

RENDERED: OCTOBER 3, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000962-MR
AND
NO. 2007-CA-001143-MR

KENNETH CONWAY

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM FRANKLIN CIRCUIT COURT
v. HONORABLE O. REED RHORER, JUDGE
ACTION NO. 05-CI-01407

KATHLEEN CONWAY

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART,
AND VACATING AND REMANDING IN PART

** ** * ** * ** *

BEFORE: THOMPSON AND VANMETER, JUDGES; HENRY,¹ SENIOR
JUDGE.

¹ Senior Judge Michael L. Henry 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.

VANMETER, JUDGE: Kenneth Conway appeals, and Kathleen Conway cross-appeals, from a judgment entered by the Franklin Circuit Court, Family Division, in a marital dissolution proceeding. For the reasons stated hereafter, we affirm in part, and vacate and remand in part for further proceedings.

The parties married in 1971, divorced in 1989, and reconciled a few months later. They remarried in September 1990, and separated in September 2005. The court dissolved the marriage in February 2006, reserving all property issues for future resolution.

During a lengthy hearing in June 2006, both parties testified and produced evidence regarding the pending property issues, including evidence that they maintained separate bank accounts except for a joint checking account used for some joint expenses. Kenneth asserted that he alone bore the cost of all marital expenses, and that Kathleen used her income only for her own needs. Kathleen testified to the contrary, stating that she used her income for marital expenses such as groceries and home improvements. Substantial evidence was adduced regarding various investments and Kenneth's transfers of funds to his sister, but the parties disagreed regarding the source, disposition, or justification for many of the investments or transfers. While the parties agreed that Kenneth paid Kathleen \$25,000 for her interest in the marital residence at the time of the first divorce, Kenneth denied Kathleen's claim that she repaid the amount to him after they remarried. In February 2007, the court entered findings, conclusions and a judgment which it subsequently clarified. However, the court denied Kenneth's

motion to alter, amend or vacate the judgment. This appeal and cross-appeal followed.

First, Kenneth contends that the trial court erred by failing to restore the marital residence and certain personal property to him as nonmarital property. We disagree.

At the time of dissolution, the trial court is required to assign each spouse's nonmarital property to him or her. KRS 403.190(1). Nonmarital assets which have been commingled with marital property or traded for other property may be traced into a presently owned specific asset in order to restore nonmarital funds to either spouse. *See, e.g., Sexton v. Sexton*, 125 S.W.3d 258 (Ky. 2004); *Chenault v. Chenault*, 799 S.W.2d 575 (Ky. 1990).

Here, the circumstances regarding the marital residence differ from the typical tracing situation. The parties agree that when they divorced in 1989, Kenneth paid Kathleen \$25,000 for all her rights and interests in the marital residence. Kenneth, however, denies Kathleen's assertion that after they reconciled, she repaid the \$25,000 to him in order to regain her interest in the property. The parties attempted to prove their respective positions but neither was able to provide direct documentary proof of whether repayment occurred.

Kathleen provided evidence that her bank did not retain records as far back as the date of the alleged transfer of funds to Kenneth, but she pointed to a deposit of \$21,994.18 into the joint checking account, shortly after the 1990 marriage, as an indication of her repayment to Kenneth. Kenneth denied her claim, asserting that

both parties contributed to the deposit, and that the funds were used to purchase a vehicle for Kathleen. However, Kenneth provided no records which clearly traced the source of the funds.

Both parties testified about their financial transactions during the second marriage, and they introduced evidence of several deeds to the marital residence. The first deed showed that at the time of the first divorce in 1989, Kathleen conveyed all of her interests in the residence to Kenneth. In December 1992, while facing heart surgery, Kenneth conveyed all of his interests in the residence to Kathleen in consideration of the payment of one dollar. In January 1998, the parties executed a straw man deed reconveying the property to both, noting their

desire to hold said real property, share and share alike, for and during their joint lives and, upon the death of either husband or wife, then the remainder to the survivor thereof in fee simple[.]

The deed included the parties' certification that the transfer constituted a gift.

