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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002472-MR
AND
NO. 2007-CA-000481-MR

TED W. SCHWEIKERT — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT,
FAMILY COURT DIVISION
HONORABLE LISA O. BUSHELMAN, JUDGE
ACTION NO. 02-CI-01459

SHERRY T. SCHWEIKERT — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

TAYLOR, JUDGE: Ted W. Schweikert brings Appeal No. 2006-CA-002472-MR from Findings of Fact, Conclusions of Law and Order entered August 31, 2006, and Appeal No. 2007-CA-000481-MR from a Supplemental Decree of Dissolution entered February 9, 2007, in the Casey Circuit Court. We affirm.

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Ted and Sherry T. Schweikert were married February 22, 1986. The parties entered into a prenuptial agreement on February 14, 1986. No children were born of the marriage. The marriage was dissolved by decree of dissolution of marriage entered in the Kenton Circuit Court on February 28, 2005. The decree dissolved the marriage but reserved all other issues for future adjudication.

The circuit court conducted a hearing to determine the validity of the parties' prenuptial agreement. By order entered on April 20, 2004, the court determined that enforcement of the prenuptial agreement would be manifestly unfair, unreasonable and unconscionable. Thus, the court held the prenuptial agreement to be invalid. Following lengthy discovery by the parties and several hearings before the court, Findings of Fact, Conclusions of Law and Orders were entered on August 31, 2006. Relevant to this appeal, the court made the following findings of fact:

> 5. The Court continues to find that the enforcement of the February, 1986, Prenuptial Agreement would be manifestly unfair, unreasonable, and unconscionable.
>
> 6. At the time of the filing of this Petition, Mr. Schweikert verified that Respondent was disabled.
>
> 7. At the time of the filing of this Petition, Mr. Schweikert verified that he was a Nurse Anesthetist.
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> 8. The Court has previously found that Petitioner has an earning capacity of $200,000 per year. . . .
>
> 9. The Court has previously found that Respondent receives about $1000 to $1100 per month from Social Security disability benefits.

. . . .

11. Because of her physical and emotional condition, the Respondent remains disabled and unable to be employed as an operating room nurse.

. . . .

15. The Respondent owned the Rosewood residence prior to marriage. There was no debt on the property. The parties have stipulated that the fair market value of the home is $390,000. Her equity in the property at the time of marriage was $222,000.

16. The parties have stipulated that there is now an existing mortgage on the Rosewood property held by People's Bank of Northern Kentucky. The amount owed is $126,165.24 as of December 29, 2004.

17. The parties stipulated that the equity in the Rosewood property as of December 29, 2004, was $263,834.76.

18. The parties stipulated that the Respondent be awarded the Rosewood residence.

. . . .

21. Petitioner filed bankruptcy and discharged his one-half debt owed on the mortgage. The mortgage is secured by the pre-marital residence of the Respondent, and she is left responsible for payment of 100% of the debt.

22. The Respondent's non-marital contribution to the Rosewood residence was $222,000. The Petitioner lacked any non-marital interest in the property.

23. The total marital contribution of the parties was $83,000.00 in accordance with the proof.

24. Total contribution equals $305,000.00.

25. The marital home at 826 Rosewood Drive is found to be mixed property, and an initial application of the formula set forth in Brandenburg v. Brandenburg, (Ky.App. 1981) 617 S.W.2d 871, is found to be appropriate.

. . . .

28. The parties stipulated that the Petitioner had the following retirement accounts at separation:

(A) J P Morgan Investments Account and SEP Account 319874, Value $1310.03;

(B) IRA Account 7999-9733, Value $202,671.41; and

(C) American Funds Account, Value $124,389.24.

29. By December 7, 2004, the time of stipulation, those accounts had the following values:

(A) J P Morgan Investments Account and SEP Account 319874, Value $1,430.00;

(B) IRA Account 7999-9733, Value $224,185.00; and

(C) American Funds Account, Value $0.

30. In January 2006, Petitioner withdrew $100,000 from IRA Account 7999-9733. It was his testimony that this withdrawal was to pay court-ordered obligations and penalties for early withdrawal.

31. In 2004, Petitioner had withdrawn $37,000 from the J P Morgan Investment Account.

32. In 2003, Petitioner liquidated the American Funds Account.

33. Withdraws [sic] from the accounts were used for various purposes, including payments of taxes, penalties, and interest. There were also purchases made.

