

RENDERED: SEPTEMBER 9, 2005; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000663-MR

PAULA HAYES

APPELLANT

v.

APPEAL FROM BELL CIRCUIT COURT
HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 02-CI-00321

WILLIAM A. HAYES

APPELLEE

OPINION
AFFIRMING IN PART,
AND
REVERSING AND REMANDING IN PART

** ** * * *

BEFORE: BUCKINGHAM, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from a judgment entered by the Bell Circuit Court in a marital dissolution proceeding. Appellant Paula Hayes raises numerous issues on appeal relating to the division and the alleged dissipation of property, and relating to the court's failure to award maintenance or attorney's fees. For the reasons stated hereafter we affirm in part, and reverse and remand in part.

Paula and appellee William Hayes married in 1986, separated for six weeks in the summer of 2002, separated again in August 2003, and divorced in December 2003. No children were born of the marriage. Before and during the marriage, Paula was employed as a paralegal and bookkeeper in William's solo law practice, and she also worked as a professional photographer. After restoring the nonmarital property to the parties the court divided the marital property, assigned liability for an alleged tax debt, and denied Paula's requests for maintenance and attorney's fees. This appeal followed.

First, Paula contends that the trial court erred by finding that William's "attorney account" constituted nonmarital property which was not subject to division. We agree.

KRS 403.190 requires the trial court in a marital dissolution action to assign to each spouse all nonmarital property, including "[p]roperty acquired in exchange for property acquired before the marriage[.]" It has long been the rule that nonmarital funds which have been commingled with marital funds may be traced by showing that the balance of the commingled account "was never reduced below the amount of the nonmarital funds."¹ Although William correctly notes that in *Chenault v. Chenault*² the Kentucky Supreme Court "relax[ed] some

¹ *Allen v. Allen*, 584 S.W.2d 599, 600 (Ky.App. 1979).

² 799 S.W.2d 575 (Ky. 1990).

of the draconian requirements heretofore laid down,"³ that relaxation of requirements pertains only to the expansion of what types of evidence may meet tracing requirements, as the court continues to adhere to "the general requirement that nonmarital assets be traced into assets owned at the time of dissolution."⁴ The party seeking to overcome the presumption of marital property "bears the burden of proving that he or she acquired the property pursuant to an exception listed in KRS 403.190(1)."⁵

Here, it is undisputed that when the parties married, William had \$22,000 in an "attorney account" which evidently was used for office expenses. Although Paula admitted in her preliminary verified disclosure statement that the account normally contained \$20,000 - \$30,000, she produced bank statements to show that the balance dropped as low as \$538.98 in November 1987 and \$15,140.71 in January 1998. William does not dispute those figures on appeal, but he asserts that the account's funds need not be traced because that account was always kept separate from, rather than commingled with, the parties' joint bank accounts, and because Paula's admission that the account normally had a balance of \$20,000 - \$30,000 provided

³ *Id.* at 579.

⁴ *Id.* at 579.

⁵ *Terwilliger v. Terwilliger*, Ky., 64 S.W.3d 816, 823 (2002).

clear and convincing evidence that he was entitled to be restored to \$22,000 from that account.

We are not persuaded by William's assertions. Regardless of whether the account contained at least \$22,000 at the time of dissolution, the fact that the account's balance dropped substantially below that figure at least twice during the marriage clearly indicates that the nonmarital funds were spent during the marriage. In the absence of any evidence to show that the replacement funds in the account were acquired as nonmarital funds pursuant to one of the exceptions set out in KRS 403.190(2), it must be presumed that the expended nonmarital funds were replaced by marital funds earned during the marriage. Moreover, whether the funds in the attorney account were kept separate rather than commingled with marital funds is irrelevant to the determination of the marital or nonmarital nature of the replacement funds.⁶ Finally, contrary to William's contention, Paula's admission that the account normally contained \$20,000 - \$30,000 did not in any way demonstrate that he was entitled to the restoration of \$22,000 as nonmarital property, given the undisputed evidence concerning the account's reduced balance on several occasions during the marriage. Thus, the court erred in finding that the \$22,000 constituted nonmarital property, and on

⁶ See *Allen*, 584 S.W.2d at 600.

remand that sum must be distributed between the parties as marital property.

