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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001410-MR

SHERRIE CHILDERS APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 02-CI-500222

ROBERT CHILDERS AND
HON. WILLIAM TINGLEY,
ATTORNEY APPELLEES

AND

NO. 2004-CA-001514-MR

ROBERT WADE CHILDERS CROSS-APPELLANT

v.

CROSS-APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE HUGH SMITH HAYNIE, JUDGE
ACTION NO. 02-CI-500222

SHERRIE CHILDERS CROSS-APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT[1] AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.[2]

TACKETT, JUDGE: Sherrie Childers appeals from the decision of the Jefferson Family Court apportioning property between the parties. Sherrie specifically argues that the court misapplied tracing principles in fixing the amount of her non-marital contribution, specifically her inheritance, to the acquisition of marital assets. Robert Childers cross-appeals, arguing that the family court should have awarded him a greater amount in attorney's fees after Sherrie refused an offer of judgment made pursuant to Kentucky Rule of Civil Procedure (CR) 68 which proved greater than what she eventually received at trial. We affirm with respect to both appeal and cross-appeal.

The trial court found that Sherrie had presented proof as follows:

> On or about October 30, 1964, the Petitioner inherited $37,728.47 from her mother's estate. From these inherited funds, the Petitioner paid the sum of $11,070.37 to pay in full the remaining mortgage balance owed by the parties on their Morning Glory Drive real property. The parties sold the Morning Glory Drive property on a contract for deed. The parties purchased a lot on Iron Horse Way through an entity known as R. W. Enterprises, Inc. funded with $2,500 of the Petitioner's nonmarital funds. The Parties subsequently acquired a $15,000 mortgage

[1] This opinion was completed and concurred in prior to Judge Julia K. Tackett's retirement effective June 1, 2006. Release of the opinion was delayed by administrative handling.

[2] 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 KRS 21.580.

> loan through Great Financial Federal to build a house on the Iron Horse lot. In September of 1997, the parties sold the Iron Horse Way property and realized $10,018.60 net at that closing. At that same time, the parties acquired the Fox Ridge property lot for the sum of $6,400. The Petitioner expended $2,000 of her nonmarital funds toward the Fox Ridge lot purchase. The Petitioner then contributed an additional amount of $4,800 of her nonmarital funds toward the acquisition of the Fox Ridge property. The parties utilized the net proceeds that they realized from the closing of the Iron Horse Way property in the construction of the house at the Fox Ridge property. In 1997, the parties refinanced the debt on the Fox Ridge property and used the surplus proceeds borrowed in the sum of $11,279.59 to improve the property owned by the parties at Nolin Lake.

The court held that Sherrie's tracing proof was significant but not sufficient to show the impact of the infusion of nonmarital money on the total value of the properties relative to the expenditure of marital funds and effort, and so limited its apportionment of the nonmarital share of the property to the amount of the nonmarital funds expended, not designating the appreciation in value as nonmarital, following Travis v. Travis, 59 S.W.3d 904 (2001). This appeal followed.

Sherrie argues on appeal that the court misapplied the Travis case, which she argues should be read narrowly while the rules of Brandenburg v. Brandenburg, 617 S.W.2d 781 (Ky. App. 1981) should apply to give her a share of the appreciation in value, also relying on Chenault v. Chenault, 799 S.W.2d 575 (Ky.

1990) for the proposition that tracing to a mathematical certainty is not always possible, and that the trial court held her to an unnecessarily high standard of proof while holding Robert to a "loose standard of unsupported, subjective proof", Appellant's Brief at 16.

