

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002069-MR

TANI BROWN

APPELLANT

v. APPEAL FROM WEBSTER CIRCUIT COURT
HONORABLE WILLIAM E. MITCHELL, JUDGE
ACTION NO. 04-CI-00080

CARROLL BROWN

APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR JUDGE.

COMBS, CHIEF JUDGE: Tani Brown appeals from a decree of dissolution of her ten-year marriage to Carroll Brown by the Webster Family Court. Tani argues that the trial court erred by failing to value, assign, and divide properly the couple's property and debts; by failing to award her adequate maintenance; and by failing to order Carroll to

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

pay a reasonable amount for her attorney's fee. After considering these arguments in light of the record, we affirm the judgment.

At approximately mid-life, Tani and Carroll Brown married in 1993. No children were born of their marriage, and they separated in March 2004. Tani then petitioned for divorce. Following an evidentiary hearing held in early March of 2005, the family court concluded that while Carroll alone had amassed a substantial estate of his own, the couple together had accumulated only a modest marital estate.

The court assigned the non-marital property and divided the marital property between the parties. Carroll was awarded the residence, which he had built before the marriage, and the retirement accounts that he had funded prior to the marriage. However, the court was not persuaded that Carroll had adequately traced non-marital funds which he claimed had been used to purchase a disputed certificate of deposit (CD); that CD was, therefore, characterized as an asset subject to division as marital property. Carroll was ordered to pay to Tani the sum of \$37,075.00 to equalize the distribution of the marital assets. He was also ordered to pay her maintenance in the amount of \$200.00 per week for a period of eighteen months. Each party was to retain his/her own golf and country club stock, and the court concluded that the parties should bear the cost of their own attorneys' fees. This appeal followed.

Tani argues that the family court erred by concluding that the bulk of Carroll's retirement accounts at Hilliard-Lyons and Independence Bank were his separate property rather than marital property. We disagree. In her appellate brief, Tani contends

that “during the parties' pre-marital co-habitation, [Carroll] as [*sic*] hired by Tani’s family at Hudson Automotive and he was graced by her family with monies which allowed him to accumulate” the disputed retirement accounts. With enumerated exceptions, Kentucky Revised Statute (KRS) 403.190 defines “marital property” as all property acquired by either spouse **subsequent** to the marriage. Thus, Tani cannot assert a claim to property acquired by Carroll **prior** to the marriage. Previously acquired property was not subject to equitable distribution under the clear wording of the statute even if it was derived from monies earned from employment by Tani's family.

Next, Tani argues that the court erred in its computation of the marital interest in the residence that Carroll built **prior** to the parties’ marriage. She contends that Carroll failed to prove his non-marital interest in the house. As a result, she claims that the entire value of the residence must be characterized as marital property. We conclude that the trial court properly and accurately characterized the respective marital and non-marital interests in the house and that it divided the marital interests in just proportions.

At the evidentiary hearing held in March 2005, the court heard evidence indicating that the home’s fair market value was \$207,500.00. Carroll introduced evidence indicating that the real property upon which the house was built had been purchased for \$19,000.00. His documentary evidence indicated that he had paid a total of \$164,510.95 for labor and supplies for the construction. Carroll also testified that the house was completed and that he resided there for many months **before** the parties

married in May 1993. Carroll acknowledged an unpaid balance on his house loan of between \$24,000.00 and \$25,000.00 as of the time of the marriage; this loan was repaid during the marriage. The only improvements made to the property during the course of the marriage were the addition of a metal outbuilding and the construction of a paved driveway.

Relying on the tax return that was filed in 1992, the family court calculated the balance of Carroll's mortgage at the time of the marriage at \$32,000.00. The court concluded that the non-marital contribution represented 83% of the total construction cost, leaving a marital contribution of 17%. The court deducted the appraised value of the improvements made to the property following the marriage and arrived at a sum of \$162,265.00 as representing the value of the non-marital contribution to the home. The remaining value was characterized as marital and was equitably divided between the parties.

The division of marital property is committed to the sound discretion of the family court. *See Johnson v. Johnson*, 564 S.W.2d 221 (Ky.App. 1978). We cannot discover any abuse of its discretion when the court apportioned the marital and non-marital interest in the marital residence. Carroll had carefully documented the evidence in his favor, and the court's findings of fact are adequately supported by the record. There was no error.

Tani also contends that the family court erred by failing to conclude that Carroll had dissipated the marital estate by withdrawing \$10,000.00 from his checking account in January 2004. We disagree.

