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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001804-MR
AND
NO. 2004-CA-001971-MR

DAVID LYNN SCHRECKER

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM DAVIESS CIRCUIT COURT
v. HONORABLE THOMAS O. CASTLEN, JUDGE
ACTION NO. 02-CI-00568

SHERRI PARKER SCHRECKER

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
VACATING IN PART AND REMANDING

** ** * * *

BEFORE: BARBER, BUCKINGHAM, AND JOHNSON, JUDGES.

JOHNSON, JUDGE: David Lynn Schrecker has appealed from the Decree of Dissolution of Marriage entered on August 24, 2004, by the Davies Circuit Court, which adopted the findings of fact and conclusions of law entered on July 13, 2004, which adopted the Report of the Circuit Commissioner entered on March 17, 2004. Sherri Parker Schrecker has cross-appealed. Having concluded

that the trial court abused its discretion under KRS¹ 403.190 in determining the percentage of David's non-marital interest in the real estate, we must vacate the decree and remand this matter so the trial court can recalculate the percentage of the contributions and determine David's non-marital interest in the real estate before dividing the remaining marital interest and assigning the marital debt attached thereto. Having concluded that the trial court did not err in its determination that the entire value of David's pre-marital stock in the company, including the increase in value during the marriage, was his non-marital property, we affirm that portion of the decree.²

David and Sherri were married on August 25, 1992. No children resulted from the marriage. On April 26, 2002, Sherri filed a petition to dissolve the marriage, and David filed a response on May 24, 2002. A two-day hearing was held before the Commissioner on June 25, 2003, and July 30, 2003. On March 17, 2004, the Commissioner entered his report recommending that the equity in the real estate located at 212 Hubert Court, Owensboro, Kentucky (the real estate) be set at \$94,000.00; that

¹ Kentucky Revised Statutes.

² While we cannot say the findings of the trial court are necessarily sufficient as required by Kentucky Rules of Civil Procedure (CR) 52.01 as to either issue reviewed by this Court, we are constrained by Cherry v. Cherry, 632 S.W.2d 423, 425 (Ky. 1982), from remanding either since neither party moved the trial court for more specific findings on the issues raised. See also Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997)(stating "[f]ailure to bring such an omission to the attention of the trial court by means of a written request will be fatal to an appeal" [citations omitted]).

53% of the equity, or \$49,820.00, was marital property to be divided equally between the parties, with the remaining equity to be assigned as David's non-marital property; and that David pay the entire debt against the real estate. The Commissioner also recommended that David be awarded the entire value of the stock that David owned in Schrecker Supply Company (the company) prior to the marriage, as its increase in value was attributable to economic growth, not the efforts of the parties during the marriage. Both parties filed exceptions to the Commissioner's report as to the respective issues that they raise on appeal. The trial court overruled the exceptions and upheld the Commissioner's recommendations by order entered on July 13, 2004. A decree of dissolution of marriage was entered on August 24, 2004, incorporating the Commissioner's report. This appeal and cross-appeal followed.

The only issue David raises on appeal is whether the trial court was clearly erroneous in dividing the equity in the real estate. Specifically, he contends the trial court erred by failing to consider the marital mortgage debt in its calculations and thus incorrectly established his non-marital interest in the real estate's equity. He argues that his non-marital contribution consisted of his equity in the home at the time of the marriage and the increase in value of that interest due strictly to economic growth. He further argues that all the

equity in the real estate on the date of divorce should have been assigned to him as his non-marital property because the equity in the real estate at the time of the divorce was less than his original equity interest on the date of marriage. While we do not completely agree with David's argument, we do agree that the trial court erred in its calculations as to the non-marital and marital contributions in the property, resulting in an incorrect division of the marital and non-marital interest in the property.

David purchased the real estate on July 26, 1982, from his mother Geraldine S. Schrecker, a widow, for \$50,000.00 after obtaining a loan from Cardinal Federal Savings Bank. No improvements were made to the property prior to the marriage. On August 15, 1992, the date of the marriage, the loan balance was \$47,002.87. The trial court found the value of the real estate on the date of marriage to be \$132,500.00³ with a debt of \$47,500.00, which would indicate that the equity in the property on that date, or David's non-marital contribution on the date of marriage, was approximately \$85,000.00. After the parties married, the mortgage was paid down with marital funds from \$47,002.87 to \$37,665.91 as of August 2000 when they refinanced

³ Both parties offered expert testimony as to the value of the real estate on the date of marriage. David offered a value of \$132,500.00, and Sherri offered a value of \$110,000.00. The trial court mistakenly stated that the parties agreed on the value as \$132,500.00.