The flaw in Sherrie's argument is that property acquired during the marriage is presumed to be marital unless it is shown otherwise. Sherrie argues that by using her inheritance money, she alone is responsible for the acquisition of the property, since they would not have been able to buy the property at all if not for that. That is not a fair statement of the standard required in tracing. Sherrie contends that the standard of proof in showing that the property is marital should be the same, but she is simply incorrect in this assertion. Tracing requires that the person claiming that property is acquired through non-marital funds carry the burden of proof by clear and convincing evidence. Brandenburg, Id. Importantly, tracing principles do not involve burden-shifting in the way Sherrie suggests, and she has provided no authority to show that they do. Once she presented her proof of tracing, the court had the authority to weigh that evidence and make a determination on whether she had carried the strict burden of presenting clear and convincing evidence, which it concluded that she had to the extent that she successfully traced the contribution of non-marital assets to the purchase of property that would otherwise be marital, but otherwise did not carry the burden to show that the increase in value should also be considered marital. In no sense can the court's application of tracing principles be considered overly strict when compared to existing case law. Reliance on Chenault for an argument that the rules of tracing have been relaxed is misplaced; Chenault dealt with a situation where it would have been unfair to the wife, who had held only low-paying jobs during the marriage, to require her to provide the kind of documentation more sophisticated persons might have kept. The basic rule, that a person who claims an increase in value of property to which a non-marital contribution was made is also non-marital, has the burden of proof with respect to the increase as well. Travis, Id. The trial court, sitting as the finder of fact, has great discretion to determine the weight and quality of evidence before it, and its findings of fact will not be disturbed on appeal absent clear error. We believe the court's conclusions are sound based on the record before us, and therefore affirm its decision.

With respect to the cross-appeal, we also affirm. While CR 68 authorizes an award of attorney's fees where an offer of judgment is refused and the party refusing ultimately recovers less than the offer, the trial court has broad discretion in the amount of fees to be awarded. We believe the court's award falls within that discretion, and that no abuse of discretion was committed in awarding $2,500 in fees as opposed to the $12,640 claimed by the cross-appellant.

Also with respect to the cross-appeal, Robert argues that the court should have found the non-marital contribution to have been extinguished after finding that Robert had performed "significant activities" on the properties, namely relating to the construction and maintenance of the houses. We believe that such a finding does not preclude the tracing of the non-marital contribution to the purchase of the asset under the cases cited above nor the applicable statutes. Therefore, we affirm with respect to the cross-appeal as well.

For the foregoing reasons, the judgment of the Jefferson Family Court is affirmed.

EMBERTON, SENIOR JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, DISSENTING IN PART: I concur totally with the majority's opinion except as pertains to the award of attorney's fees to appellee's counsel, to which I respectfully dissent.

I believe the family court erred by applying CR 68 in awarding attorney's fees to appellee's counsel for two reasons. First, CR 68 is not applicable to divorce proceedings in my opinion. KRS 403.220 explicitly provides that the court may order a party to a divorce proceeding to pay reasonable attorney's fees of the other party after considering the financial resources of the parties. I do not believe CR 68 can be used to circumvent this statute.

Second, the language of CR 68(3), upon which the trial court relied, provides that if an offeree obtains a judgment that is not more favorable than that made by the offeror, the offeree must pay the costs incurred by the offeror, after the making of the offer. No Kentucky court to date has interpreted "costs" in CR 68 to include attorney's fees or legal expenses. Costs as defined in CR 54.04 do not include attorney's fees. Perhaps costs should include attorney's fees under CR 68 to facilitate expeditious resolution of civil cases. However, to date, there is no legal authority that supports the position that costs include attorney's fees under CR 68.

Federal courts, in addressing the same issue under Fed. R. Civ. P. 68 (which is virtually identical to the state court rule), have held that the term "costs" does include attorney's fees if the underlying statute defines costs to include attorney's fees as a substantive element of damages. See Zackaroff v. Koch Transfer Co., 862 F.2d 1263 (6th Cir. 1988).

In this case, the underlying statute, KRS 403.220, specifically delineates between costs and attorney's fees. The statute also gives the trial court discretion to award attorney's fees, costs, or both subject to the court considering the resources of the parties. I would thus remand this case to the Jefferson Family Court to reconsider the attorney’s fees issue pursuant to KRS 403.220, not CR 68.

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