

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-000368-MR

KAVEN L. RUMPEL

APPELLANT

v.

APPEAL FROM BULLITT CIRCUIT COURT
HONORABLE RODNEY BURRESS, JUDGE
ACTION NO. 09-CI-00456

KATHIE W. RUMPEL (NOW WOLFORD)
AND DIANA L. SKAGGS

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

COMBS, JUDGE: Kaven Rumpel appeals from the judgment of the Bullitt Circuit Court entered in this action for dissolution of marriage. The judgment divided the parties' marital property and debts and awarded maintenance to Kaven's former

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

wife, Kathie W. Rumpel (now Wolford). After our review of the record, we affirm.

Approximately four years before the parties married in August 1994, Kathie acquired a residence at 189 Whirlaway Court. Following their marriage, they lived together at the house. No children were born of the marriage, but they were awarded sole custody of Kaven's grandson in August 2001. In January 2002, they sold the Whirlaway property and purchased a house at 210 Oakview Court.

During the marriage, the parties established Advantage Associates, Inc. They agree that the corporation is marital property. It owns Highview Manor Associates, LLC, and operates a bingo hall. Highview Manor owns commercial property which is leased to numerous tenants.

They separated in March 2009, and a final decree of dissolution was entered on February 10, 2011.

In its findings of fact and conclusions of law, the family court first determined that the marital residence should be sold and that Kathie's non-marital interest in the property be restored to her. Various items of personal property were also assigned to each of them or divided between them, including: a yacht, a boat condominium, shares of British Petroleum Corporation, Kathie's 401(k) plan, Kaven's defined-benefit pension from the Louisville Police Department, a life insurance policy, and the proceeds from a joint tax refund.

The court reviewed and considered the parties' competing business valuations for Advantage Associates. Ultimately, the court accepted the valuation

testimony of Helen Cohen, CPA, who determined that the enterprise was worth \$383,000.00. The court awarded Advantage Associates and its debts to Kaven and ordered him to pay \$246,000.00 to Kathie in order to achieve an equitable division of the marital estate.

Finally, the court awarded Kathie maintenance in the amount of \$3,164.00 per month for a period of 72 months. She was also awarded her attorneys' fees of \$50,000.00. Pursuant to her subsequent motion to alter, amend, or vacate, the court awarded Kathie an additional \$87,700.00 as an equitable division of the marital estate. Kaven then filed this appeal.

In dissolution proceedings, appellate review is limited to the determination of whether the court's findings of fact are clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Sexton v. Sexton*, 125 S.W.3d 258 Ky.2004). Findings of fact are clearly erroneous only where they are manifestly against the weight of the evidence. *Bennett v. Horton*, 592 S.W.2d 460 (Ky.1979). Questions of law are subject to *de novo* review.

On appeal, Kaven first argues that the court erred by assigning to Kathie a non-marital interest in the couple's residence at 210 Oakview Court. He contends that Kathie failed to adequately trace her non-marital interest. In the alternative, he contends that any separate interest was effectively extinguished since the parties paid down the principal balance of the house loan with marital funds.

At trial, Kathie testified that she had a non-marital interest in the Whirlaway property amounting to \$52,392.16. She indicated that the parties secured a bridge

loan against this equity in order to have most of the \$57,726.29 down payment made to acquire the marital residence at Oakview Court. Kathie did not ask that any appreciation attributable to her non-marital contribution to the property be assigned to her. The trial court found that Kathie had adequately traced her non-marital interest in the Oakview Court property.

The provisions of Kentucky Revised Statute[s] (KRS) 403.190(3) create a presumption that all property acquired during the marriage is marital property. However, KRS 403.190(2)(b) exempts from the definition of marital property “property acquired in exchange for property acquired before the marriage.” Nevertheless, because all property acquired during the marriage is presumed marital, “[a] party claiming that property acquired during the marriage is other than marital property, bears the burden of proof.” *Terwilliger v. Terwilliger*, 64 S.W.3d 816, 820 (Ky. 2002).

“[A]n item of property will often consist of both nonmarital and marital components, and when this occurs, a trial court must determine the parties’ separate nonmarital and marital share or interest in the property on the basis of the evidence before the court.” *Travis v. Travis*, 59 S.W.3d 904, 909 (Ky.2001). Our courts have interpreted KRS 403.190 as requiring a party seeking to have property classified as non-marital to “trace” the non-marital property to a specific asset owned by the parties at the time of dissolution. *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990). Tracing does not necessarily require documentary evidence or mathematical certainty. *Id.*

In this case, the court did not err by concluding that Kathie had adequately established her separate interest in the Whirlaway property and that she had sufficiently traced her non-marital interest to the acquisition of the residence at Oakview Court. Kathie presented unchallenged evidence that she owned her own home prior to the marriage and that she had equity of more than \$52,000.00 (upon the sale of the house) available for the parties' investment in the Oakview Court home. She indicated that these funds were, in fact, used to pay for a portion of Oakview Court. The trial court found Kathie to be forthright and her testimony to be entirely credible. Moreover, Kathie's non-marital interest in Oakview Court was not extinguished by the payment of the monthly mortgage with marital funds. *See Travis, supra*. Consequently, Kathie is entitled to the restoration of her non-marital contribution to the property.