the loan. During this period, there were no improvements made to the real estate.⁴

At the time of refinancing in August 2000, the parties borrowed \$111,000.00 from National City Mortgage Company. The money was disbursed as follows:

\$37,665.91	paid off Cardinal mortgage
\$71,942.52 ⁵	deposited in parties account at National City Bank
<u>\$ 391.57</u>	paid closing cost (approximate)
\$110,000.00	Total

From August 2000 through December 2000, the parties made various improvements on the real estate, including an in-ground pool. Of the \$71,942.52 deposited in the parties' checking account with NCB, the trial court found \$44,500.00 was used for improvements on the property. David presented evidence that the value of the real estate at the end of December 2000, after the improvements were made, was \$212,500.00. Sherri did not offer any evidence on this issue. There were no further improvements on the property between December 2000 and the date of the divorce.

Both parties presented testimony as to the value of the real estate and the debts against the real estate at the

⁴ David presented testimony from an expert that the value of the real estate in August 2000 was \$168,000.00, a difference of \$35,500.00 from the value on the date of marriage. Sherri presented no evidence as to its value on this date. However, we do not find this value significant in the final calculations of the marital and non-marital contributions of the parties.

⁵ Approximately \$4,000.00 of this money remained in the checking account at NCB as of the date of the hearing.

time of hearing. David's expert testified that the value of the real estate as of that date was \$210,000.00 and Sherri's expert testified that the value was \$214,000.00. The trial court found the value on the date of the hearing to be \$210,000.00. David presented proof that the balance of the debt to NCMC as of that date was \$109,194.09. David also submitted proof of a second mortgage on the parties' real estate through NCB obtained on or about October 30, 2001. This mortgage was a revolving line of credit in the amount of \$50,000.00 which had an outstanding balance on the date of the hearing of \$8,342.67. David testified that this money was used for various marital purposes, but not for improvements to the real estate. Sherri disputed the balance on the equity line and offered proof that the balance of this loan was \$6,471.48, a difference of \$1,871.19. The trial court found the balance on the two mortgages to be approximately \$116,000.00 as of the date of the hearing.

The findings of the Commissioner, as adopted by the trial court, stated, in part, as follows:

REAL PROPERTY: The residential property located at 212 Hubert Court has both non-marital and marital qualities. There is no question that David owned this property for ten (10) years prior to the marriage. The parties agreed that at the time of their marriage the property had a value of \$132,500.00.⁶ It had a mortgage of approximately \$47,500.00 on it. The non-

⁶ This is incorrect since Sherri's expert valued the property at \$110,000.00.

marital equity at the time of marriage was therefore \$85,000.00.

During the marriage, payments were made on the original mortgage to the point it was reduced to \$37,665.91 when the property was refinanced for \$111,000.00. The replacement mortgage has been reduced to approximately \$108,500.00. During the marriage, the principal on the two (2) mortgages have been reduced by at least \$12,000.00. There have also been substantial improvements made on this property. The costs of their improvements are at least \$44,500.00. While these funds may have been all borrowed funds, they have increased the value of the property. Its present value is found to be \$210,000.00.

David has attached three (3) different work sheets as exhibits to his Brief. In these work sheets, his claim on non-marital contributions range from \$85,035.00 to \$62,535.00. The average is \$74,785.00. On these same charts, he states marital contributions range from \$94,834.00 to \$72,334.00 or an average of \$83,584.00. Using David's charts, he acknowledges that marital contributions equal 53%. This is considerably higher than the 39.2% claimed by Sherri as [David's] marital contributions. In division of marital/non-marital contributions to this property, the Commissioner accepts the percentages set forth by David or 53% is marital and 47% is non-marital [citation to record omitted].

David's argument that there is no marital equity in this property and Sherri should leave this marriage without getting anything from the residence is not accepted. David acknowledged that Sherri has earned in excess of \$50,000.00 a year during this marriage. They have made substantial improvements in this home. Its value has increased from \$132,500.00 to \$210,000.00. While his non-marital equity may be reduced

from [the] \$85,000.00 figure, this reduction is at least in part due to borrowing money on this property for other uses. The same would be true if he had remained single and borrowed the money on this home for other uses. David's percentage of non-marital[] interest protects his interest by the percentage he contributed alone to this (non-marital) property. It is found that the equity in the home is [] \$94,000.00. \$210,000.00 - 116,000.00 (present lien) = \$94,000.00[.] Fifty three (53%) or \$49,820.00 is marital property to be divided. This property is awarded to David. He shall be solely responsible for the debts on said property and hold Sherri harmless from said debts. He shall pay Sherri her share or one-half (1/2) of the marital equity (\$24,910.00) within ninety (90) days of the decree.