In other words, regardless of typical tracing requirements and regardless of whether Kathleen reimbursed Kenneth \$25,000, the deeds establish that Kenneth deliberately conveyed his entire marital and nonmarital interest in the residence to Kathleen in December 1992, and then regained a marital interest in the property only in 1998, when the parties executed the straw man deed reconveying the property to both. Kenneth's assertion that the trial court should have assigned the property to him as nonmarital property must be considered in light of the

Kentucky Supreme Court's recent summary of the case law relevant to the construction of deeds, including that

“[i]n determining the intention of the parties, courts look at the whole deed, along with the circumstances surrounding its execution, and courts may also consider the acts of the parties following the conveyance.” *Arthur v. Martin*, 705 S.W.2d 940, 942 (Ky.App. 1986). . . . A deed “is ambiguous when its language is reasonably susceptible of different constructions.” *Blevins v. Riedling*, 289 Ky. 335, 158 S.W.2d 646, 648 (1942).

Of course, “[t]he construction of a deed is a matter of law, and [absent an ambiguity,] the intention of the parties is to be gathered from the four corners of the instrument.” *Phelps v. Sledd*, 479 S.W.2d 894, 896 (Ky. 1972). Thus, the “court may not substitute what [a] grantor may have intended to say for what was said.” *Id.*

Hoskins Heirs v. Boggs, 242 S.W.3d 320, 328 (Ky. 2007).

Hence, regardless of the circumstances underlying the parties' decisions to convey the property, the lack of ambiguity in the wording of the 1992 and 1998 deeds required the trial court to construe the deeds according to their terms, rather than according to either party's underlying intent or the source of funds applied to the property's purchase. According to the deeds' specific and unambiguous terms, all of Kenneth's interest in the property was conveyed to Kathleen in December 1992, and in 1998 he regained only a joint tenancy interest in the property. Further, the court noted that both parties behaved consistently with a joint ownership of the property. Given the substantial evidence to show that the residence constituted marital property at the time of the 2006 dissolution, the trial

court did not err by equally dividing its value between the parties in light of the provisions set out in KRS 403.190.

Moreover, we are not persuaded by Kenneth's assertion that the trial court erred by failing to restore to him as nonmarital property the household furnishings and other personal property which he received as nonmarital property in the first divorce. The record shows that the parties' 1989 property settlement agreement awarded Kenneth "[a]ll property not specifically designated" as having been awarded to Kathleen. However, the record neither identifies what items had not been restored to Kenneth's possession even though previously awarded to him, nor specifically addresses whether any of the items in question still existed. Absent such evidence, we cannot say that the trial court erred in its assignment of nonmarital personal property.

Further, we are not persuaded by Kenneth's assertion that the trial court erred by failing to assign to him, as nonmarital property, "three I.R.A.'s in the form of certificates of deposit totaling \$17,922.94 that were earned prior to marriage from his employment at National Distillers[.]" The videotape of the June 2006 hearing shows that Kenneth testified that only one of the three IRA's was established with funds rolled over from a nonmarital National Distillers retirement account. Moreover, he could not recall which of the three IRA accounts allegedly was established with funds from such a nonmarital account, and he provided no documentation to demonstrate that the accounts had nonmarital origins. Given our review of the evidence and our obligation to accept the trial court's findings unless

clearly erroneous, we cannot say that the trial court clearly erred by finding that “[n]either party presented sufficient proof that any of the funds maintained in their accounts was non-marital money.” See CR² 52.01; *Ghali v. Ghali*, 596 S.W.2d 31 (Ky.App. 1980).

Next, Kenneth contends that the trial court abused its discretion when dividing marital property. We disagree.

KRS 403.190(1) requires a trial court to divide marital property

without regard to marital misconduct in just proportions considering all relevant factors including:

- (a) Contribution of each spouse to acquisition of the marital property, including contribution of a spouse as homemaker;
- (b) Value of the property set aside to each spouse;
- (c) Duration of the marriage; and
- (d) Economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

The parties both testified regarding the nature, value and source of various items of marital property. They kept separate bank accounts, but at times they both used a joint account for household or living expenses. Although Kenneth alleged that Kathleen retained all of her earnings for her own use throughout the sixteen-year marriage, Kathleen testified that she contributed toward joint expenses including groceries and home improvements. She also testified regarding her marital role in performing chores and maintaining the residence.

² Kentucky Rules of Civil Procedure.

