

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001985-MR

LYDIA R. SCHARSTEIN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE WILLIAM J. WEHR, JUDGE
ACTION NO. 05-CI-02116

THOMAS R. SCHARSTEIN

APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT, TAYLOR, AND WINE, JUDGES.

WINE, JUDGE: Lydia R. Scharstein (“Lydia”) appeals from a judgment of the Kenton Circuit Court dissolving her marriage to Thomas R. Scharstein (“Thomas”). She contends that the trial court erred in characterizing her separate bank account as entirely marital and subject to division. We agree with Lydia that she presented sufficient evidence to trace her original nonmarital contribution of \$50,000 to the account. But since Lydia also deposited her marital income into the account, we agree with the trial

court that the increase in the value of the account was marital. Hence, we affirm in part, reverse in part and remand for entry of a new judgment.

The underlying facts of this action are not in dispute. Lydia and Thomas Scharstein were married on July 8, 2000, and separated in May 2005. There is one child born of the marriage. Lydia filed a petition seeking dissolution of the marriage on August 8, 2005. After both parties sought custody, child support and exclusive possession of the marital residence, the trial court entered orders granting joint custody and permitting both parties to remain in the marital residence. Thereafter, the trial court directed the parties to each pay one-half of the marital bills relating to the residence.

On June 23, 2006, the trial court conducted an evidentiary hearing on the disputed issues between the parties. In pertinent part, the parties disputed the status of Lydia's checking account at the Bank of Kentucky, which at the time of the hearing had a balance of \$83,324.69. Lydia asserted that she had opened the account with nonmarital funds. Thomas claimed that Lydia had intermingled marital funds in the account. After considering the evidence, the trial court found

that the Wife's checking account valued at \$83,342.69 at the Bank of Kentucky is marital property and shall be divided equally between the parties. This is based upon the Court's finding that on a regular basis the Wife contributed her paycheck into this account and the Court is not satisfied from the testimony and documents submitted that said funds initiate from a non-marital source.

Lydia now appeals from this portion of the trial court's judgment. She argues that her testimony and documentary evidence were sufficient to establish that the

initial \$50,000.00 in the checking account came from a nonmarital source. She also contends that the trial court should have found the increase in the account to be nonmarital.

The central question in this case is whether Lydia met her burden of tracing her nonmarital assets in the checking account. The concept of “tracing” is not expressly created by statute, but it is strongly implied by the presumptions created in KRS 403.190. Essentially, the tracing requirement simply means that “[w]hen the original property claimed to be nonmarital is no longer owned, the nonmarital claimant must trace the previously owned property into a presently owned specific asset.” 15 Graham & Keller, *Kentucky Practice, Domestic Relations Law*, § 15.10 at 512 (2nd ed. 2000). If the claimant does so, then the trial court assigns the specific property, or an interest in the specific property, to the claimant as his or her nonmarital property. On the other hand, a claimant cannot meet the tracing requirement simply by showing that he or she brought nonmarital property into the marriage without also showing that he or she has spent his or her nonmarital assets in a traceable manner during the marriage. Under such circumstances, the trial court will not assign the property to the claimant as nonmarital property, but it may consider nonmarital contribution as a factor when it makes a just division of the parties’ marital property. *See Chenault v. Chenault*, 799 S.W.2d 575, 578-79 (Ky. 1990). *See also Brunson v. Brunson*, 569 S.W.2d 173, 176 (Ky.App. 1978); *Angel v. Angel*, 562 S.W.2d 661, 664-65 (Ky.App. 1978).

In *Chenault, supra*, the Kentucky Supreme Court recognized that tracing to a mathematical certainty is not always possible, noting that: “[w]hile such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skills or persons who are imprecise in their record-keeping abilities.” 799 S.W.2d at 578. As a result, the *Chenault* Court held that testimony alone may be sufficient to satisfy the tracing requirement. More recently, however, the Court has held that while *Chenault* relaxed the more draconian requirements for tracing, it did not do away with the tracing requirements altogether. *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 821 (Ky. 2002). Where the party claiming the nonmarital interest is a skilled business person with extensive record keeping experience, the courts may be justified in requiring documentation to trace nonmarital assets into marital property. *Id.*