KRS 403.190 governs the division of property in a divorce action. Under the statute, the trial court must first separate the parties' marital estate by assigning to each party his or her non-marital property. "This court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous" [citations omitted].⁷ "The trial court's judgment and valuations in a divorce will not be disturbed on appeal unless it is contrary to the weight of the evidence."⁸ Under CR 52.01, this Court's review of the trial court's decision "is limited to reversing

⁷ Cochran v. Cochran, 746 S.W.2d 568, 569-70 (Ky.App. 1988); Johnson v. Johnson, 564 S.W.2d 221, 222-23 (Ky.App. 1978).

⁸ Underwood v. Underwood, 836 S.W.2d 439, 444 (Ky.App. 1992) (citing Heller v. Heller, 672 S.W.2d 945, 947 (Ky.App. 1984)).

only clearly erroneous findings, keeping in mind that the trial court had an opportunity to hear evidence and observe witnesses so as to judge credibility" [citations omitted].⁹

The division and valuation of property is "within the sound discretion of the trial court."¹⁰ "Disagreeing with the findings is not sufficient to find the findings as clearly erroneous."¹¹ However, the trial court's decision must be guided by certain statutory requirements that create evidentiary presumptions. KRS 403.190(3) provides that "all property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property. . . ." This presumption has been held to include the increase or appreciation in property.¹² The presumption may be overcome with respect to a particular item by showing there is persuasive evidence that a party owned the item prior to marriage, received it by gift or bequest, or obtained it in exchange for separate property,¹³ and with respect to any appreciation, was not due to the efforts of the parties.¹⁴

⁹ Chalupa v. Chalupa, 830 S.W.2d 391, 393 (Ky.App. 1992).

¹⁰ Cochran 746 S.W.2d at 570.

¹¹ Chalupa, 830 S.W.2d at 393.

¹² See Travis v. Travis, 59 S.W.3d 904, 908 (Ky. 2000).

¹³ KRS 403.190(2)(a) through (c).

¹⁴ KRS 403.190(3).

A trial court must determine the proportional contribution each party made in acquiring the asset. This analysis as mandated by Brandenberg v. Brandenberg,¹⁵ enables the trial court to value the property set apart to each spouse prior to undertaking an equitable division of the marital estate pursuant to KRS 403.190. This Court in reviewing the trial court's determination of the non-marital and marital interest in the real estate will first consider, in determining the equity in the real estate, whether the trial court has correctly valued all components of the property, including the present value of the real estate, values of marital and non-marital contributions made by the parties through reduction in mortgage principal and improvements, and the current debt owed on the real estate and its characterization as marital or non-marital. Then, this Court will determine whether the trial court has used these values to correctly calculate the respective contributions of the parties, both marital and non-marital, to the equity in the real estate and their respective portions of the equity. Under our standard of appellate review, we conclude that the trial court's valuations of the real estate on the date of marriage and the date of the hearing were supported by substantial

¹⁵ 617 S.W.2d 871 (Ky.App. 1981).

evidence and, thus, not clearly erroneous.¹⁶ However, we do conclude that the trial court erred in its calculation of the percentage of interest of David's non-marital contribution and the parties' marital contribution.

The first step in the calculation is to establish the non-marital contribution. It is undisputed that David owned the real estate prior to the marriage, and he has thus rebutted the presumption of KRS 403.190 that the equity in the real estate is entirely marital property. The trial court did not err in determining that the value of the real estate on the date of marriage was \$132,500.00, and that the non-marital contribution on the date of marriage was \$85,000.00, as both values were supported by substantial evidence.

In determining the amount of the marital contribution, the trial court found that David and Sherri jointly reduced the mortgage indebtedness by approximately \$12,000.00 and, as stated previously, made improvements to the property during their marriage at a cost of \$44,500.00. The trial court found the marital contribution was approximately \$56,500.00. Thus, the

¹⁶ We conclude that the trial court erroneously considered the costs of the improvements on the real estate in determining the parties' marital contribution rather than the value of the improvements. In the property division context, "property" means equity. Robinson v. Robinson, 569 S.W.2d 178, 181 (Ky.App. 1978). The value of the improvements to the real estate, therefore would be limited to their effect on equity of the real estate. 15 Graham & Keller, Kentucky Practice, §15.62 (1997). However, this issue is not raised by the parties and we will not address it further. Thus, the values placed by the trial court on the improvements during the marriage were not clearly erroneous.