34. Respondent has an interest in a vested retirement fund through the Bethesda Hospital Employee Pension Fund. There was no testimony as to its present value, but she may begin early withdrawals at a reduced amount at age 55. Her monthly lifetime benefit at age 65 (absent early withdrawal) will be $331.10.

35. The parties stipulated that the Respondent had the following financial accounts at separation;

(A) American Funds Account Number 59001035, Value $10,166.00;

(B) American Funds Account Number 60033608-03, Value $21,987.00;

(C) American Funds Account Number 60033608-06, Value $43,470.00; and

(D) American Funds Account Number 649079356, Value $1,839.00.

36. By December 7, 2004, the time of stipulation, those accounts had the following values:

(A) Account Number 59001035, Value $10,982.00;

(B) Account Number 60033608-03, Value $0;

(C) Account Number 60033608-06, Value $12,579.89; and

(D) Account Number 649079356, Value $2,216.57.

[American Funds] Account 59001035 is non-marital. It is owned by Respondent and her daughter, and consists of monies received from the daughter's father.

. . . .

44. At the time of final hearing, the parties owned motor vehicles. These are:

(A) 2001 Audi stipulated value $28,965;

(B) 2003 Chevrolet Tahoe, value $25,740; and

(C) 2001 Volkswagen Passat, value $12,310.

45. The 2003 Tahoe was included in the Petitioner's Bankruptcy filing. It has been repossessed.

46. The Petitioner now owns a 2005 Volkswagen Passat. There was no value given this vehicle, but the Petitioner has a debt through Passat on it.

47. The Audi has also been repossessed since this case was submitted for decision. During the pendency of this action, the Petitioner had been ordered to pay the Audi payment. He did not do so in a timely manner.

48. At the time of Decree, the mortgages on the 2003 Tahoe and the 2001 Passat exceeded the value of each vehicle. There is little equity in the 2001 Audi.

. . . .

58. The parties have significant marital debt. As stated by Mr. Frank Neltner, a CPA called as a witness for

> Petitioner, this couple lived an extravagant life style [sic] off money owed to the government and, the Court finds, money owed to others.
>
> . . . .
>
> 60. As of the time of the final hearing, the parties owe the following tax debts, which are marital:
>
> (A) 2003 Federal tax, Amount owed $57,434.
>
> (B) 2003 Kentucky tax, Amount owed $2,500.
>
> (C) 2003 Ohio tax, Amount owed $13,552.
>
> (D) 2003 Indiana tax, Amount owed $613.
>
> (E) 2003 City of Chillicothe tax, Amount owed $2550.
>
> (F) 2004 taxes, Amounts owed $68,000.

The court ultimately awarded maintenance to Sherry in the amount of $3,000.00 per month to be paid until her death, remarriage or cohabitation. The court ordered Ted to make an equalization payment to Sherry in the amount of $69,108.80 and to pay Sherry $10,000.00 for attorney's fees.

Ted timely filed a Motion to Alter, Amend, or Vacate under Ky. R. Civ. P. 59.05. By order entered November 3, 2006, the court clarified a creditor's name and the value of an item but otherwise denied Ted's motion. Ted filed a notice of appeal on November 30, 2006 (Appeal No. 2006-CA-002472). On February 9, 2007, a Supplemental Decree of Dissolution was entered. Therein, the court incorporated the August 31, 2006, Findings of Fact, Conclusions of Law and Orders and the November 3,

2006, order. Ted filed a second notice of appeal on March 1, 2007 (Appeal No. 2007-CA-000481) from the February 9, 2007, supplemental decree. These appeals follow.

Ted's first argument on appeal is that the circuit court erred by determining that enforcement of the parties' prenuptial agreement would be manifestly unfair, unreasonable, and unconscionable and by declaring the prenuptial agreement invalid. The unconscionability of a prenuptial agreement is a question of law to be determined by the court. 41 C.J.S. *Husband and Wife*, § 136 (2006).

It is well-settled that prenuptial agreements providing for disposition of property upon dissolution of marriage are permitted in this Commonwealth. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). However, such an agreement may be invalid if certain legal criteria are not met. *Id.* In determining the validity of a prenuptial agreement, the court must consider whether: (1) the agreement was obtained through misrepresentation or non-disclosure of material facts; (2) the agreement was unconscionable when executed ; and (3) the facts and circumstances have changed since the agreement was executed so as to make its enforcement unfair and unreasonable. *Id.*

In the case *sub judice*, the circuit court determined that the prenuptial agreement was not the result of fraud, duress, mistake or non-disclosure of material facts and that the agreement was not unconscionable when it was executed. However, the court held that the agreement was invalid as an unforeseen circumstance, Sherry's subsequent disability and loss of income, had arisen since its execution rendering it unfair and unreasonable.