Next, Kaven contends that the trial court erred in its division of the parties' marital property and debt. Issues pertaining to the assignment of marital property and the assignment of debts incurred during the marriage are reviewed under an abuse of discretion standard. *Neidlinger v. Neidlinger*, 52 S.W.2d 3d 513 (Ky. 2001).

With respect to the marital debt, Kaven argues that the court erred by charging against his share of the marital estate more than \$13,000.00, which represented his contribution to a failed bid for city council. We disagree.

At trial, Kathie introduced two entries from the Kentucky Registry of Election Finance evidencing contributions from Kaven to his own campaign in

September 2009 and May 2010 (after the parties' separation). Kaven claims that these contributions were made from loans from third parties rather than from marital funds. Kaven also argues that the debt should be presumed to be marital and assigned in the same proportion as the marital assets.

There is no statutory authority for assigning debts in an action for dissolution of marriage. Nevertheless, such assignments are routinely made as a matter of common law in all divorce actions. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Nor is there a statutory presumption as to whether debts incurred during the marriage are marital or non-marital in nature. *See Bodie v. Bodie*, 590 S.W.2d 895 (Ky.App.1979). Finally, there is no presumption that debts must be divided equally or in the same proportion as the marital property. *Russell v. Russell*, 878 S.W.2d 24 (Ky.App. 1994). Instead, debts incurred during the marriage are traditionally assigned on the basis of such factors as the receipt of benefits and the extent of each party's participation in the debt. *Neidlinger v. Neidlinger, supra*.

Kaven claims that the campaign expenditure was made in an effort to increase the marital estate. However, the trial court found that the \$13,000.00 was primarily for Kaven's own benefit. Under those circumstances, the assignment of this debt to him was not an abuse of the court's discretion.

Kaven also contends that the court erred by awarding to him the parties' yacht at a value of \$145,000.00, less the mortgage of \$144,610.00. Kaven argues that the parties' valuations show that the yacht has a negative value.

Kathie's testimony indicated that the vessel was in excellent condition and that it was worth at least as much as was owed on it. A financial statement prepared for Kaven in December 2009 valued the yacht at \$210,000.000. Kaven insured it for \$214,000.00. The court did not abuse its discretion by valuing the vessel at a few hundred dollars more than the outstanding mortgage against it.

Kaven argues that the court erred by assigning to him a diamond ring worn by his fiancé. The trial court's judgment did not mention this ring; no value was assigned to it in the court's findings of fact. Its existence had no bearing on the equitable distribution of the marital property or the allocation of marital debt to either of the parties. Consequently, it is not a factor upon which an allegation of error can be premised.

Kaven next contends that the court erred by assigning to him the right to collect the outstanding child-support arrearage owed by his daughter, a debt of \$15,600. He challenges the characterization of this debt as marital property to be charged against his share of the marital estate. Again, contrary to Kaven's assertion, there is **nothing** in the court's findings of fact, conclusions of law, or judgment to indicate that this sum was actually charged against his share of the property distribution. Consequently, we can discover no reversible error.

Next, Kaven argues that the trial court erred by accepting Kathie's evidence with respect to the valuation of Advantage Associates and Highview Manor Associates. He contends that the trial court's conclusion with respect to the

valuation of the business entities does not properly reflect their fair market value.

We disagree.

Appellate courts will not disturb a trial court's valuations unless the court's decision is contrary to the weight of the evidence. *Clark v. Clark*, 782 S.W.2d 56 (Ky.App.1990). We examine the methods utilized by the trial court to determine whether the trial court clearly erred in valuing the asset.

Kentucky courts have not specifically adopted one method of valuation. *Id.* at 59. The trial court must consider a variety of factors to properly value a business, including which calculations best represent the value of the business. “The task of the appellate court is to determine whether the trial court's approach reasonably approximated the net value” *Id.* Our review indicates that the court's decision to value Advantage Associates at \$383,000 was based upon the appraisal of Helen Cohen; it was well-reasoned and based upon sufficient evidence. As the trial court stated in its order:

Advantage has two businesses segments. 1.) It operates a bingo hall with a subcomponent which is a snack bar. 2.) It also owns 100% of Highview Manor Associates, LLC (“Highview”). Highview owns commercial real estate on Fegenbush Lane which it leases to several tenants. One of those tenants is Advantage who leases space for operation of the bingo hall and snack bar.