two equitable contributions, the reduction in the mortgage balance (\$97,000.00) and the cost of the improvements (\$44,500.00), totaled \$141,500.00. Once the trial court made its findings as to the marital and non-marital contributions, it was required to apply the Brandenburg formula. However, we conclude the trial court erred by adopting the percentages as proposed by David of 47% non-marital and 53% marital, as these percentages did not accurately reflect the proportional contributions of the parties on the values of their contributions to the equity as found by the trial court.¹⁷ Our computations indicate that, based on the totals of the non-marital and marital contributions, as determined by the trial court, the non-marital percentage should be 60% and the marital percentage should be 40%.¹⁸

The trial court then determined the overall equity in the property, which represents the equity in the property at the time of distribution,¹⁹ was \$94,000.00. Once the equity

¹⁷ It appears the trial court accepted David's calculations on page 2 of his Exhibit 1 where he included as part of the total marital contribution the \$37,666.00 payoff of the first mortgage when funds were borrowed on August 29, 2000. This is clearly erroneous since the payoff of \$37,666.00 through the refinancing of the mortgage did not constitute a marital contribution but rather a re-characterization of a non-marital debt to a marital debt.

¹⁸ Based on simple arithmetic, the trial court should have calculated the percentages as follows: \$85,000.00 (non-marital contribution) + \$56,500.00 (marital contribution) = \$141,500.00 (total contribution). $\$85,000.00 / \$141,500.00 = 60\%$ and $\$56,500.00 / \$141,500.00 = 40\%$.

¹⁹ Brandenburg 617 S.W.2d at 872. The following indicates the meaning of the letters used in the formula: nmc=non-marital contribution; mc=marital contribution; e=equity; n-m p=non-marital property; and mp=marital property.

available for distribution was determined, it appears the trial court correctly used the formula set out in Brandenburg as follows:²⁰

$$\frac{nmc}{tc} \times e = n-m p$$

$$\frac{mc}{tc} \times e = mp$$

The trial court found that the total marital portion was \$49,820.00, and ordered that David pay Sherri one-half of this amount or \$24,910.00 and that he be responsible for the entire debt. Since we conclude that the percentage of contribution was miscalculated by the trial court, we must vacate its judgment and remand this matter for the trial court to use the above formula with the proper percentages of marital and non-marital contributions.

David contends that because the debt against the real estate at the time of divorce, totaling approximately \$116,000.00, substantially outweighed the marital contribution totaling \$56,500.00, all the equity in the real estate should be his non-marital property. However, this approach does not properly account for the marital contributions to the mortgage principal reduction and the home improvements. Since the mortgage was reduced during the parties' marriage from 1992 to 2004, some of the equity in the real estate during that period

²⁰ Brandenburg, 617 S.W.2d at 873.

was attributable to their marital contributions. The fact that the parties encumbered the property in 2000 does not wipe out the marital contribution made to that point. Obviously, if the mortgage balance had not been reduced prior to the refinancing, then a greater amount would have been required to payoff the mortgage.

On remand, the trial court is directed to recalculate the division of the real estate equity based on the correct percentages of the non-marital and marital contributions. Then the trial court shall determine whether it is equitable to assign all of the marital debt on the real estate to David and still give Sherri a portion of the marital equity, when the marital debt clearly outweighs the marital equity. We are unsure of the reasoning behind the trial court's division of the marital real estate interest and debt. From the wording of the Commissioner's findings, it appears that there could be some belief that David is in no different position than if the parties had not refinanced his non-marital debt on the real estate and made it marital debt. This is clearly not the law of Kentucky and the debt is clearly marital. However, as stated previously, we are constrained from remanding for more specific findings as to this issue since it was not raised by David on appeal. However, we would strongly caution the trial court that

this would not be an equitable ground for making such division of the parties' marital assets and debts.

In her cross-appeal, Sherri contends the trial court erred by assigning the entire value of David's pre-marital company stock to David after finding that the increase in the value of the stock during the marriage was solely attributable to economic growth. Both parties offered expert testimony as to the value of the stock at the time of marriage and the date of divorce. While the values varied between the two experts, both agreed that the stock had increased considerably in value since the parties' marriage. Sherri argues that the trial court was clearly erroneous in finding that the increase in the value of the stock was not the result of the efforts of the parties, and that the increase was merely due to economic growth.

The trial court adopted the recommendations of the Commissioner as follows:

SCHRECKER SUPPLY COMPANY: This is family owned business which David inherited one-third of the stock. The stock is non-marital. David has worked in the business during the marriage and is an officer in the cooperation. The value of the share has increased although there is a dispute between the parties as to its increase. David states it had increased \$31,800 while Sherri states his stocks have increased to \$87,189 during this marriage. The question is not the increase in its value of the stock but whether the increase is the result of the efforts of the parties as opposed to the mere economic growth of the cooperation.

