

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000894-MR

SANDRA ELAINE JOHNSON

APELLANT

v. APPEAL FROM BOYD CIRCUIT COURT
HONORABLE C. DAVID HAGERMAN, JUDGE
ACTION NO. 03-CI-00877

TERRY JOHNSON

APELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * *

BEFORE: BARBER, KNOPF, AND SCHRODER, JUDGES.

KNOPF, JUDGE: Sandra Elaine Johnson appeals from a judgment of the Boyd Circuit Court dissolving her marriage to Terry Johnson. As part of the judgment, the trial court divided the equity in the marital residence. Sandra argues that the trial court erred by classifying a substantial portion of that equity to be Terry's non-marital property. We conclude that the trial court erred by finding that income earned from Terry's non-marital property was his non-marital property. Hence, we affirm in

part, reverse in part, and remand for additional findings and division of the marital equity.

Sandra and Terry Johnson were married in 1991 and separated on March 28, 2003. After Sandra filed the petition for dissolution of the marriage, the parties entered into an agreement which the trial court adopted. Among other things, the agreement assigned the marital residence and the mortgage to Terry. However, the parties could not agree on the division of the equity in the marital residence. That matter was submitted to a domestic relations commissioner (DRC), who heard evidence and issued a report and recommendations. The trial court overruled Sandra's objections and adopted the DRC's findings and recommendations

At the time the parties were married, Terry owned a residence on property located in Ulysses, Lawrence County, Kentucky. Terry also owned two rental properties in Pike County, Kentucky. The income from these properties, as well as Terry's other income, was deposited into Terry's brokerage account, which was used to pay household expenses. Sandra also deposited some of her income into the brokerage account, but she maintained a separate account for her own use.

The parties jointly borrowed \$25,000.00 to improve the Ulysses property. However, Terry testified that he sold non-marital stock to pay off the remaining loan balance of

\$11,009.00. In 1998, the parties purchased a new residence on Brandywine Drive in Catlettsburg, Boyd County, Kentucky, for \$268,000.00. The Ulysses property sold for \$150,330.00, which the parties applied toward the purchase of the Brandywine residence. The parties agreed that the \$33,200.00 paid toward the reduction of the mortgage on the Brandywine residence was marital property and would be divided equally.

Strictly speaking, the DRC did not attempt to divide the marital equity in the Brandywine residence. Rather, the DRC allocated the \$150,300.00 in proceeds from the sale of the Ulysses property which was applied toward the Brandywine residence. Terry testified that he paid \$45,000.00 for the Ulysses property, and the parties agree that this amount is non-marital. This leaves \$105,330.00 of Ulysses proceeds remaining. The DRC awarded \$76,128.00 to Terry as his non-marital property based on the income he received from the non-marital rental properties. The DRC also awarded Terry the \$11,009.00 in proceeds from the sale of the non-marital stock which he applied toward the home improvement loan. The DRC then deemed the remaining \$18,193.00 to be marital, added the \$33,200.00 in other marital equity, and equally divided the total marital equity of \$51,393.00.

Sandra challenges the trial court's assignment of \$87,137.00 of the equity in the marital residence to Terry as

his non-marital property. She first argues that the trial court erred by finding the \$76,128.00 of income received from Terry's rental properties to be non-marital. KRS 403.190(2) provides that all property acquired after marriage and before a decree of legal separation is marital, with enumerated exceptions. In Dotson v. Dotson,¹ the Kentucky Supreme Court noted that all income earned during the marriage is considered marital property, including income from non-marital property.² The trial court distinguished Dotson, stating that this result was based on the unique facts of that case. However, Dotson cites to Sousley v. Sousley,³ and Brunson v. Brunson,⁴ both of which hold that "income produced from nonmarital property is, in fact, marital property for purposes of disposition of property pursuant to the directives of KRS 403.190."⁵ Thus, the result in Dotson reflects the general rule, not an exception.

In 1996, the General Assembly amended KRS 403.190(2)(a) so that income from gifted or inherited property will be marital only if one spouse's activities contribute to

¹ 864 S.W.2d 900 (Ky. 1993).

² Id. at 902.

³ 614 S.W.2d 942 (Ky. 1981).

⁴ 569 S.W.2d 178 (Ky.App. 1978).

