

RENDERED: APRIL 22, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-000022-MR

LINDA R. TONG (NOW JACKSON)

APPELLANT

v. APPEAL FROM HENRY CIRCUIT COURT
HONORABLE PAUL W. ROSENBLUM, JUDGE
ACTION NO. 00-CI-00007

STEPHEN B. TONG

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: McANULTY AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

TAYLOR, JUDGE: Linda R. Tong appeals from a December 3, 2002, Order of the Henry Circuit Court. We affirm.

Linda and Stephen B. Tong were married September 3, 1993. In January 2000, Linda initiated this action by filing a petition for dissolution of marriage. The marriage was

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

dissolved by a decree of dissolution entered September 22, 2000; all other issues were reserved for future adjudication.

Pursuant to Ky. R. of Civ. P. (CR) 53.03, the matter was referred to the Domestic Relations Commissioner. Evidentiary hearings were subsequently conducted, and the Commissioner's Recommendations were entered September 16, 2002. Both parties filed objections to the recommendations. See CR 53.06. Following a hearing, the circuit court sustained in part the objections and adopted in part the recommendations of the Commissioner. Relevant to this appeal, the circuit court adopted the following recommendations of the Commissioner: (1) the real property located in Shelby County was Stephen's nonmarital property; (2) each party should be responsible for his or her own attorney's fees; and (3) the proceeds from the sale of the vehicle and a construction refund were marital funds received and expended during the marriage. This appeal follows.

We begin our analysis with a statement of the appropriate standard of review. In an action tried by the court upon the facts without a jury:

Findings 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. The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. . . .

CR 52.01. A finding of fact is not clearly erroneous if it is supported by substantial evidence. Moore v. Asente, 110 S.W.3d 336 (Ky. 2003). Legal issues will be reviewed de novo and conclusions of law will not be set aside absent an abuse of discretion. Sherfey v. Sherfey, 74 S.W.3d 777 (Ky.App. 2002); Carroll v. Meredith, 59 S.W.3d 484 (Ky. 2001). An abuse of discretion "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Sherfey, 74 S.W.3d at 783 (citation omitted).

With the appropriate standard of review in mind, we turn to Linda's contentions of error. Initially, Linda contends the circuit court erred by characterizing a 2.5 acre tract of property located in Shelby County, Kentucky as Stephen's nonmarital property.

Marital property is generally property acquired by either spouse during the marriage. Kentucky Revised Statutes (KRS) 403.190; Marcum v. Marcum, 779 S.W.2d 209 (Ky. 1989). Relevant to this appeal is whether Stephen purchased the property during the marriage or after entry of the decree of dissolution.

Stephen testified that he only leased the property during the marriage and that he did so with money he borrowed from his mother. Linda, however, asserts that Stephen actually purchased the property during the marriage with marital funds.

The deed to the property was in the name of a third party and was not transferred to Stephen until after entry of the decree of dissolution. Linda argues, however, that the deed conveying title to Stephen after entry of the decree was a fraud and that Stephen actually purchased the property during the marriage.²

The evidence presented regarding the status of the property was conflicting and disputed. From our review, the circuit court could have ruled in favor of either party on this issue. Accordingly, we do not view the circuit court's characterization of the Shelby County property as nonmarital to be arbitrary or capricious. Absent an abuse of discretion, the circuit court's conclusion that the property was nonmarital will not be set aside.

Linda also contends the circuit court "erred by failing to require [Stephen] to account for money he received" during the marriage from the sale of a motor vehicle and a refund from a construction company that had gone bankrupt during construction of the residence on Bart Smith Lane. The circuit court observed that those monies were received during the marriage and "the parties disbursed them as they saw fit."

The general rule is an accounting of marital funds is not required unless dissipation of marital assets is alleged. Robinette v. Robinette, 736 S.W.2d 351 (Ky.App. 1987). If

² The stated consideration in the deed was one (\$1.00) dollar.

dissipation is alleged, the burden of proof is upon the party claiming dissipation. Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998).

Here, Linda has failed to allege that Stephen dissipated marital assets. Linda merely asserts that Stephen should be required to account for the money. Under the above rule of law, Stephen is not required to account for marital funds received and expended during the marriage. As Linda has failed to even allege dissipation, we are of the opinion that the circuit court properly ruled that Stephen was not required to account for these funds.

Finally, Linda contends the circuit court erred by not ordering Stephen to pay a portion of her attorney's fees and costs associated with the dissolution proceeding. Specifically, Linda asserts that given the disparity in the financial resources of the parties the circuit court's decision was an abuse of discretion.

KRS 403.220 reads, in relevant part, as follows:

The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for attorney's fees, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or after entry of judgment. . . .

In a dissolution proceeding, the allocation of attorney's fees and costs is "entirely within the discretion" of the circuit court. Neidlinger v. Neidlinger, 52 S.W.3d 513, 519 (Ky. 2001). As the circuit court is in the best position to observe the conduct and tactics of the parties, broad discretion shall be given to the court's allocation of fees and costs. Id. A reviewing court will not disturb the circuit court's refusal to allocate attorney's fees and costs absent an abuse of discretion.

A review of the record does not reveal that the circuit court's decision was arbitrary or capricious under the circumstances. See Sherfey, 74 S.W.3d 777. Linda and Stephen were both awarded an equitable share of the marital property, and there was no indication that Linda lacked the financial resources to pay her attorney's fees and costs. In sum, we are of the opinion the circuit court did not abuse its discretion by refusing to allocate attorney's fees and costs in this case.

For the foregoing reasons, the Order of the Henry Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

D. Berry Baxter
LaGrange, Kentucky

BRIEF FOR APPELLEE:

Patricia A. Smith
Louisville, Kentucky