Resolution of the validity of the prenuptial agreement centers upon the third part of the above test. More particularly, the prenuptial agreement may only be held invalid thereunder if "the circumstances of the parties at the time the marriage is dissolved are not so beyond the contemplation of the parties at the time the contract was entered into as to cause its enforcement to work an injustice." *Blue v. Blue*, 60 S.W.3d 585, 590 (Ky.App. 2001).

In support of Ted's argument that the prenuptial agreement is valid, he believes that Sherry's disability and consequent inability to continue work as an operating room nurse were circumstances well-within the parties' contemplation when they executed the prenuptial agreement. Ted asserts that Sherry was diagnosed with rheumatoid arthritis in May 1983 and had experienced health problems before execution of the prenuptial agreement. In its order voiding the prenuptial agreement, the circuit court pointed out that although Sherry had been diagnosed with rheumatoid arthritis, she remained active and had not been advised that her condition could become disabling. The court also noted that Sherry certainly never contemplated being unable to work and receiving disability of only $977.00 per month. Given the unforseeability of Sherry's disability and the resulting vast disparity between the parties' incomes, we also conclude that circumstances have arisen that were beyond the parties' contemplation at the time the prenuptial agreement was executed.

Ted next contends the circuit court "erred as a matter of law by placing the burden of proof on [Ted] to prove the validity of the agreement." Ted argues that the

burden was upon Sherry, as the party opposing the prenuptial agreement, to prove the agreement was invalid when it was executed.

This argument is without merit because the circuit court found the agreement to be valid at the time it was executed. Specifically, the court concluded:

> 2. Although Exhibits A and B to the Agreement are missing at this time, the Court concludes from the testimony of each party that they had full knowledge of the other's assets and liabilities when the Agreement was signed in February, 1986.
>
> 3. The Court therefore concludes that the Pre-Nuptial Agreement is not void ab initio.

Thus, Ted's argument is without merit.

Ted next contends that the circuit court erred by awarding Sherry maintenance. Specifically, Ted argues that Sherry possesses sufficient assets to provide for her reasonable needs and is able to support herself through employment.

The decision to award a party maintenance is an issue within the sound discretion of the circuit court. *Browning v. Browning*, 551 S.W.2d 823 (Ky.App. 1977). However, it is well-established that an award of maintenance must satisfy the elements of Kentucky Revised Statutes (KRS) 403.200(1)(a) and (b). *Drake v. Drake*, 721 S.W.2d 728 (Ky.App. 1986). To properly award maintenance pursuant to KRS 403.200, the court must find: (1) the spouse seeking maintenance lacks sufficient property, including the marital property apportioned to her, to provide for her reasonable needs; and (2) is unable to support herself through appropriate employment.

In the case *sub judice*, the circuit court made findings of fact regarding the sufficiency of the property apportioned to Sherry to provide for her reasonable needs including that: (1) the Rosewood residence, which was Sherry's unencumbered premarital property, was awarded to her subject to the $126,250.00 mortgage incurred during the marriage and subject to offset for the value of the marital portion of the property in the amount of $83,000.00, (2) Sherry was to be responsible for the entire amount of the mortgage on the residence as a result of Ted's bankruptcy and discharge of his portion of the debt, (3) Sherry had approximately $11,000.00 in a nonmarital account in November, 2004, (4) Sherry had no vehicle as Ted did not pay the payments as ordered during the pendency of the action and her vehicle was repossessed, (5) the parties owed some $143,000.00 in marital tax debt, and (6) the parties owed some $250,000.00 in consumer debt which Sherry is now solely responsible for as a result of Ted's bankruptcy.

The circuit court also found that: (1) Ted verified at the time of filing the petition for decree for dissolution, that Sherry was disabled, (2) Ted verified he was employed as a nurse anesthetist, (3) Ted had an earning capacity of $200,000.00 per year while Sherry would receive approximately $1,000.00 per month in social security disability, (4) Sherry remained disabled and due to her physical and emotional condition after the divorce and was unable to be employed as an operating room nurse.

