finds that the \$191,718.40 Ms. Miller took from her Procter & Gamble retirement account to have been marital funds acquired by the parties between December 22, 2003 and October 2009.

Findings and Conclusions at p. 11.

The trial court then goes on to discuss the \$70,000 invested with Montano's brother:

During the marriage Ms. Miller loaned a business entity owned by Mr. Montano's brother, Downtown Properties, LLC, \$70,000.00. (Respondent's Exhibit #23.) Under

the terms of the April 26, 2011 written Promissory Installment Note, Downtown Properties, LLC was to pay Ms. Miller interest only on said \$70,000.00 at \$700.00 per month for a term of six (6) months, at which time the principal balance of \$70,000.00 would then be due and payable in-full. Both parties acknowledge that the source of said \$70,000.00 was from non-marital funds belonging to Ms. Miller.

Both parties further acknowledge that at the time of trial[,] Downtown Properties, LLC had paid Ms. Miller \$30,000.00 of said \$70,000.00 leaving an unpaid principal balance of \$40,000.00. Based on the parties' representations, acknowledgments, and admissions to the Court during the trial, the Court finds any and all rights under the April 26, 2011 written Promissory Installment Note to be the non-marital property of Ms. Miller. The Court will restore Ms. Miller to any and all rights under that promissory note as her non-marital property.

Findings and Conclusions at p.14.

Montano filed a Motion to Amend the Findings, Conclusions and Order entered by the trial court on July 22, 2013. In his motion, Montano argued that the tracing of the \$70,000.00 from the \$191,718.40 marital asset required the trial court to conclude that the \$70,000.00 note was also a marital asset. The trial court denied Montano's motion holding that, "Mr. Montano asked the Court to consider facts in existence at the time of trial, but not in evidence, asks that the Court make a ruling contrary to evidence at trial, and merely reargues his position with regard to maintenance." Montano then brought this appeal.

STANDARD OF REVIEW

Kentucky Rules of Civil Procedure 52.01 provides that "[f]indings of fact, shall not be set aside unless clearly erroneous, and due regard shall be given to the

opportunity of the trial court to judge the credibility of the witnesses.” A judgment is not “clearly erroneous” if it is “supported by substantial evidence.” *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

Substantial evidence is “evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Id. Kentucky State Racing Comm’n v. Fuller*, 481 S.W. 2d 298, 308 (Ky. 1972). With this standard in mind, we review the trial court’s Findings and Conclusions.

DISCUSSION

Montano argues on appeal that the trial court erred when it found that the \$191,718.40 distribution from Miller’s 401k account was marital property, but that the \$70,000.00 taken from that distribution was non-marital. We agree.

At trial, Miller provided the following answer when asked where the \$70,000.00 that they had invested with Downtown Properties, LLC came from:

In January of 2011, Tony and I cashed in a sizeable amount of stock from my 401k and the intention of—I thought that we already [spent] that – we would use part of that to take – supplement my income, to take care of the kids’ expenses because we had three in college. He had one in private school here. And just whatever expenses that came up. Out of that \$30,000.00 I paid off that line of credit. Just paid – the money back up, say, – a year prior to this filing for this divorce, he had filed for divorce. Almost the exact same time the year prior. And then he really wanted to get back together, so we decided that we should try and make it work and we cashed in that stock and with that we paid off all of our debt. Everything so we could kind of start with a clean slate. We did what we needed to pay off whatever the kids college expenses were and so forth.

Question: And how much did you cash out of your 401k?

Answer: We actually both cashed out because we had to sign the paperwork because we [are] both joint on the 401k, and I believe it was, I don't know, somewhere around \$180,000.00.

Question: Let me show you...refresh your recollection about X amount.

Answer: Oh...

Question: Please tell the Judge what you're looking at.

Answer: This is for tax reporting purposes. And it shows that the gross proceeds, less commissions, was \$191,718.59. (Trial Exhibit 24.)

Question: And that was taken out in 2011?

Answer: Yes. And like I said, it was right after we decided...

Question: And this was...

Answer: ...stay together and...

Question: ...stock from your Procter & Gamble 401k?

Answer: Yes.

Question: Is there any of that money left over?

Answer: That's the \$40,000.00. It is still with his brother's company. And I believe there is approximately \$13,000.00 in that – my checking account where I deposited.

Question: Now, are you talking about the \$30,000.00 or are you talking... Out of this \$191,000 that you guys cashed out...

Answer: We had \$70,000.00 that we invested with Miguel, his brother's company, and then \$30,000.00 when he brought me a check to the house, I deposited it into the checking account.

Question: Okay, I think you are mixing apples and oranges here.

Answer: Okay

Question: Okay, the \$191,000, you spent \$70,000.00 loaning it to Miguel?

Answer: Right.

Question: You...

Judge Bowles: Your question was how much of that 191 is left, and she is saying that she has \$13,000 in her checking account plus the 40 that is still owed on the 70 that they loaned and that's it. Is that your testimony?

Answer: Yes.

Video Record #4: 8/15/2012 at 2:14:55 through 2:19:14.

Clearly the testimony set forth by Ms. Miller indicated that the \$70,000.00 was marital property. The trial court erred in finding the \$70,000.00 used to invest in Downtown Properties, LLC was not marital property. Therefore, we reverse the decision of the trial court and remand this action to the trial court for findings and conclusions consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Stephen A. Schwager
Louisville, Kentucky

BRIEF FOR APPELLEE:

Cathy Montano (Miller), *pro se*
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