Next, Paula contends that the trial court erred by finding that William did not dissipate certain marital funds. We disagree.

It is undisputed that during the parties' first separation, William received a check for \$150,000 in settlement of a client's personal injury claim. He deposited the check in his adult son's name into a new account at a bank in Ewing, Virginia. After the client was paid \$95,000 and William was reimbursed \$5,000 for expenses, \$50,000 was left in the account for the son. Paula learned of the gift during the parties' subsequent year-long reconciliation.

Paula alleged that William attempted to conceal the money by placing it in the Virginia account, and that she never consented to providing the son with such a substantial gift. William, by contrast, asserted that the money was given to his son for use toward a house down payment and related expenses, and that Paula never objected to the gift until the parties separated a second time. The trial court found:

Mr. Hayes testified that he saw no reason for his son to wait for his inheritance and he made a gift to his son of \$55,000.00. The funds were deposited in a bank in Virginia. He testified that Mrs. Hayes was fully aware of the gift and that she had all the records of the transaction

and he thought she was in full agreement. He did not file any gift tax in this transaction, because his public accountant said he did not have to.

Mrs. Hayes denies agreeing to a gift of \$55,000.00 to the son. The Court has observed each of the witnesses and must make a determination as to the truth. The parties were separated when Mr. Hayes made the gift to his son. However, when the parties reconciled, Mrs. Hayes had access to the records. If Mr. Hayes intended to keep this transaction from her, then he would surely have concealed the records. If the parties had stayed together and not gone through with the divorce, would Mrs. Hayes make an issue of the gift? Of course not. This became an issue only when the parties separated, for the second time, and Mrs. Hayes proceeded with the divorce action. The Court finds Mr. Hayes' testimony credible and the \$55,000.00 is not marital property. Mr. Hayes did not dissipate any of the marital funds. Mrs. Hayes agreed to the gift.

Given the conflicting evidence adduced below, we cannot say that the trial court clearly erred by finding that Paula agreed to the gift of \$55,000 to William's son.⁷ Thus, Paula is not entitled to relief on this ground.

Next, Paula contends that the evidence was insufficient to support the trial court's findings regarding an alleged marital income tax liability of \$65,000. We agree.

Apparently the parties had \$145,000 in a joint bank account at the time of their first separation, when Paula left

⁷ CR 52.01.

\$75,000 in the account for William but withdrew \$70,000 which she deposited into her own accounts. Evidently the \$70,000 was left in the separate accounts throughout the parties' reconciliation and second separation.

Two months before the parties divorced, William attested in a sworn statement that the parties had a "current income tax liability" of \$24,000. Some six weeks later, William's attorney indicated during a hearing that William had spent the money remaining in the joint account to satisfy the parties' alleged \$65,000 joint tax liability for the years 2001 and 2002. However, it appears that the record contains no probative evidence to show whether a \$65,000 tax liability had in fact accrued, or whether any such debt was satisfied out of the \$75,000 which Paula left in the joint account.

The court's subsequent division of marital property credited Paula with possessing the \$70,000 withdrawn from the joint account at the time of the first separation, but it did not address the fate of the \$75,000 which she left in the joint account. Despite the indication by William's attorney during the hearing that the alleged joint tax liability already had been satisfied out of the \$75,000 left in the joint account, the court directed William to pay the \$65,000 debt "from his part of the marital property." The court then found that although William would receive \$376,584.63 in marital property, the

satisfaction of a \$65,000 tax debt would reduce the net value of his share of the marital property to \$311,584.63, which was significantly closer than the original amount to the \$217,657.06 in marital property awarded to Paula.

