

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000662-MR
AND
NO.2007-CA-000709-MR

KATHLEEN LEY

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 05-CI-502812

BRUCE MORTON LEY

APPELLEE/CROSS-APPELLANT

OPINION AFFIRMING

** ** * * * * *

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

KNOPF, SENIOR JUDGE: Kathleen Ley and Bruce Morton Ley each appeal the

February 9, 2007, findings of fact and conclusions of law, disposing of their

property and debts in their dissolution of marriage action. 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 21.580.

The parties were married on March 3, 1979. On August 3, 2005, Kathleen filed a petition for dissolution of marriage in the Family Division of Jefferson Circuit Court. There were three children born of the marriage, all of whom had been emancipated at the time the petition was filed. Although the parties were residing in the same residence, they both testified that they had been separated since 1995.

Prior to the marriage, on June 27, 1978, Bruce was granted the option to purchase 300 shares of Wendy's stock at \$32.38 per share. The option was later cancelled and subsequently reissued at a much lower price. On May 5, 1981, Bruce exercised his option and purchased 450 shares of Wendy's stock at \$6.00 per share. The purchase was admittedly made with marital funds. The fair market value of the stock at the time of purchase was \$17.19 per share.

The primary debt to be divided between the parties was for federal income taxes for the tax years of 1998, 1999, 2000, and 2001. The total amount owed to the IRS was approximately \$200,000, plus penalties and interest. The tax returns were prepared by Bruce and signed by both of the parties. Bruce filed the state tax returns under the state amnesty program but failed to file the federal returns. Kathleen testified that she had failed to review the tax returns when given the opportunity and that she was unaware the federal returns had not been filed until the dissolution action was filed. Upon discovering this information, Kathleen filed for those years as married filing separately, taking the standard deduction and claiming all three children as dependency exemptions.

On February 9, 2007, the trial court entered its findings of fact and conclusions of law. In its judgment, the trial court found that the stock option was non-marital as it was in the form of compensation for Bruce's service to Wendy's prior to the marriage. The trial court then calculated the value as the fair market value of the shares at the time of purchase, less the option price. Accordingly, \$5,035.50 of the stock was restored to Bruce as non-marital. The remainder of the stock was ordered to be divided equally between the parties.

The trial court also found that the federal income taxes were a marital debt. In so concluding, the court further ruled that the tax debt would be divided equally between the parties, but that Bruce would be solely responsible for all of the penalties and interest owed on the taxes. The trial court gave the parties the option to file separately or jointly and ordered that if the tax liability was not paid from other sources, that it was to be paid from the proceeds of the marital home. The trial court also divided the marital debt amongst the parties in a manner that will be further discussed later in this opinion. These appeals followed.

On appeal, Kathleen argues that the trial court erred in its allocation of the tax obligation and abused its discretion in its allocation of the parties' debt. Bruce argues that the trial court abused its discretion in calculating his non-marital interest in Wendy's stock; in assigning the tax interest and penalties to him; and in its assignment of assets and debts.

The Parties' Tax Obligation

Both parties take issue with the trial court's division of the parties' tax obligation. Kathleen argues that Bruce should be required to pay all of the principal as well as the interest and penalties. Bruce argues that Kathleen should be made to share the interest and penalty payments due and owing to the IRS.

The division of marital property is within the sound discretion of the trial court and will not be disturbed unless we find an abuse of discretion.

Neidlinger v. Neidlinger, 52 S.W.3d 513 (Ky. 2001). Preferably

[i]n dividing marital property, *including debts*, appurtenant to a divorce, the trial court is guided by Kentucky Revised Statute (KRS) 403.190(1), which requires that division be accomplished in "just proportions." This does not mean, however, that property must be divided equally. . . . It means only that division should be accomplished without regard to marital misconduct and in "just proportions" considering all relevant factors.

Lawson v. Lawson, 228 S.W.3d 18, 21 (Ky.App. 2007) (emphasis added) (internal citations omitted).

In support of its decision to divide the parties' tax obligation as it did, the trial court looked to the factors of *Neidlinger, supra*. The trial court stated:

[t]hese factors include: which party received the benefits; extent of participation; whether the debt was incurred to purchase marital property; whether the debt was necessary to provide for the maintenance and support of the family; and the economic circumstances of the parties and their ability to assume the indebtedness. There was no evidence presented at trial that the income earned by [Bruce] was used for non-marital purposes. Although the parties maintained separate bank accounts and were no longer speaking, [Bruce] continued to pay the mortgage and utilities on the parties' residence and contributed to

the children's expenses. After considering these factors, the Court finds the income taxes for the years 1998-2001 is a marital debt, the burden of which should be shared equally by the parties. However, [Bruce] acknowledged that he did not inform [Kathleen] that the returns were not filed. [Bruce] had historically prepared and filed the parties' tax returns. [Bruce] prepared and [Kathleen] signed the tax returns in 2002, but [Bruce] did not file them. The Court finds that [Bruce] alone should be liable for all penalties and interest owed.

(Citation omitted).

In support of her argument, Kathleen cites to *Dobson v. Dobson*, 159 S.W.3d 335 (Ky.App. 2005), in which the Court affirmed a decision apportioning only 40% of the tax liability to the wife, who had failed to show that any funds had been used for non-marital pursuits. The 40/60 split that was affirmed in *Dobson* is not a standard to be followed in all cases, it was merely the division that was appropriate for those parties. Such an outcome does not remove the trial court's discretion to divide the marital debt in a "just" manner, as set out in *Neidlinger*.