We are not persuaded by Kenneth's assertion that the trial court failed to consider the factors set out in KRS 403.190(1) when dividing the marital property. The court's judgment specifically acknowledged the marriage's "relatively long duration," as well as the fact that each party "contributed both domestically and financially to the accumulation of the marital estate." The court further reviewed the conflicting evidence and found that Kenneth had concealed some marital funds and transferred others to his sister, all with the intent of depriving Kathleen of her marital interest in such funds. Moreover, there is no merit to Kenneth's argument that the parties' use of separate checking accounts should be treated as evidence of a postnuptial waiver of spousal property rights, as the record contains no evidence that both parties ever agreed to waive such rights in marital property. We conclude that the court did not clearly err in dividing marital property.

Next, Kenneth contends that the trial court erred by awarding Kathleen duplicate credit for a single asset. More specifically, he refers to Section II(F)(4) of the judgment, wherein the court stated that Kenneth

has three CD's at Farmer's Bank totaling \$25,000.00. ([Kenneth's] Exhibit 11) This money was derived from the \$25,000.00 cash [Kenneth] transferred to his sister, Judy Wilson, during the marriage to hold for his benefit with the expectation that it would be concealed from [Kathleen] and returned to him after the divorce was final.

He also refers to Section II(G), wherein the court stated:

1. [Kenneth] testified that in 2005 he transferred to his sister, Judy Wilson, \$25,000.00 in cash to hold for his benefit.
2. The \$25,000.00 in cash was returned to [Kenneth] by his sister within one week after the divorce was final in February of 2006. The money was placed in three CDs at Farmer's Bank by [Kenneth]. ([Kenneth's] Exhibit 11)

The court found that Kathleen was entitled to one-half of the assets described in each section.

Kenneth asserts, and Kathleen agrees, that the three CD's described in Section II(F)(4) are the same three CD's described in Section II(G). Although Kenneth therefore argues that the award to Kathleen of one-half of the CD's described in Section II(G) should be stricken as duplicative of the Section II(F)(4) award, Kathleen asserts that the court correctly found that Kenneth made two separate transfers of approximately \$25,000 each to his sister, and that she is entitled to one-half of each transfer. She argues that while one of the \$25,000 transfers was used to purchase the three CD's described in Section II(F)(4), the other \$25,000 transfer was in fact returned to Kenneth and, as he testified below, was held by him in travelers checks and cash. Further, on cross-appeal Kathleen urges this court both to correct the duplicate award, and to award her one-half of the amount addressed above in Section II(G).

After reviewing the record, we agree with the parties that the trial court erred when making its findings of fact and awarding Kathleen duplicate credit for the three CD's described in Section II(F)(4) and Section II(G). Clearly,

the funds described in Section II(G) were not invested in the same three CD's as the money described in Section II(F)(4). The second sentence of Section II(G)(2) therefore is vacated, and this matter is remanded for new findings and conclusions relating to the division of the \$25,000 in assets described in Section II(G)(1).

Next, Kenneth contends that the trial court erred by finding that he dissipated marital assets. We disagree.

A trial court may find that a party has dissipated marital assets if marital property has been used “(1) during a period when there is a separation or dissolution impending; and (2) where there is a clear showing of intent to deprive one's spouse of her proportionate share of the marital property.” *See Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky.App. 1998) (citing *Robinette v. Robinette*, 736 S.W.2d 351, 354 (Ky.App. 1987)). Once the spouse alleging dissipation presents evidence of such, the burden shifts to the other spouse to show that the assets were not expended for nonmarital purposes. *Brosick*, 974 S.W.2d at 502.

Here, after the parties adduced substantial conflicting evidence, the trial court found that two separate groups of assets had been dissipated. First, in Section II(G), as set out above, the court found that dissipation occurred when \$25,000 was transferred to Kenneth's sister in 2005, “to hold for his benefit,” and then was returned to him within one week after the parties' dissolution became final. As noted above, on remand the trial court must make new findings regarding the use and disposition of those funds so as to avoid the duplication of awarded assets. Nevertheless, we cannot say that the trial court clearly erred by finding that

marital assets were dissipated by the transfer and apparent attempt to conceal marital funds. *See* CR 52.01.

