



LEXSEE 1997 VA. CIR. LEXIS 602

Re: Lynch v. Lynch

Chancery No. 143989

CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA

1997 Va. Cir. LEXIS 602

December 15, 1997, Decided

COUNSEL: [*1] Dana James Carlson, Esq., Duvall, Harrigan, Hale & Hassan, P.L.C., Fairfax, Virginia, Counsel for Complainant, Lynda J. Lynch.

James A. Watson II, Esq., Surovell, Jackson, Colten & Dugan, P.C., Fairfax, Virginia, Counsel for Defendant, Jon H. Lynch.

JUDGES: David T. Stitt.

OPINION BY: David T. Stitt

OPINION

OPINION LETTER

Dear Counsel:

This matter comes before the Court on the parties' request for a divorce based on a one-year separation, equitable distribution of the parties' marital property, and Mrs. Lynch's request for spousal support and an award of attorneys fees.

The Court has reviewed the memoranda of counsel, the authorities cited therein, and the testimony and evidence presented during the hearing. The Court has considered the factors contained in *Va. Code § 20-107.3* (1995), and makes the following findings of fact and conclusions of law.

GROUND OF DIVORCE

The parties seek a divorce under *Va. Code § 20-91(9)* (1995) on the ground of the parties' one-year separation. The parties were married on June 20, 1984, and commenced living separate and apart while still residing under the same roof on or about November 6, 1995. The Commissioner found the date of separation [*2] to be on or about April 18, 1996, when Mr. Lynch moved from the marital residence, and the Court adopts that finding. Based on the evidence presented, the Court finds that divorce under *Va. Code § 20-91(9)* is proper, and grants the parties a divorce on the ground of a one-year separation.

EQUITABLE DISTRIBUTION

This case involves a marriage of approximately eleven years duration. The husband and wife are 50 and 54 years old respectively. The husband is in good physical and mental health. The wife is in good mental health, but reported physical limitations on her ability to lift and do strenuous work due to a bad back.

During the marriage, both parties made substantial monetary and non-monetary contributions to the well-being of the family and to the acquisition and care and maintenance of the marital assets. On balance, the husband made greater monetary contributions and the wife made greater non-monetary contributions. After considering all of the factors in *Va. Code § 20-107.3* (1995), the Court finds that the marital assets should be divided equally.

The parties stipulated that the parties will keep their respective checking accounts. Mrs. Lynch will retain

Nations [*3] Bank Checking Account No. 008-173-7198, while Mr. Lynch will retain Navy Federal Credit Union Account No. 1791892-704.

The parties' assets will be distributed as indicated in the schedule appended hereto as Attachment A. The schedule includes certain values and distributions to which the parties stipulated. The Court is instructed by *Parra v. Parra*, 1 Va. App. 118, 336 S.E.2d 157 (1985), to decree an equitable distribution award which is consistent with the parties' stipulations. Va. Code § 20-107.3 (1995) provides that all assets must be valued as of the date of the hearing unless a party moves the court to use a different valuation date to attain the ends of justice or for good cause shown. Accordingly, the Court will value the assets as of the date of the hearing.

The following item numbers correspond to the numbers in the schedule in Attachment A.

1. Item 1--Navy Federal Credit Union Account No. 1791892-001

Navy Federal Credit Union Account No. 1791892-001 holds the proceeds from the sale of the parties' former marital residence located at 2667 Cliquot Court, Poway, California. The property was purchased in May 1983, approximately one year prior to the [*4] parties' marriage. Mr. Lynch contributed \$ 44,000 and Mrs. Lynch contributed \$ 22,000 to the down payment on the property. The property was held in joint tenancy. The original purchase price of the property was \$ 164,000. The parties' mortgage on the property was \$ 76,527. During the course of the marriage, the parties made improvements and expended joint funds for the preparation of the sale of the property in the amount of \$ 26,538. The date of sale of the property was June 29, 1995. The mortgage balance at the date of sale was \$ 70,883.71. The parties had reduced the original mortgage balance by \$ 5,643.36. The sales price was \$ 235,000. The parties received cash proceeds in the amount of \$ 132,674.74, and noncash proceeds of \$ 10,000 in the form of the "Kalsow" note they took back from the purchasers.

