

RENDERED: May 29, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-000955-MR

MICHAEL GERALD FRIEDEL

APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY PAYNE, JUDGE
ACTION NO. 94-CI-003072

JANICE NAHRA FRIEDEL

APPELLEE

OPINION AFFIRMING IN PART;
REVERSING and REMANDING IN PART

* * * * *

BEFORE: EMBERTON, HUDDLESTON and MILLER, Judges.

EMBERTON, JUDGE. This case arises from an action for dissolution of marriage. The appellant, Michael Gerald Friedel, alleges that the property division and the division of marital debts was erroneous. We affirm in part and reverse and remand in part.

The parties were married in 1973, and until 1994, resided in Iowa. During the course of the marriage, the appellee, Janice Nahra Friedel, worked as a teacher and eventually obtained her Masters and Ph.D. Michael obtained

licenses in securities and insurance and certification as a financial planner. During the early years of the marriage, the incomes of the parties were comparable. From 1980 to 1994, Michael earned an average of \$28,732 and Janice \$36,402.

In March 1994, Janice and the children moved to Kentucky where Janice accepted a position as President of the Lexington Community College earning \$73,000 annually. Michael remained in Iowa until July 1994. He is now employed on a part-time basis in the financial planning field earning approximately \$12,000 annually.

The major assets of the parties include various retirement fund accounts. The trial court found that Michael had made little financial contribution to those accounts or to the family expenses. Janice was awarded the Security Benefit account of \$71,002.81, and a state bond of \$60,226.29. Michael was awarded his IRA of \$34,054, and Janice awarded her IRA of \$10,682.75. The Iowa Public Employee's Retirement Account of \$32,041.99 was divided equally between the parties. Michael's share of the accounts totaled \$60,757.74, or 28% of the total value, and Janice received \$147,250.09. Additionally, Janice received a TIAA-CREF account of \$8,099 and a life insurance policy of \$3,870.91 as nonmarital assets.

Michael maintains that the TIAA-CREF account and the life insurance policy account should not have been considered as Janice's nonmarital property and is subject to distribution under

Ky. Rev. Stat. (KRS) 403.190. We agree. Marital property is all property acquired by either spouse subsequent to the marriage unless the property falls within certain statutory exceptions, including property acquired by a spouse after a decree of legal separation. KRS 403.190(2). The concept of marital property is so elementary that the court in Stallings v. Stallings, Ky., 606 S.W.2d 163, 164 (1980), reduced it to three basic principles:

1. All property acquired by either spouse after marriage is marital property unless it falls within one of the listed exceptions.
2. "Separation" means a legal one granted by a decree entered pursuant to KRS 403.140(2). The language of the legislature is so definitive it not only does not require, but rather prohibits, us from engrafting any exception based on mere "actual" separation.
3. the concept of "team or joint efforts" is not germane to the determination of whether property is marital or not. At most it may convert the increase in value of non-marital property into marital property.

The TIAA-CREF account was accumulated while the parties were physically, but not legally, separated and the life insurance policy was established in 1983. The trial court erroneously characterized these two assets as nonmarital property, and as a consequence, failed to consider the factors in KRS 403.190(1)(a) through (d). On remand, however, the contribution of each spouse to the accumulation of the marital assets is a factor which may be considered.

The remaining retirement assets of the parties were not divided in equal proportions; KRS 403.190, however, requires only

that the distribution be just and there is no presumption that marital property be equally divided. Russell v. Russell, Ky. App., 878 S.W.2d 24 (1994). The actual contribution of each spouse to the acquisition of the property must be considered. KRS 403.190(1)(a).

The trial court found that throughout the marriage Janice expended her earnings on the family and was able to save a considerable amount. Michael's work history has been sporadic and the majority of his expenditures unexplained. The trial court also found that Michael had incurred considerable debt without Janice's knowledge. Both parties contributed to the care of the children and the home. Janice, although not in severely declining health, has suffered a stroke which the trial court considered when distributing the marital assets.

There is an obvious disparity in the division of the marital assets. Despite Michael's argument to the contrary, however, the trial court properly considered all the factors set forth in KRS 403.190. Although marital misconduct is not a consideration, Michael's contribution to the marital assets is a factor. The facts indicate that Michael's financial contribution was minimal and he actually depleted the assets throughout the marriage. Although Michael contributed to the care of the children, there was evidence that Janice bore the primary responsibility. The only assets of the parties are those accumulated through Janice's efforts. In light of all relevant

factors, we do not find that the division of marital property to be clearly erroneous. Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391 (1992).

Michael was allocated \$18,121.41 of indebtedness, or 80% of the total debt. The trial court found that the \$18,121.41 indebtedness, incurred by Michael without Janice's knowledge and subsequent to her move to Kentucky, were incurred solely for Michael's benefit. The trial court's finding was not clearly erroneous and will not be disturbed on appeal. Glidewell v. Glidewell, Ky., 859 S.W.2d 675 (1993).

Despite Michael's cries of injustice and sexism, we believe the trial court's factual findings are not clearly erroneous. The evidence indicates that Michael has not, throughout the marriage, contributed financially or expended personal effort for the benefit of the family. Through her work both inside and outside the marital home Janice has enabled the family to enjoy a good standard of living and security for the future. The trial court obviously believed that the only way to preserve that future was to apportion a majority of the assets to Janice. We will not disturb that finding.

This case is reversed and remanded for the limited purpose of distribution of the TIAA-CREF account and the life insurance policy as marital property. In all other respects, it is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Debra Ann Doss
Lexington, Kentucky

BRIEF FOR APPELLEE:

W. Stokes Harris
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