While David worked in the business during the marriage, he was compensated by both a salary and bonuses for his efforts. There is no evidence that his or the couples' efforts did anything to increase the value of these stocks during the marriage. Based on the evidence, any increase in the value of the stock is found to be due to economic growth. It is non-marital and awarded solely to David [emphasis added].

David's father, Albert Shrecker, founded the company in 1947, and the company was incorporated in 1971. Upon Albert's death in 1979, David and his siblings, Terry Shrecker and Connie Shrecker, each became owners of 1/3 of the company's capital stock.²¹ The three shareholders are officers of the company and all three share in the company's tax loss carry-over. Terry is the president and general manager of the company and is responsible for hiring, firing, and supervising the employees and in turn receives a higher salary. While David is vice-president of the company, he has no management responsibilities.²² David presented testimony that after employee bonuses are paid, Terry and the company's CPA, Jeff Ebelhar, determine what bonuses, if any, are paid to the

²¹ Sherri attempted to refute David's claim that the original value of the stock was non-marital by attempting to demonstrate that he did not inherit the stock. However, regardless of how it came into his possession, David had owned the stock for 28 years and clearly owned the stock prior to the marriage and, thus, it was clearly his non-marital property under KRS 403.190.

²² David's responsibilities include preparing bid packages and working with various customers. He managed the store the company owned in Bowling Green from 1990 until 1993 when it closed. Two other employees have the same responsibilities as David.

shareholders. Terry testified that there was very little turnover of the employees and that it takes all the employees to operate the business. If David died or retired, business would go forward.

The trial court framed the issue in terms of whether the increase in the value of the stock was the result of the joint efforts of the parties during the marriage and found the increase in value of the stock was due solely to economic growth. Sherri's expert testified that the increase in the value of the stock was due to income earned during the marriage retained by the company and reinvested in additional inventory, company assets, and debt reduction. David argues that the corporation's income is not the income of the shareholders and that because the company stock is not publicly traded the only way it can increase in value is through retention of the shareholder's income.

The trial court found that while David worked in the business during the marriage, he was compensated by a salary and bonuses for his efforts and that rather than these efforts, economic growth caused the increase in the value of the stock, as there was no evidence that the parties' efforts did anything to increase the value of the stock during the marriage.

As stated previously, the trial court's factual findings cannot be set aside unless they are clearly erroneous,

and its decision will not be overturned unless it is an abuse of discretion. Neither occurred in the case before us.

Under KRS 403.190(2), marital property includes all property acquired by either spouse subsequent to the marriage, except the increase in value of property acquired before the marriage to the extent that such increase did not result from the efforts of the parties during the marriage. Only when the increase in value is a result of the joint efforts of the parties can the increase in value of nonmarital property be considered marital.²³ In Goderwis, the husband had built a business during the marriage which was the couple's principal source of income, while the wife contributed as a homemaker. The Supreme Court of Kentucky held that the increased value of the business was marital. However, in this case, neither David nor Sherri contributed to the increased value of the company's stocks.

Sherri appears to be confusing income from non-marital property with increases in value of non-marital property. An attempt to equate these two concepts was rejected by our Supreme Court in Mercer v. Mercer,²⁴ which clearly differentiated income derived from non-marital property from mere increases in the value of non-marital property:

²³ Goderwis v. Goderwis, 780 S.W.2d 39, 40 (Ky. 1989).

²⁴ 836 S.W.2d 897, 899 (Ky. 1992).

The case of Daniels v. Daniels, Ky.App., 726 S.W.2d 705 (1986), is not applicable in this situation either in its facts or in its rationale. In Daniels, supra, there was no finding by the trial court that the increase in the value of the stocks was the result of the joint efforts of the parties. Daniels involved an increase in the value of stocks purchased by the husband with nonmarital funds. That increase in value was not income. The stocks were the same stocks but they simply were worth more in value because of change in economic conditions. The increase in value could not be realized or used as income until the stocks were sold. Here the interest income was liquid and could have been used by the parties at any time.²⁵

For the foregoing reasons, we vacate that portion of the Daviess Circuit Court's order calculating the marital and non-marital contributions and ultimate shares of equity in the real estate and remand for a new calculation by using the correct percentages in the same formula. In the cross-appeal, we affirm the trial court's characterization of the entire value of the stock in the company as David's non-marital property.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT/CROSS-APPELLEE:

Phillip G. Abshier
Owensboro, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE/CROSS-APPELLANT:

Joseph R. Flaherty
Owensboro, Kentucky

²⁵ Income from non-marital property is non-marital. KRS 403.190(2)(a).