

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002218-MR
&
NO. 2006-CA-000775-MR

JITANDER SINGH DUDEE

APPELLANT

v. APPEALS FROM FAYETTE FAMILY COURT
HONORABLE TIMOTHY NEIL PHILPOT, JUDGE
ACTION NO. 03-CI-00442

CHARLENE THERESA DUDEE

APPELLEE

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: KELLER AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

KNOPF, SENIOR JUDGE: Dr. Jitander Singh Dudee appeals from both the decree and amended decree dissolving his marriage to Charlene Theresa Dudee. On appeal, Dr.

Dudee alleges numerous trial court errors. We affirm.

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

Dr. Dudee and Mrs. Dudee married in 1995. Prior to their marriage, Dr. Dudee purchased the Malibu Eye Clinic where he practiced ophthalmology and Mrs. Dudee worked as a bookkeeper. The practice was purchased entirely on funds obtained by loan from the Johnson & Johnson Corporation. In 1994, the practice was incorporated as Medical Vision Group. The parties also purchased a residence together where they cohabited prior to the marriage. Four minor children were born of the marriage. Following the birth of their first child, Mrs. Dudee worked primarily as a homemaker. During the marriage, the value of the ophthalmology practice increased and the parties enjoyed an affluent lifestyle. The Dudees formed a holding company, Schatzie, LLC, to manage their commercial real estate investments. Eventually, the marriage deteriorated and Mrs. Dudee filed for divorce in January 2003. In 2006, the parties entered an agreement concerning child custody and timesharing, which is not at issue in this appeal. Following a bench trial in Fayette Circuit Court, the trial court entered a decree dividing the parties' property and awarded Mrs. Dudee her attorney fees. A separate hearing was held on the issue of maintenance after which the trial court awarded Mrs. Dudee limited maintenance in the amount of \$5,600.00 per month until Dr. Dudee satisfies the property judgment or until the youngest child begins kindergarten, whichever occurs first. Dr. Dudee appeals both the original decree and the amended decree that awarded maintenance. Additional facts will be developed as necessary.

Dr. Dudee first argues that the trial court erred by presuming an equal division of marital property in contravention of KRS 403.190, which requires that

division be made “in just proportions.” This argument is based on some comments made by the trial court to counsel and the court's alleged indifference and hostility towards Dr. Dudee. We find no merit in this contention.

At the outset, we are mindful that the standard of review on issues involving the division of property is as follows: “[t]his court cannot disturb the findings of a trial court in a case involving dissolution of marriage unless those findings are clearly erroneous... The property may very well have been divided or valued differently; however, how it actually was divided and valued [is] within the sound discretion of the trial court.” *Cochran v. Cochran*, 746 S.W.2d 568, 569-70 (Ky.App. 1988).

KRS 403.190(1) states:

In a proceeding for dissolution of the marriage or for legal separation, or in a proceeding for disposition of property following dissolution of the marriage by a court which lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall assign each spouse's property to him. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set apart to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

A review of the trial court's extensive 42 page judgment in this case reveals that the court correctly applied the appropriate standard as set forth in KRS 403.190(1). The record

indicates that the trial court did not presume an equal division of marital property. Rather, the court found that an equal division of the marital estate constituted an equitable division in just proportions. This finding was supported by substantial evidence and, therefore, will not be reversed. *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky.App. 2002); CR 52.01. Additionally, we could not locate at the citation provided by Dr. Dudee any of the alleged comments made by the trial court indicating that it would apply an inappropriate presumption. (The appellee noted the same citation difficulty in her brief). We will not scour the record to determine whether the alleged comments occurred.

Next, Dr. Dudee argues that the trial court erred in its apportionment of marital and non-marital property. Specifically, he contends that the trial court failed to recognize his non-marital interest in the marital residence and in Schatzie, LLC, the real estate holding company. Dr. Dudee argues that the trial court did not correctly apply the principles of tracing in its apportionment of marital and non-marital property.

