

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000797-MR

ROSIELEE WHITFORD

APPELLANT

v.

APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
CIVIL ACTION NO. 04-CI-00054

W.L. WHITFORD

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

HUDDLESTON, SENIOR JUDGE: Rosielee Whitford appeals from a Webster Circuit Court decree dissolving her marriage to W.L. Whitford. Rosielee disputes the trial court's calculation of W.L.'s non-marital interest in the marital residence. She also contends that the maintenance awarded her is inadequate. And she claims it was error for the court to refuse to order W.L. to pay her attorney's fee and the costs of this action.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Rosielee and W.L. married in 1981 and separated in 2003. During the marriage, and until her retirement in 1994, Rosielee performed clerical work at W.L.'s heating and electric business.

In 1985, the parties purchased a home referred to as the "Green Grove property" for \$61,500.00. At the time of the purchase of the Green Grove property, W.L. owned a non-marital residence on Bradley Street in Providence. When that property was sold, W.L. applied \$46,000.00 of the sale proceeds to the reduction of the mortgage on the Green Grove property. In 1993, the parties sold the Green Grove property for \$73,900.00 and purchased a house at 120 Payne Avenue in Providence for \$37,500.00. The parties stipulated that the value of the Payne Avenue house at the time of their separation was \$42,000.00.

W.L. did not file a brief on appeal. Accordingly, we elect to follow Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) and accept as true the facts and issues set out in Rosielee's brief.

Rosielee first argues that the trial court improperly awarded W.L. a 75% non-marital interest in the equity of the Payne Avenue house.

The trial court found that

[t]he pre-marital residence [on Bradley Street in Providence] sold by [W.L.] was his non-marital property. Both parties have

acknowledged that the sale proceeds [\$46,000.00] from the sale of [W.L.'s] non-marital residence was applied toward the purchase of the 'Green Grove Property.' The Court finds that [W.L.] has a 75% non-marital interest in the 'Green Grove Property.' This 75% interest is computed by dividing the non-marital interest of \$46,000.00 by the purchase price of [the Green Grove property] \$61,500.00.

The 'Green Grove Property' was later sold by the parties on November 18, 1993, for \$73,900.00. [W.L.] would have had a 75% non-marital interest in the sale proceeds of \$73,900.00. The residence locate[d] at 120 Payne Avenue was purchased on September 29, 1993 for the purchase price of \$37,500.00. Both parties acknowledge that the purchase price paid for the 120 Payne Avenue property came from the sale proceeds resulting from the sale of the 'Green Grove Property.' The Court finds that [W.L.] has a 75% non-marital interest in the 120 Payne Avenue property. The parties have agreed that the 120 Payne Avenue property has a fair market value of \$42,000.00 for the purpose of this proceeding. [W.L.'s] non-marital interest in the 120 Payne Avenue property is 75% of \$42,000.00, or the sum of \$31,500.00. The marital interest in the 120 Payne Avenue property is \$10,500.00.

Kentucky Revised Statutes (KRS) 403.190(3) creates a rebuttable presumption that all property acquired during the marriage is marital. A spouse can offer evidence to rebut the presumption by "tracing" property acquired during the marriage to non-marital assets.² Tracing is "[t]he process of tracking property's ownership or characteristics from the time of its

² See *Chenault v. Chenault*, 799 S.W.2d 575, 578 (Ky. 1990).

origin to the present.”³ “When the original property claimed to be non-marital is no longer owned, the non-marital claimant must trace the previously owned property into a presently owned specific asset.”⁴

In this case, the trial court relied on *Davis v. Davis*⁵ for the proposition that tracing non-marital funds is not required when the contesting spouse admits that certain assets are non-marital.⁶ In *Davis*, the property in question was purchased with the husband’s non-marital inheritance, and the same property was owned by the parties at the time of their divorce.⁷ What this Court said in *Davis* is applicable to this case:

Whether the documentary evidence provided by Frank [Davis] constitutes sufficient tracing is unnecessary for us to decide. As [the executor of Frank Davis’s estate] points out in his brief, Elizabeth [Davis] testified that, with the exception of about \$2,000, the Calloway County property was purchased with the proceeds of the sale of Frank’s nonmarital property. This admission on her part, we hold, relieves Frank of the burden to technically

³ *Black’s Law Dictionary* 1499 (7th ed. 1999).

⁴ 15 Louise Graham & Hon. James Keller, *Kentucky Practice, Domestic Relations Law* § 15.10 (2d ed. 2000).

⁵ 775 S.W.2d 942 (Ky. App. 1989).

⁶ *Id.* at 945.

⁷ *Id.* at 944.

trace the proceeds from one account to another.⁸

According to the trial court, “[b]oth [Rosielee] and [W.L.] testified that [W.L.] applied the \$46,000.00 [from the sale of the non-marital Bradley Street property] to the mortgage indebtedness on the ‘Green Grove property.’” Rosielee points to no evidence to contradict that finding of fact. Thus, the trial court correctly found that W.L. paid approximately 75% of the purchase price of the Green Grove property from non-marital funds. When that property was sold, a portion of the proceeds was used to purchase the residence at 120 Payne Avenue in Providence for \$37,500.00. The court correctly determined that W.L.’s non-marital interest in that property was 75%.

Rosielee’s alternative argument is that the trial court should have considered the parties’ expenditure of some \$20,000.00 to improve and renovate the Payne Avenue house in the assessment of marital value. Rosielee was unable to show that the improvements increased the value of the property. Indeed, the property was appraised at \$40,000.00 and the parties stipulated the value of the home as \$42,000.00. This represents a minimal increase in value from the \$37,500.00 purchase price and may simply reflect a general increase in real estate prices.

⁸ *Id.* at 945.

Rosielee next contends that the maintenance award was inadequate. She sought monthly maintenance of \$300.00, but was awarded \$160.00 per month. "[T]he amount and duration of maintenance is within the sound discretion of the trial court. Furthermore . . . in matters of such discretion, 'unless *absolute abuse* is shown, the appellate court must maintain confidence in the trial court and not disturb the findings of the trial judge.'"⁹

In this case the trial judge determined long-term maintenance was necessary because of the marriage's twenty-three-year history and because W.L.'s income was double Rosielee's. The court also considered the fact that both parties are over the age of seventy and primarily rely on Social Security income.¹⁰ The trial court set a reasonable amount of maintenance under the circumstances, and we see no reason to disturb its decision.

Rosielee's final argument is the trial court erred when it failed to require W.L. to pay all or part of her attorney's fee and the costs of this action. As the Supreme Court said in *Neidlinger v. Neidlinger*¹¹:

⁹ *Weldon v. Weldon*, 957 S.W.2d 283, 285 (Ky. App. 1997) (internal citations omitted).

¹⁰ Rosielee is presently 77 years of age and W.L. is 73.

¹¹ 52 S.W.3d 513 (Ky. 2001).

If there has ever been any doubt regarding the discretionary authority of the trial court to allocate court costs and award an attorney's fee, KRS 403.220 laid that doubt to rest once and for all. As matters now stand, an allocation of court costs and an award of an attorney's fee are entirely within the discretion of the court.¹²

The decree is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

NO BRIEF FOR APPELLEE

William Clint Prow
Providence, Kentucky

¹² *Id.* at 519.