The trial court also found that Kenneth dissipated the assets described in Section II(H) of the judgment when he transferred \$9,500 to his sister on each of three occasions between 1991 and 1993. Kenneth asserted that he transferred money to his sister as a gift during a time when he was in medical crisis and contemplating the possibility of death. However, although the transfers occurred long before the parties' final separation, the parties briefly separated on other occasions, and Kenneth also testified that the transactions occurred after he and Kathleen fought. Further, the evidence indicated that Kenneth's sister purchased CD's which named him as the beneficiary, that Kathleen was unaware of the transfers, and that Kenneth knew Kathleen would not agree to the transfer of such large gifts to his sister. Again, we cannot say that the trial court clearly erred by finding that the assets were wrongfully dissipated by Kenneth in an attempt to "deprive [Kathleen] of her marital share of the \$28,500.00[,]" and by awarding half of that amount to Kathleen. *See Brosick*, 974 S.W.2d at 500-01; *Robinette*, 736 S.W.2d at 354.

Finally, Kenneth asserts that the trial court abused its discretion by awarding Kathleen costs and attorney's fees. He also contends that when he filed a motion to alter, amend or vacate the judgment, the court wrongfully retaliated against him by modifying the judgment "to increase [his] share of [Kathleen's]

costs and attorneys fees from one-fourth to one-half, a proposition that wasn't even before the court." We disagree.

KRS 403.220 permits the trial court in a dissolution proceeding to consider both parties' financial resources, and to order one party to pay "a reasonable amount" to the other for costs and attorney's fees. It is well established that an award of attorney's fees and the allocation of courts costs falls entirely within the trial court's discretion. *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. 1975).

Here, the trial court's judgment included the following:

1. At the trial of this case, [Kathleen] presented proof that she had incurred approximately \$4,000.00 in costs, expenses and attorney's fees up to the date of the final hearing. The attorney's fees did not include any trial preparation, trial or post-trial work.
2. The Court finds that some of the attorney's fees were incurred by [Kathleen] as a result of [Kenneth's] failure to answer Interrogatories and Requests for Production of Documents.
3. The Court finds that [Kenneth] shall pay to [Kathleen] one-fourth of her costs, expenses and attorney's fees incurred by her in this case. [Kathleen's] counsel shall file an Affidavit with the Court providing proof of the amount incurred by [Kathleen] in this case. [Kenneth] shall have ten days to dispute any item included in the Affidavit and thirty days thereafter to make payment for one-half of the amount presented.

The court directed Kenneth to reimburse Kathleen

for one-fourth of her costs, expenses, and attorney's fees incurred to the date of the entry of this Order. Counsel for [Kathleen] shall file an Affidavit with the Court, and [Kenneth] shall have ten days to dispute any item contained therein. [Kenneth] shall have thirty days

thereafter to make payments for one-half of the amount directly to [Kathleen].

The court subsequently clarified the judgment to correct the obvious discrepancies by directing Kenneth to pay Kathleen “for *one-half* of her costs, expenses, and attorney fees incurred herein[,]” but it denied Kenneth’s motion to alter, amend or vacate the judgment.

Our review of the record, including the videotape of the hearings, supports the trial court’s statement that “some of the attorney’s fees were incurred by [Kathleen] as a result of [Kenneth’s] failure to answer Interrogatories and Requests for Production of Documents.” Further, the record shows that Kathleen’s attorney spent substantial time addressing issues relating to assets which the court found were marital assets dissipated by Kenneth. Under these circumstances, we cannot say the trial court abused its discretion when awarding costs and attorney’s fees to Kathleen. Moreover, given the judgment’s obvious error in directing Kenneth to pay one-fourth of Kathleen’s costs, expenses and attorney’s fees, while providing thirty days to pay one-half of the amount presented by counsel, we are not persuaded by Kenneth’s argument that the amended order constituted evidence of retaliation.

The court’s judgment is affirmed in part, and vacated and remanded in part for further proceedings relating to the division of the assets described in Section II(G)(1), as discussed above.

HENRY, SENIOR JUDGE, CONCURS.

BRIEFS FOR APPELLANT/
CROSS-APPELLEE:

Steven G. Bolton
Frankfort, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Michael L. Hawkins
Frankfort, Kentucky