Both parties have obtained business valuations of Advantage. Helen Cohen, CPA of Blue & Co., LLC appraised Advantage at \$383,000. Richard M. Robinson of Rodefer Moss & Co., PLLC found it had a negative value. Both accountants considered the company debt in arriving at their valuations. Ms. Cohen relied on the

Spence real estate appraisal and Mr. Robinson relied on the Allgeier real estate appraisal.

Having received the testimony of Ms. Cohen and Mr. Robinson, and having observed the demeanor of the witnesses while testifying, the court finds the Cohen valuation to be more reliable. Ms. Cohen used three approaches in reaching her valuation. She used the asset approach, the income approach and the market approach. The evidence showed that [Kaven] had the real estate appraised by Allgeier Company who was instructed to use only an income capitalization approach. While Mr. Allgeier testified he felt this to be the proper approach[,] the Court finds that a more accurate fair market value is obtained when the asset approach, income approach and market approach are all considered.

Ms. Cohen valued the business as a going concern but valued it separately in two business segments. She then combined the separate segments to reach a total value. The business segments used were 1.) Real estate and 2.) Bingo and snack bar.

Both Cohen and Robinson recognized that the major difference in their valuations can be attributed to the difference in the Spence and Allgeier real property valuations. However, the court also notes that Mr. Robinson's approach used a risk-free bond yield rate which was not the actual rate in making his valuation. Mr. Robinson also failed to separate the two business segments (real estate and Bingo). These businesses can be separated as they are technically independent operations. The court therefore finds the Cohen valuation provides a more accurate figure. This is especially true given the fact that a lower real estate value as determined by Allgeier would not affect the Bingo operation as a going and independent concern.

The real estate was appraised by William D. Otto Spence, MAI, on June 10, 210. Mr. Spence found it had a value of \$1,400,000. It was also appraised by Allgeier Company . . . who found it to have an estimated market value as of April 6, 2010 of \$810,000.00

The evidence introduced during the hearing also showed that the real estate had been appraised several times in connection with the mortgage by PBI Bank. Those appraisals were by Bryant Appraisal Company and were introduced [by Kathie]. One valuation found that on December 9, 2008 . . . the fair market value was \$1,870,000. Another found that on October 8, 2004 . . . the value to be \$1,800,000. The most recent valuation prepared by PBI Bank (valued on December 9, 2008) was approximately 90 days prior to the date of separation. . . . These valuations were made in connection with credit applications signed by [Kaven].

The court finds Mr. Spence's valuation to be the most reliable. Mr. Spence considered a sales comparison approach, an income approach and a cost approach in arriving at his valuation. Mr. Allgeier used only an income approach. In addition, Mr. Spence used a Bingo Hall in his valuations where Mr. Allgeier did not. Also, Mr. Allgeier used a national cap rate and failed to use an actual cap rate. These issues, in the court's opinion, make the Spence valuation more reliable. This is especially true given that [Kaven] used a higher valuation of the business approximately 90 days prior to separation in his effort to obtain a loan from PBI Bank.

While [Kaven] has asserted this asset has a negative net worth in this litigation the Court notes that he has recognized a higher value for the business in his Financial Statement . . . where he valued the company at \$506,366.

* * * * *

The Court finds that the underlying real estate on Fegenbush Lane has a fair market value of \$1,400,000. The Court further finds that Advantage and Highview have a value of \$383,000. [Kaven] seeks this asset and is awarded Advantage and Highview, with their underlying debts and assets including the real estate at a value of \$383,000.

In light of the evidence supporting the trial court's decision, we conclude that the trial court did not abuse its discretion by discounting Allgeier's report and testimony and by accepting *in toto* the appraisal performed by Spence. On the contrary, the court was meticulous in its analysis of the valuations submitted. Consequently, it did not err by accepting the valuation submitted by Cohen.

Next, Kaven argues that the family court erred by awarding Kathie maintenance under the provisions of KRS 403.200. He contends that Kathie was awarded sufficient property under the court's judgment and that she is otherwise capable of supporting herself through appropriate employment. He also contends that the court erred by concluding that he was capable of paying maintenance in the sum awarded in addition to meeting his own financial needs.

KRS 403.200(1) provides that a court may award maintenance based upon a finding that the spouse seeking maintenance lacks sufficient property to provide for her needs and is unable to support herself through employment. The maintenance awarded must be in such amounts and for such periods of time as the court deems just after considering all relevant factors. KRS 403.200(2). Some of the statutory factors governing the amount and length of maintenance include: the financial resources of the party seeking maintenance; the standard of living established during the marriage; the duration of the marriage; and the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance. There is no presumption in favor of an

award of maintenance, and the amount and duration of maintenance is within the sound discretion of the trial court. *Weldon v. Weldon*, 957 S.W.2d 283 (Ky.App. 1997).