⁵ Sousley, 614 S.W.2d at 944. See also Schoenbachler v. Minyard, 110 S.W.3d 776, 788, n. 2 (Ky. 2003).

the production of the income. But the placement of the rule in a particular statutory exception rather than in a general exception indicates that the Legislature intended for it to apply only to gifted and inherited property and not to other types of assets.⁶ Terry never argued to the trial court that he acquired the rental properties by gift, decent, bequest or devise.⁷ Moreover, the statute specifically excepts such property acquired "*during the marriage* and the income derived therefrom." Thus, income from non-marital property acquired prior to the marriage remains marital.

Consequently, the income from the rental properties was entirely marital, and the trial court erred by awarding it to Terry as a non-marital contribution. Upon remand, the trial court shall divide the \$76,128.00 between the parties as marital property. However, the extent of each party's contribution to the brokerage account may be relevant as a factor to be

⁶ L. Graham & J. Keller, 15 Kentucky Practice Domestic Relations Law, § 15.6, pp. 261-62 (2005 Pocket Part).

⁷ In his brief in this appeal, Terry suggests, in passing, that he acquired the rental properties by gift, but he does not cite any evidence in the record supporting this assertion. The deeds indicate that the properties were conveyed to him for \$1.00 and \$10.00, respectively. Such nominal consideration for the conveyances could indicate that Terry received the properties as a gift. However, Terry did not specifically testify that he received the property as a gift or inheritance.

considered in the division of the equity, along with the other factors listed in KRS 403.190(1).⁸

Sandra also argues that the trial court erred in finding that Terry had traced the proceeds from the sale of his non-marital stock into the payoff on the home-improvement loan. The tracing requirement simply means that "[w]hen 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."⁹ If the claimant does so, then the trial court assigns the specific property, or an interest in specific property, to the claimant as his or her non-marital property.¹⁰

At the time of the marriage, Terry owned 238 shares of Pitney-Bowes stock. He purchased additional shares of that stock after the marriage. In 1996, Terry sold 300 shares of the stock for \$14,814.20, deposited the proceeds into the brokerage account, and then paid off the home-improvement loan from that account. Sandra asserts that Terry did not show that the

⁸ Dotson, supra at 902, citing KRS 403.190(1)(a).

⁹ Graham & Keller, 15 Kentucky Practice, Domestic Relations Law § 15.10, p. 512. (2nd ed. West Group 2000). See also KRS 403.190(3), and Brosick v. Brosick, 974 S.W.2d 498 (Ky.App. 1998).

¹⁰ See Brunson v. Brunson, 569 S.W.2d at 176; and Angel v. Angel, 562 S.W.2d 661, 664-665 (Ky.App. 1978).

\$11,009.00 applied toward the loan came from the sale of his non-marital stock rather than his marital stock. Furthermore, she argues that Terry co-mingled the stock proceeds with marital funds in the brokerage account, thus rendering them untraceable.

In Chenault v. Chenault,¹¹ the Kentucky Supreme Court recognized that tracing to a mathematical certainty is not always possible, noting that: "[w]hile such precise requirements for nonmarital 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."¹² As a result, the Chenault court held that testimony alone may be sufficient to satisfy the tracing requirement. More recently, however, the Court has held that while Chenault relaxed the more draconian requirements for tracing, it did not do away with the tracing requirements altogether.¹³ Where the party claiming the non-marital interest is a skilled business person with extensive record keeping experience, the courts may be justified in requiring

¹¹ 799 S.W.2d 575 (Ky. 1990).

¹² Id. at 578.

¹³ Terwilliger v. Terwilliger, 64 S.W.3d 816, 821 (Ky. 2002).

documentation to trace non-marital assets into marital property.¹⁴

Terry's record-keeping regarding his purchases and sale of the Pitney Bowes stock was not perfect. However, the documentary evidence shows that Terry paid off the home-improvement loan very shortly after he deposited the stock-sale proceeds into the brokerage account. The non-marital share of these proceeds would have amounted to more than the loan payoff of \$11,009.00.¹⁵ Under the circumstances, the trial court did not clearly err by classifying this amount as Terry's non-marital contribution.

Accordingly, the judgment of the Boyd Circuit Court is affirmed in part, reversed in part, and remanded with directions to divide the \$76,128.00 in marital equity as set forth in this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sharon Easthom Rowsey
Wilson, Stavros & Rowsey
Ashland, Kentucky

BRIEF FOR APPELLEE:

Richard W. Martin
Martin, Justice, Vincent &
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¹⁴ Id.

¹⁵ $\$14,814.20 \times (238/300 =) 79.33\% = \$11,752.10.$