KRS 403.190(2) provides:

For the purpose of this chapter, “marital property” means all property acquired by either spouse subsequent to the marriage except:

- (a) Property acquired by gift, bequest, devise, or descent during the marriage and the income derived therefrom unless there are significant activities of either spouse which contributed to the increase in value of said property and the income earned therefrom;
- (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise, or descent;
- (c) Property acquired by a spouse after a decree of legal separation;

- (d) Property excluded by a valid agreement of the parties;
and
- (e) The increase in value of property acquired before the marriage to the extent that such increase did not result of the efforts of the during marriage.

The party seeking to establish a non-marital claim in property acquired after the marriage bears the burden of proof. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002).

The trial court found that the marital residence was purchased prior to the marriage. Mrs. Dudee made the down payment on the residence and wrote a check for \$41,700.00 and wrote an additional \$15,502.00 check at the closing. The property was titled to both Dr. and Mrs. Dudee. Both of their names appear on the closing documents. Dr. Dudee asserts that Mrs. Dudee had insufficient funds to make the down payment, therefore, he must have supplied the funds. However, Dr. Dudee presented no proof as to his own ability to have made the payment. Rather, the only testimony regarding the source of the down payment was Mrs. Dudee's testimony that the funds were obtained from cash advances on their credit cards. Dr. Dudee also claims that the trial court held him to a higher burden of proof than the preponderance of the evidence standard. However, any alleged error in the application of the burden of proof is inconsequential in that Dr. Dudee could not have established a non-marital claim under either the preponderance of the evidence standard or the higher clear and convincing standard. Reversal is unwarranted.

Next, Dr. Dudee argues that the trial court erred by finding that he had no non-marital claim in Schatzie, LLC. The trial court found that Schatzie was entirely

marital property and was valued at \$810, 295.50. Dr. Dudee contends that he is entitled to a non-marital credit of \$185, 387.00 for his investment of funds that were gifted to him by his parents.

The trial court found that the parties stipulated that Dr. Dudee's parents provided funds for investment in commercial real estate. There was no stipulation that this was a gift to Dr. Dudee alone. Nor was there any evidence of his parents' intent to make a gift solely to him. Additionally, Dr. Dudee testified that he partially repaid his parents for these funds. Therefore, the alleged gift was actually a loan that he repaid with marital funds. The trial court also found that Schatzie was refinanced numerous times over and above the equity in the property. These findings are supported by substantial evidence and we are not at liberty to reverse.

Next, Dr. Dudee argues that the trial court's valuation of the Medical Vision Group practice was not supported by the evidence. The trial court found that the value of the practice was \$1,006,000.00. "It is within the province of the fact-finder to determine the credibility of witnesses and the weight to be given the evidence." *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 118 (Ky. 1991); CR 52.01. Regarding the valuation, the trial court simply chose between the conflicting opinions of experts. Based on our review of the record, we cannot determine that the valuation was clearly erroneous.

Finally, Dr. Dudee argues that the trial court failed to properly consider the statutory factors when it awarded Mrs. Dudee maintenance. Dr. Dudee contends that the

trial court failed to properly account for Mrs. Dudee's marital infidelity and lack of contribution to the marital estate in its award of maintenance.

“The decision to grant or deny a maintenance award lies within a trial court's sound discretion as it applies the governing factors of KRS 403.200 to the parties' circumstances upon dissolution of marriage.” *Leveridge v. Leveridge*, 997 S.W.2d 1, 2 (Ky. 1999). KRS 403.200(2)(a-f) lists the factors that the trial court may consider in awarding maintenance. *Id.* These factors include “the spouse's financial resources, the time necessary to acquire education or training to enable the spouse to find appropriate employment, the standard of living established during the marriage and the duration of the marriage.” *Id.* It is apparent from the judgment that the trial court properly applied the KRS 403.200 factors in its award of maintenance to Mrs. Dudee. In the maintenance proceeding, the only evidence the trial court had before it was Mrs. Dudee's testimony. We find no abuse of discretion nor do we perceive any injustice in the trial court's determination of the equity of this case. Marriage is a joint venture and as the trial court stated in its findings of fact, “[t]here is plenty of fault on both sides.”

Accordingly, the judgment of the Fayette Family Court is affirmed.

ALL CONCUR.

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