After considering the evidence, the court found that Kathie had worked throughout the marriage primarily as a homemaker and as a caregiver for Kaven and his grandson; that she lacked sufficient property, including the marital property apportioned to her, to provide for her reasonable needs; and that, despite her employment as a nurse, Kathie was unable to support herself financially. Additionally, the court found that Kaven was well able to support himself while paying the maintenance required. Based upon those findings, the court determined that a maintenance award of \$3,164 per month for a period of 72 months was warranted. The trial court deliberately and properly considered the factors relevant to its maintenance determination. We cannot conclude that either the amount or the duration of maintenance awarded was erroneous.

Kaven also contends that the family court erred by awarding attorneys' fees to Kathie. He argues that it confused the requirements of Kentucky Rule[s] of Civil Procedure 37.03 with those of KRS 403.220. Again, we disagree.

Under the provisions of KRS 403.220, the trial court may award a party a reasonable amount of attorney's fees and costs associated with an order for dissolution of marriage. However, to justify such an award, there must exist a disparity in the parties' financial resources. *Neidlinger v. Neidlinger*, 52 S.W.3d 513 (Ky. 2001). Additionally, “obstructive tactics and conduct, which multipl[y]

the records and proceedings’ are proper considerations ‘justify[ing] both the fact and the amount of the award.’” *Sexton v. Sexton*, 125 S.W.3d 258, 273 (Ky. 2004), quoting *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990). Appellate review of an award of attorney’s fees and costs is limited to a consideration of whether the trial court abused its discretion.

After considering the course of the proceedings, the court found that the bulk of Kathie’s legal expenses were related to proving the value of Advantage Associates. The court considered the provisions of KRS 403.220 and the fact that during discovery Kathie had formally requested Kaven to admit that the business had a value of \$265,000. It then awarded Kathie \$50,000 for her attorneys’ fees.

A review of the voluminous record of documentary evidence confirms that Kathie indeed incurred significant legal fees as a direct result of the contentious business-valuation question. It also confirms the disparate financial resources of the parties. Under the circumstances, we conclude that the court’s award of attorneys’ fees was reasonable and was supported by sound legal principles.

Kaven also argues that the court erred by amending the judgment to increase his equity interest in Advantage Associates. We disagree.

Kathie filed a post-trial motion to alter, amend, or vacate a portion of the court’s judgment. The motion was based on Kaven’s payment of more than \$175,000 toward the principal balance of the business’s mortgage between the date of the accountants’ valuation and the date of trial. As a result of the motion, the

court found that it would be equitable to add that sum to the value of the marital estate and to divide it equally between the parties. The court observed as follows:

The date of the business valuation of the business real estate was December 31, 2008. The Court finds that the Respondent had sole possession of that asset and had complete control of the financial information during the pendency of the action. In addition, he was solely responsible for the filing of tax returns and providing updated financial records.

The lack of information to present an up to date valuation resulted from [Kathie's] expert being confined to a valuation date of December 31, 2008. At that time the amount owed on the real estate's mortgage was \$1,401,269.00. The Court finds that during the pendency of the action the principal balance of the mortgage had been paid down to \$1,225,866.76 at the time of trial. Thus, from the period of December 31, 2008 the business equity increased \$175,403.00. The Court finds it would therefore be equitable to add to the value of the marital estate the sum of \$175,403.00 of which [Kathie] should be awarded one half.

We cannot perceive any abuse of discretion on this issue. The decision appears reasonable and adequately supported by the record.

Last, Kaven argues that the court erred by failing to amend the judgment to compensate him for a share of the marital debt that he paid during the divorce proceedings. In its order amending the judgment, the court noted as follows:

During the pendency of the action the Respondent [had] the sole use and management of the parties' main asset which is the business property. This asset was accumulated and developed during the course of the marriage. [Kaven] testified he had no additional income and was unable to, in that period of time, pay maintenance pendente lite.

The Court finds that any funds generated were the result of the marital assets and it would be inequitable to require [Kathie] to repay those funds.

The court was not required to order Kathie to reimburse Kaven for his payment of marital debts with marital funds during the pendency of the divorce proceedings. It was within the court's sound discretion to find the payment of marital debts from the marital estate as entirely proper and not to order any repayment from Kathie's separate estate. There was no error.

We affirm the judgment of the Bullitt Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Dennis Sims
Louisville, Kentucky

BRIEF FOR APPELLEE RUMPEL
(NOW WOLFORD):

Eric G. Farris
Rebecca Murrell
Shepherdsville, Kentucky