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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001089-MR

REBEKAH ESKRIDGE WILSON

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DOLLY WISMAN BERRY, JUDGE
ACTION NO. 05-CI-502769

JEFFREY KEITH WILSON

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR JUDGE.

VANMETER, JUDGE: Rebekah Eskridge Wilson appeals from an order of the Jefferson Circuit Court, Family Division, which found that a marital business had no value after the business was discharged in bankruptcy prior to the dissolution of the parties' marriage. For the reasons stated hereafter, 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 Kentucky Revised Statutes (KRS) 21.580.

Rebekah and Jeffrey Keith Wilson married in 1982 and separated in 2005. A decree of dissolution was entered in May 2007.² The record shows that Rebekah, who has not worked since 1990, receives Social Security disability benefits. Jeffrey, who primarily worked as a construction manager during the marriage, left that work in 2004 to start a mortgage brokerage business after receiving encouragement from a former classmate who operated a similar business in Colorado. The business evidently did well initially, and the classmate joined Jeffrey as a partner in the business. They opened a Florida office in 2005, and the business paid the classmate's moving, travel and temporary living expenses in Florida. At some point, Jeffrey and the classmate began an extramarital affair. The Florida office did not perform as expected, and the classmate was released from membership in the business. Jeffrey filed the underlying petition for dissolution in July 2005 and on September 15, 2005, he filed for personal and business bankruptcy.

The court conducted hearings on August 23 and September 16, 2005, to address issues including Rebekah's motion seeking temporary maintenance. At that point Jeffrey was unemployed but seeking work. In an order entered on January 6, 2006, the trial court found that

[d]espite testifying that he realized his new business was doing poorly in June of 2005, [Jeffrey] and his "business partner" continued to eat out, stay at hotels, and travel beyond what this Court considers reasonable for a

² The decree of dissolution was entered shortly after the trial court denied Rebekah's motion to alter the findings and conclusions entered on April 4, 2007. Rebekah's appeal is taken from the April order, which the trial court designated final and appealable.

business in serious financial trouble. [Jeffrey's] mortgage business incurred many questionable expenses, including a payment of over \$5,000 for [his] paramour's apartment in Florida. And despite testifying that he knew the business was not profitable, [Jeffrey] admitted that he signed a contract with his paramour/partner wherein he agreed that she would receive 50% of all commissions received by the business and that the business would pay all of her living expenses for the indefinite duration of the contract. The business paid her over \$23,000 in cash and paid for numerous hotel and apartment bills on her behalf after June of 2005.

During both hearings, [Jeffrey] testified that he has declared bankruptcy and that the marital estate has no assets. In fact, there are very few marital assets at this time. However, the Court finds that this is largely due to [Jeffrey's] dissipation of those assets under the guise of a business venture. While [Jeffrey] clearly had a new business, AAA Discount Mortgages LLC, he also had a girlfriend on whom he spent much of his money.

After finding that Rebekah had an income of \$752 and reasonable expenses of \$2500 per month, and that Jeffrey was capable of finding gainful employment, the court awarded Rebekah temporary maintenance of \$1,748 per month. In June 2006, the court entered an order prohibiting any unnecessary expenditure of marital assets.

In October 2006, a court-appointed expert provided the court with a valuation of the business as of September 30, 2005, which was 15 days after Jeffrey filed for business bankruptcy. Although the expert noted that the bankruptcy had been discharged in August 2006 "with no assets to administer[.]" she treated the business as if it had remained in operation. After returning to the business the value of the money paid to the partner and certain expenses which

“were not part of the ongoing operations of mortgage brokerage[,]” such as those “related to a furnished apartment and excessive travel and entertainment[,]” the expert valued the business at \$46,000.

A trial was conducted in January 2007. In an order entered on April 4, the trial court found that Jeffrey earned some \$90,000 per year as a construction manager. The court assigned the parties their nonmarital property, permitted Rebekah to keep the marital residence which had no equity value, and directed the division of other marital property. Although the court accepted the expert’s September 2005 valuation of the business, it found that the business had a value of zero as of the time of the dissolution. The court awarded Rebekah maintenance of \$2,100 per month, subject to possible future modification in accordance with KRS 403.250, and it ordered the parties to pay their own debts. Finally, after noting that Jeffrey had already paid \$19,010 toward Rebekah’s attorney’s fees, the court ordered the parties to pay the remainder of their own attorney’s fees. This appeal followed.

Rebekah first contends that the trial court erred by assigning a zero value to the business at the time of dissolution. We disagree.

For purposes of KRS Chapter 403, marital property includes “[a]ll property acquired by either spouse after the marriage and before a decree of legal separation” or divorce. KRS 403.190(2) and (3). *See also* 15 Louise Everett Graham and James E. Keller, *Kentucky Practice* §15.5 (2008). Here, Rebekah does not challenge the expert’s valuation of the business at \$46,000 as of

September 30, 2005, based on an assumption of the business's continued operation and the inclusion of dissipated assets. Moreover, she does not dispute that even if it is assumed that assets were dissipated, the business had no assets or value when it was discharged in bankruptcy, eleven months later, while the dissolution proceeding was still pending. Under these circumstances, the trial court did not err by both adopting the expert's valuation, and finding that the business had no divisible value at the time of dissolution. CR³ 52.01. We note that although the parties did not own other substantial marital property which could be considered for allocation to Rebekah in compensation for the previously dissipated marital assets, her resulting lack of property was certainly considered when the court awarded \$2,100 per month as ongoing maintenance.

Further, we are not persuaded by Rebekah's assertion that the trial court abused its discretion by awarding marital personal property to Jeffrey. Although the business's bankruptcy discharge and complete lack of assets were relevant to the court's subsequent failure to distribute business assets in the dissolution proceeding, the same did not hold true as to the distribution of marital personal property which continued to exist at the time of dissolution. Regardless of whatever declarations Jeffrey may have made in his personal bankruptcy proceeding regarding his personal property, the trial court had a duty to value and divide the limited marital personal property which undeniably existed on the date

³ Kentucky Rules of Civil Procedure.

of dissolution. KRS 403.190. The court therefore did not abuse its discretion by awarding a portion of the marital personal property to Jeffrey.

The court's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

C. Thomas Hectus
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