On January 9, 2004, Carroll wrote a \$10,000.00 check for the benefit of his nieces. While the transaction posted to his account a few days later, Carroll's sister, the payee of the check, did not disburse the money to her daughters (Carroll's nieces) for several months. By that time, the parties had separated.

Dissipation, spending marital funds for nonmarital purposes, can be established by showing that property is expended (1) during a period when the parties' separation or a dissolution of the marriage is imminent and (2) where there is a clear showing of intent to deprive one's spouse of his or her proportionate share of the marital property. *Robinette v. Robinette*, 736 S.W.2d 351 (Ky.App. 1987). After the spouse alleging dissipation has established these elements, the burden of going forward falls on the spouse charged with dissipation. *See Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998).

There was no evidence presented to indicate that the transfer from Carroll to his sister was made in contemplation of dissolution or separation or that Carroll's intent was to deprive Tani of her share of the marital estate. At the evidentiary hearing, Carroll testified that he was aware that his nieces were dealing with medical problems entailing serious financial consequences. He testified that following a social engagement sometime in early January 2004, he and Tani had discussed his plan to give some money

to his nieces. He indicated to the court that he did not believe that his marriage was in trouble at this time. Under these circumstances, we cannot say that the court erred by concluding that there had been no dissipation of marital assets.

Next, Tani argues that the family court erred by assigning to her the debts that she incurred following the parties' separation. Again, we disagree.

While there is no statutory authority for the assignment of debts in an action for dissolution of marriage, such assignments are made as a matter of course pursuant to common law principles. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Under the common law, there is no presumption that debts must be divided equally or in the same proportion as marital property. *Id.* Instead, debts are traditionally assigned on the basis of numerous factors – including the receipt of benefits and whether the debt was necessary to provide for the maintenance and support of the family. *Id.*

The family court was persuaded that the disputed debts were incurred primarily for Tani's individual benefit. In fact, Carroll was paying maintenance to Tani at the time that the challenged debts were incurred, and he did not receive any benefit from her expenditures. Consequently, we cannot conclude that the assignment of the disputed debts to Tani constituted an abuse of the family court's discretion.

Next, Tani contends that the family court erred by failing to award her adequate maintenance. We disagree. KRS 403.200(1) provides that a maintenance order shall be in such amounts and for such periods of time as the court deems just upon consideration of the following factors:

- (a) The financial resources of the party seeking maintenance . . . ;
- (b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
- (c) The standard of living established during the marriage;
- (d) The duration of the marriage;
- (e) The age, and the physical and emotional condition of the spouse seeking maintenance; and
- (f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

After weighing and considering the provisions of KRS 403.200, a family court has broad discretion in deciding whether to grant maintenance and, if so, in what amount. *Leveridge v. Leveridge*, 997 S.W.2d 1 (Ky. 1999). We may vacate a maintenance order only if we find that a court abused its discretion or that it based its decision on findings of fact that were clearly erroneous. *Perrine v. Christine*, 833 S.W.2d 825 (Ky. 1992).

The family court carefully reviewed the factors enumerated in KRS 403.200. As a result of the court's equitable distribution of the marital property, Tani received \$37,075.00 as a cash payment from Carroll. She also received one-half of the value of the retirement accounts that were included in the marital estate. The court found that Tani's monthly income was \$1,172.00 and that Carroll's net income was \$2,618.26 per month. While Tani indicated that her monthly expenses totaled nearly \$5,000.00, Carroll testified that this amount exceeded their monthly income and expenses when they lived together. The court did not find that the expenses claimed by Tani were reasonable. After reviewing a deposition from Tani's doctor, the court was not convinced that she faced any physical limitations on her ability to continue working. Having reviewed the

facts and the basis for the court’s ruling, we conclude that the award of temporary maintenance did not amount to an abuse of discretion.

Tani last contends that the family court erred by failing to order Carroll to pay at least a portion of her attorney’s fees. KRS 402.220 authorizes a trial court to order one party to a divorce action to pay a “reasonable amount” for the attorney’s fees of the other party – but only if there is a disparity in the relative financial resources of the parties in favor of the payor. *Hale v. Hale*, Ky., 772 S.W.2d 628 (1989). Even if a disparity exists, the decision whether to make such an assignment (and, if so, the amount to be assigned) is entirely within the discretion of the family court. *See Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001).

Based upon the record before us, we conclude that the family court’s decision not to award attorney’s fees was reasonable. Under the circumstances, there was no abuse of its broad discretion by the court.

The judgment of the Webster Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Amealia R. Zachary
Dixon, Kentucky

BRIEF FOR APPELLEE:

Susie H. Moore
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