

RENDERED: June 6, 1997; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 95-CA-002635-MR

GERALDINE KENNEDY;  
and GARY L. HERFEL

APPELLANTS

v.

APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE JOSEPH F. BAMBERGER, JUDGE  
ACTION NO. 91-CI-00490

EDWARD T. KENNEDY

APPELLEE

OPINION AFFIRMING IN PART;  
REVERSING IN PART and REMANDING

\* \* \* \* \*

BEFORE: EMBERTON, HUDDLESTON and SCHRODER, Judges.

EMBERTON, JUDGE. This is an appeal from a post-decree domestic relations dispute involving the value of property sought to be substituted as collateral to secure the monthly payment obligation of the husband to the wife under the parties separation agreement. The appellants, Geraldine Kennedy and her attorney, Gary Herfel, appeal alleging that the trial court erroneously valued the property and erred in denying Mrs. Kennedy

her costs incurred in defending appellee's motion to substitute collateral.

Edward Kennedy and Geraldine Kennedy were married on November 16, 1974, and in June 1991, commenced an action for dissolution of marriage. On March 2, 1994, a final decree was entered by the court incorporating the parties' settlement agreement. Pursuant to that agreement, Mr. Kennedy is to pay Mrs. Kennedy \$4,000 per month for the remainder of her life. Mr. Kennedy is further obligated to secure the payment with collateral of a sufficient value to purchase an annuity on Mrs. Kennedy's life that would provide \$4,000 per month to Mrs. Kennedy during her life. The initial security pledged is an open-ended mortgage on 43.664 acres of real estate located on Kings Mill Road in Warren County, Ohio.

Pursuant to the agreement, Mr. Kennedy is able to substitute and change collateral provided that the substitution has the same full fair market value and meets the same standards as does the existing collateral. As to the costs incurred as a result of any substitutions of collateral, paragraph 6(b) states as follows:

After the initial security is pledged Edward T. Kennedy shall pay all costs required to grant such mortgages and make such pledges and changes and substitutions of such collateral including without limitation reasonable attorney's fees of Geraldine M. Kennedy. (Emphasis added).

On March 8, 1995, Mr. Kennedy filed a motion to substitute collateral. Although the original motion did not detail the nature of the collateral sought to be substituted, Mrs. Kennedy learned that it was a 5.67 acre tract located in Mason Ohio. Mr. Kolb, a real estate developer, valued the tract of land at \$615,000 and stated that it could potentially be worth \$740,000 if certain improvements were made.

A hearing was held to establish if the 5.67 acre tract was at least equal to the value of the annuity value required by the agreement. The value of the annuity was provided by James Walter, a certified public accountant, and was placed between \$697,490 and \$735,300.

Mr. Kolb testified at the hearing that the fair market value of the property to be substituted was \$615,000, substantially less than the value of the annuity. Mrs. Kennedy objected to the testimony of Mr. Kolb on the basis that he is not a licensed real estate broker and is not a certified appraiser.

Jerry C. Fletcher, a certified real estate appraiser, testified that the 5.67 acre tract has a fair market value of \$320,000.

The court found that the value of the tract is \$532,800 and denied the motion to substitute collateral. The court, however, denied appellant's motion for attorney's fees and costs associated with the motion.

Attorney's fees are recoverable when provided for by statute or by agreement of the parties. Holsclaw v. Stephens, Ky., 507 S.W.2d 462, 480 (1973). The trial court interpreted the agreement to provide for the payment of Mrs. Kennedy's fees and costs only if the substitution of collateral actually occurred. In short, in order to recover her costs, Mrs. Kennedy would have to lose on her objection to the substitution of the collateral.

The agreement clearly states that Mr. Kennedy "shall pay all costs required to grant such mortgages and make such pledges and changes and substitutions of such collateral including without limitation reasonable attorney's fees of Geraldine M. Kennedy." The phrase "all costs" certainly includes the costs of Mrs. Kennedy in objecting to the proposed substitution. Otherwise, the payment of the attorney's fees and costs provision in the agreement would have little or no significance.

The costs and attorney's fees requested by Mrs. Kennedy must be reasonable. This case is remanded to the trial court for an award of reasonable attorney's fees and costs.

Mrs. Kennedy also objects to the value placed on the 5.67 acre tract by the trial court. There was no error in the admission of Mr. Kolb's opinion as to the value of the property. Although not a certified appraiser, he is a licensed real estate broker and is qualified to testify as to the value of the property. Whitesburg Municipal Housing Commission v. Bates, Ky.

App., 412 S.W.2d 225 (1967). We find no reversible error in the trial court's valuation of the property. Traughber v. Traughber, Ky. App., 434 S.W.2d 643 (1968).

The judgment of the trial court is reversed and remanded for an award of reasonable attorney's fees and costs incurred by Mrs. Kennedy. It is affirmed as to the valuation of the property.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gary L. Herfel  
Florence, Kentucky

BRIEF FOR APPELLEE:

Willie Mathis, Jr.  
Florence, Kentucky