There are two separate but related disputes concerning the status of the Bank of Kentucky account: the initial source of the funds in the account and the increase in the value of the account. From the date of the marriage until early 2003, Lydia maintained a separate account at PNC Bank. She testified that she regularly deposited her paychecks into this account and she used this account to pay the mortgage on her residence. In late 2002, she transferred approximately \$50,000.00 from this account, which she testified was used to pay for the construction of the new marital residence. In March of 2003, Lydia sold the residence which she owned prior to the marriage. She

testified that she received \$61,213.73 from the sale of that residence. Lydia further testified that she deposited \$50,000.00 of that amount into a separate account at the Bank of Kentucky.¹

The trial court stated that it was not convinced that the funds in the account initiated from a nonmarital source. But while Lydia likely co-mingled marital funds into her PNC account, there was no evidence that Lydia deposited any of the PNC Bank funds into the Bank of Kentucky account. Rather, Lydia presented documentary evidence showing the amount received from the closing and the initial deposit of \$50,000.00 into the Bank of Kentucky account shortly thereafter. Moreover, Thomas does not argue that any of the proceeds from the sale of Lydia's residence were marital.

Given this uncontested evidence, it appears that the trial court misapplied the standard of proof necessary to trace the initial \$50,000.00 contribution to the Bank of Kentucky account. Thomas focuses on the fact that Lydia is a certified public accountant and thus should be expected to keep detailed financial records. But unlike the situation in *Terwilliger*, the matter at issue in this case involves personal transactions by the parties – Lydia's sale of her residence and the parties' purchase of a marital residence. Nevertheless, Lydia did present documentary evidence supporting her testimony that she opened the Bank of Kentucky account with the proceeds from the sale of her nonmarital residence. Under the circumstances, we conclude that Lydia met her burden of showing that the original \$50,000.00 contribution was nonmarital.

¹ Lydia testified that she deposited the remaining amounts received from the closing into two accounts for their child's benefit. The status of these accounts is not at issue in this appeal.

The more difficult questions in this case involve the increase in the balance of this account and whether Lydia substantially co-mingled marital funds with this nonmarital asset. At the time the petition was filed, the balance in the account was approximately \$63,000.00. Lydia testified that she regularly deposited her income into this account, from which she would transfer funds into the marital account to pay bills. After the parties separated, Lydia testified that she used the Bank of Kentucky account exclusively. Specifically, Lydia stated that she used this account to pay her portion of the household expenses which the court had ordered to be equally divided between the parties. By the time of the hearing, the account balance had increased to \$83,324.69.

As Thomas correctly notes, all property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of how the property is titled. KRS 403.190(3).² Furthermore, the court's interlocutory order directing the parties to equally divide the household expenses was not a "decree of legal separation" as contemplated by the statute. As a result, all of Lydia's income must be considered marital, including income which she earned after the parties separated but before the entry of the decree. *Travis v. Travis*, 59 S.W.3d 904, 908-09 (Ky. 2001); and *Stallings v. Stallings*, 606 S.W.2d 163, 164 (Ky. 1980).

Lydia argues that this rule unfairly penalizes her for being thrifty and rewards Thomas for squandering the funds in his separate account. The trial court could have taken this into consideration in dividing the marital asset. The court was not

² We have also considered KRS 404.010(1), as well as Lydia's partial reliance on that statute, and do not find it applicable as to the facts at hand.

required to equally divide the account, only to divide it in “just proportions” after considering all of the relevant factors. KRS 403.190(1). However, Lydia does not challenge the trial court’s equal division of the account, only its characterization as marital. Under the circumstances, the trial court correctly found that the increase in the balance of the Bank of Kentucky account must be deemed to be entirely marital and thus subject to division.

On the other hand, there was no evidence that the balance of the Bank of Kentucky account ever fell below the original \$50,000.00 contribution. Furthermore, the fact that Lydia deposited marital funds into the account does not alter the nonmarital character of the original amount. *Overstreet v. Overstreet*, 144 S.W.3d 834, 837 (Ky.App. 2003). Thus, despite Lydia’s contributions of marital income, there is no evidence supporting the conclusion that Lydia’s co-mingling of marital funds rendered the original deposit untraceable. Therefore, we agree with Lydia that her original \$50,000.00 contribution remained nonmarital and should have been assigned as her separate property.

Accordingly, the judgment of the Kenton Circuit Court is affirmed in part, reversed in part and remanded for entry of a new judgment. The trial court shall enter a new judgment assigning the \$50,000.00 in the Bank of Kentucky account as Lydia’s nonmarital property. The court’s equal division of the additional \$33,324.69 in the account shall remain undisturbed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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