As such, a review of the record reveals that the circuit court engaged in an extraordinarily thorough analysis and made sufficient findings of fact necessary under KRS 403.200(1) to support an award of maintenance. We, thus, find no abuse of

discretion on this issue and believe the circuit court did not err in awarding maintenance to Sherry.

Ted also argues the circuit court erred as to the amount and duration of the maintenance award. Ted specifically contends the court abused its discretion by awarding permanent maintenance in the amount of $3,000.00 per month.

It is axiomatic that amount and duration of maintenance award are within the sound discretion of the circuit court. *Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). An award of maintenance may only be reversed where there is a clear abuse of discretion. *Combs v. Combs*, 622 S.W.2d 679 (Ky.App. 1981).

When awarding maintenance, KRS 403.200(2) requires the circuit court to consider "all relevant factors" including:

> (2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, and after considering all relevant factors including:
>
> > (a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;
> >
> > (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.

Initially, we shall consider whether the duration of the maintenance award was proper. It is well-established that maintenance is considered rehabilitative in this Commonwealth and, thus, usually limited in duration. *Leitsch v. Leitsch*, 839 S.W.2d 287 (Ky.App. 1992). If rehabilitation of a spouse is not possible, the statutory scheme is intended to prevent a drastic change in the standard of living established during the parties' marriage. *Id.* Ordinarily, the duration of a maintenance award is dependent upon two factors: (1) the time period during which the need exists, and (2) the ability of the paying spouse to pay maintenance. *Combs v. Combs*, 622 S.W.2d 679 (Ky.App. 1981).

In the case *sub judice*, the evidence indicated the Sherry was fifty-seven years old at the time of dissolution, was disabled, and was unable to be employed as an operating room nurse. Sherry's monthly income was essentially limited to her social security disability benefits of approximately $1,000.00. Conversely, Ted was employed full-time as a nurse anesthetist and had an earning capacity of $200,000.00 per year. During the marriage, Ted's salary constituted the primary source of income for the parties. Given the duration of the marriage, Sherry's disability, and Ted's ability to meet Sherry's need, we believe the circuit court did not abuse its discretion by awarding permanent maintenance in the amount of $3,000.00 per month.

Ted's final argument on appeal is that the circuit court abused its discretion by ordering Ted to make a property equalization payment of $69,108.80 to Sherry.

It is well-established that a circuit court must divide marital property in "just proportions" without regard to marital misconduct.[2] KRS 403.190(1); *McGowan v. McGowan*, 663 S.W.2d 219 (Ky.App. 1983). A just division may not be an equal division. *Russell v. Russell*, 878 S.W.2d 24 (Ky.App. 1994). KRS 403.190 provides that the court must consider the following statutory factors when dividing marital property in just proportions:

> (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.

The circuit court has wide latitude where the statutory standard merely requires consideration of relevant factors resulting in an equitable division of property. 15 Louise E. Graham & Hon. James E. Keller, *Kentucky Practice*, § 15.4 (2d ed. 1997).

[2] Although marital misconduct is irrelevant when dividing marital property, dissipation of marital assets and intentional underemployment are appropriate factors for the circuit court's consideration. 15 Louise E. Graham & Hon. James E. Keller, *Kentucky Practice*, § 15.89 (2d ed. 1997).

The circuit court's division of marital property will not be disturbed on appeal absent an abuse of discretion. *Id.*

In this case, the court ordered Ted to make an equalization payment of $69,108.80 to Sherry. The court noted that after the parties had separated, Ted liquidated and/or withdrew funds from investment accounts totaling approximately $262,000.00. Ted also repeatedly violated pendente lite orders requiring him to provide support to Sherry, yet expended some $50,000.00 supporting his new girlfriend and her child. Furthermore, the court noted that Ted filed a Chapter 7 Bankruptcy Petition and was discharged of any responsibility for the parties' marital debt, except the tax debt. Thus, the court correctly concluded that Ted had been legally discharged from any obligation for these debts while Sherry was left responsible for payment of some $250,000.00 in personal debts and approximately $126,000.00 on the mortgage against her previously unencumbered residence. Thus, we cannot say the circuit court abused its discretion by ordering the equalization payment of $69,108.80.

For the foregoing reasons, Appeal No. 2006-CA-002472-MR and Appeal No. 2007-CA-000481-MR are affirmed.

ALL CONCUR.

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