It appears that the trial court erroneously subtracted the value of a previously-satisfied tax liability from William's share of the marital property, resulting in a substantial undervaluing of the marital property actually available to him. In the absence of any probative evidence to show that the \$65,000 debt existed at the time of dissolution, we must conclude that the court erred by assigning William liability for the debt, and by subtracting the amount of that debt from the net value of the marital property assigned to William. On remand, therefore, the court's division of marital property should be adjusted accordingly.

Next, Paula contends that the trial court erred by failing to award her a greater share of the parties' marital property. We disagree.

KRS 403.190(1) requires the trial court to 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 aside 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.

As noted by the Kentucky Supreme Court in *Davis v. Davis*,⁸ a division of marital property need not be equal, but only in "just proportions."

Here, the trial court's judgment includes findings as to the parties' full time employment and their sharing of household chores, as to the duration of their marriage and the value of the property set aside to each, and as to each party's economic circumstances at the time of the dissolution. Further, after specifically considering KRS 403.190 and all relevant factors, the court found that a division of the marital property in "just proportions" required William to pay Paula \$30,000 cash in addition to other marital property, resulting in an award to Paula of marital property valued at \$217,657.06 (i.e., 43.6% of the total marital property after payment of debts but before the adjustments which must be made on appeal), and an award to William of marital property valued at \$281,584.63. Regardless of whether members of this panel might have divided the marital

⁸ 777 S.W.2d 230 (Ky. 1989).

property in different proportions if sitting as triers of fact, we cannot say that the trial court clearly abused its discretion when making such a division of property.⁹

Next, Paula contends that the trial court erred by failing to make an award to her of maintenance. We disagree.

A trial court may grant maintenance to a spouse *only* if it finds that the spouse who seeks maintenance

(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 or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

Here, William asserts that Paula is not entitled to maintenance in light of the property available to her and her ability to support herself. Paula, however, asserts that she lacks sufficient property to provide for her reasonable needs. Further, she contends that she cannot support herself because she no longer works for William and no longer has a marital residence from which to operate her photography business. She argues that William is financially able to meet her needs as well as his own since, even if he paid the requested amount of maintenance, his income still would be at least double hers.

⁹ See *Johnson v. Johnson*, 564 S.W.2d 221 (Ky.App. 1978).

The trial court disagreed, finding that Paula has been awarded a substantial amount of property. She will have approximately seventy-seven (77%) of what the husband has been awarded, after he pays the income taxes. In addition, the wife is able to support herself. She has no physical infirmities. She is highly trained and capable of earning excellent wages. She earned twenty-eight (\$28,000.00) in 2001 and twenty-seven (\$27,000.00) in 2002. She has quit work and left the area where she would be most qualified to find new employment. Now, she wishes to become a Real Estate Agent. This is her choice, but the husband should not be required to support her when she is qualified to pursue a career as a legal assistant and manager of a law office. The wife does not meet the requirements of KRS 403.200 to be awarded maintenance.

Again, regardless of whether members of this panel would have reached the same conclusions based on the conflicting evidence adduced below, the fact remains that substantial evidence supported the trial court's findings. Those findings therefore are not clearly erroneous and may not be set aside on appeal.¹⁰

Finally, Paula contends that the trial court erred by failing to award attorney's fees to her. However, even a financial disparity between the parties does not compel a trial court to award attorney's fees in a dissolution proceeding. In fact, "[a]s matters now stand, an allocation of court costs and an award of an attorney's fee are entirely within the discretion

¹⁰ CR 52.01.

of the court."¹¹ Having reviewed the evidence, we cannot say that the trial court abused its discretion in this regard.

The court's judgment is affirmed in part, and reversed and remanded in part for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ann Milton Adams
Lexington, Kentucky

BRIEF FOR APPELLEE:

Raymond Overstreet
Gregory Y. Dunn
Liberty, Kentucky

Gerald L. Greene
Pineville, Kentucky

¹¹ *Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001).