Kathleen argues that, contrary to the trial court's finding, she did present evidence that Bruce's income was used for non-marital pursuits. She supports this argument by subtracting Bruce's known marital expenditures from his annual deposits. It is clear that Bruce invested in several business ventures that did not prove profitable. Although Kathleen claims that these were non-marital expenditures, she fails to recognize that the parties were in fact still married at the time of these disbursements. There is no doubt that had the ventures proven to be more profitable, Kathleen would be claiming them as marital property that she was

entitled to a portion thereof and that such a finding by the trial court would have been appropriate. It is not the burden of Bruce to show that his earnings were spent on marital pursuits. This is assumed by law. *See* KRS 403.190(3). Instead, it is the burden of Kathleen to show that the earnings were spent on non-marital pursuits. A simple mathematical calculation of Bruce's deposits, minus a specific amount of alleged marital expenses does not suffice.

Bruce argues that the trial court abused its discretion in assigning the full responsibility of the tax debt interest and penalties to him. He asserts that Kathleen's claim of ignorance, as to the tax obligation, is disingenuous. Because the discretion of the trial court in distributing such a debt is broad, Bruce has failed to persuade us that an abuse of discretion has taken place. It is clear from its findings, that the trial court took Kathleen's act of signing the returns and failing to review them into consideration. However, the trial court was also clear that it considered the history of the parties, which revealed that Bruce had been primarily responsible for the parties' tax filings. We note also that the trial court determined Bruce's portion of the tax obligation to be more than twice that of Kathleen's, and yet she was ordered to pay half of the obligation. Accordingly, a review of the trial court's judgment does not reveal an abuse of discretion in regards to the assignment of the tax debt and neither party has been successful in showing one.

Kathleen argues in the alternative that even if she is obligated to pay half of the principal, the manner in which the trial court ordered it paid makes her responsible for one-half of the interest and penalties as well. We disagree. It is up

to each of the parties to pay their portion of the tax obligation and to appropriately apportion the proceeds from the sale of the house according to their obligations as set out by the trial court. If either party fails to do so, a remedy is available to the other party at the trial court level. Kathleen is essentially asking this Court to remedy a hypothetical situation which has not yet occurred and we will not do so.

The Allocation of the Parties' Assets and Debts

Both parties claim trial court error in its allocation of the parties' assets and debts. Bruce argues that the trial court erred in the allocating the majority of the parties' interest bearing debts to him and allowing Kathleen to leave the marriage "virtually debt free." Kathleen argues that Bruce should have been assigned the entirety of the debt that she claims was expended on non-marital expenses without any credit against the division of marital property. In support of her argument, Kathleen asserts that the debt was acquired without her knowledge, for purposes other than marital expenses and after the date of separation.

In its judgment, the trial court assigned the debts in each party's name to that party, stating "the [c]ourt finds that the parties used separate accounts throughout their marriage and often were not aware of the debts incurred by the other party." As long as a couple continues to remain legally married the court may consider their financial gains and losses as marital. *See Stallings v. Stallings*, 606 S.W.2d 163 (Ky. 1980). It is clear that the trial court took the parties' separation into consideration but found that it did not alter the marital status of the debts, assets and expenditures.

We are persuaded by the trial court's worksheet included with its judgment. This worksheet clearly displays the allocation of the assets and liabilities of the parties and evidences the great length the trial court went to in order to create a fair and equal distribution of assets *and* debts. The trial court awarded approximately \$194,228 worth of marital assets to Kathleen and approximately \$337,009 worth of marital assets to Bruce. Additionally, the court assigned approximately \$1,298 of marital debt to Kathleen and approximately \$50,056 of marital debt to Bruce. This allocation of assets and debts left Kathleen with net assets of approximately \$192,930 and Bruce with net assets of approximately \$286,952. The court then ordered an equalizing payment from Bruce, to be paid to Kathleen, of \$47,011, giving both of the parties net assets of approximately \$239,941. Therefore, while Kathleen was apportioned a smaller amount of the debt, Bruce was apportioned a larger amount of the assets, offsetting the debt that he was assigned. When assigning several joint debts to Bruce, the trial court stated that it was doing so "in consideration of the division of the marital assets." Although the trial court is not required to divide the marital assets and debts equally, it has chosen to do so here. Both parties have failed to show how this division is unjust under the requirements of *Neidlinger, supra*. In conclusion, we hold that the trial court did not abuse its discretion in its division of the parties' assets and debts.

The Wendy's Stock

Bruce's final argument is that the trial court abused its discretion in calculating his non-marital interest in the Wendy's stock. Specifically, Bruce argues that the stock today is a derivative of the original stock earned by him prior to the marriage. He maintains that he should be awarded interest on his non-marital share of \$5,035.50.

On appellate review of a trial court's ruling regarding the classification of marital property, we review *de novo* because the trial court's classification of property as marital or non-marital is based on its application of KRS 403.190; thus, it is a question of law.

Heskett v. Heskett, 245 S.W.3d 222, 226 (Ky.App. 2008) (citing *Holman v. Holman*, 84 S.W.3d 903, 905 (Ky.2002)).

In response to Bruce's argument, Kathleen argues that the *option* acquired prior to the marriage is non-marital property, but that the actual *stock* was acquired after the marriage and by marital funds, and is therefore marital property. We agree. The trial court correctly awarded Bruce his non-marital share of the stock, which is the value of the *option*, at the time it was purchased. The stock itself and any increase in the value of the stock, purchased during the marriage and with marital funds, is marital in nature and therefore entitled to equitable division by the trial court as such. Accordingly, we hold that the trial court's division of the Wendy's stock is appropriate.

For the foregoing reasons, the February 9, 2007, judgment of the Jefferson Circuit Court, is hereby affirmed.

ALL CONCUR.

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