At the time of the hearing on September 4, 1997, the balance in Navy Federal Credit Union Account No. 1791892-001 was \$ 126,074.12. The parties previously agreed to use the proceeds of the account to pay the mortgage payment on the parties' Waterline Drive property in Burke, Virginia property while Mrs. Lynch

was living in the house prior to the sale of the house. As agreed by the [*5] parties in the *pendente lite* order, \$ 17,866.73 was withdrawn from the account between May 1996 and May 1997 for payment of the mortgage on the parties' Waterline Drive home in Burke, Virginia.

At the time the parties purchased the Cliquot Court property, Mr. Lynch's pre-marital contribution was \$ 44,000, while Mrs. Lynch's pre-marital contribution was \$ 22,000. The marital contribution towards the Cliquot Court property amounted to \$ 26,538 plus \$ 5,643.36, for a total of \$ 32,181.36. Together, the identifiable marital and separate contributions amount to \$ 98,181.36.

The total amount of proceeds on the sale of the Cliquot Court property was \$ 126,074.12 as of September 4, 1997. Subtracting \$ 98,181.36 from \$ 126,074.12 results in a difference of \$ 27,892.76 of equity to be allocated between the parties.

Under *Rowe v. Rowe*, 24 Va. App. 123, 480 S.E.2d 760 (1997), if one of the parties is able to trace a portion of his or her separate contribution in the asset at the time of the purchase of the marital property, then upon equitable distribution, the separate contribution may be treated as separate property and not be subject to division in equitable distribution. [*6] Thus, Mrs. Lynch will receive her \$ 22,000 separate sole source contribution, and Mr. Lynch will receive his \$ 44,000 separate sole source contribution. The marital contribution of \$ 32,181.36 is to be shared equally by the parties, so that each will receive \$ 16,090.68.

The balance of the equity in the amount of \$ 27,892.76 will be allocated proportionately to the contributions made by the parties in relation to their respective shares of combined separate contributions. Of the contributions to the property, marital contributions in the amount of \$ 32,181.36 constitute 32.8%, while contributions from separate property in the amount of \$ 66,000, constitute 67.8%. Of the \$ 27,892.76 in equity, the marital portion is calculated be determining 32.8% of \$ 27,892.76 which amounts to \$ 9,148.83. This amount is to be divided equally between the parties, such that each will receive \$ 4,574.42. The remaining 67.8%, or \$ 18,743.93, in equity is to be allocated between the parties in proportion to their separate contributions. Mrs. Lynch contributed one-third, so she will receive \$ 6,247.98. Mr. Lynch contributed two-thirds, so he will receive \$ 12,495.96.

Of the \$ 126,074.14 in the Navy Federal [*7] Credit Union Savings Account No. 1791892-001, Mrs. Lynch will receive \$ 48,913.08 and Mr. Lynch will receive \$ 77,161.06.

2. Item 2--Kalsow Note

The Kalsow note is a \$ 10,000 note payable to the parties held by counsel. The note bears interest income at the rate of \$ 54.17 per month for a period of five years until the entire note is due and payable on July 1, 2000. The note will be awarded to Mr. Lynch with set-off in favor of Mrs. Lynch in the amount of 38.8%, or \$ 3,880.00, awarded in set-off from husband's share of the marital estate to wife's share of the marital estate. The 38.8% represents wife's percentage "take-out" of the sale proceeds from the parties' Cliquot Court residence.

3. Item 3--Proceeds from the Waterline Drive Property

The parties purchased real property located at 9509 Waterline Drive, in Burke, Virginia, upon their return from London, England, in July 1994. The house has since been sold. The parties previously divided the proceeds of sale (\$ 26,911.10) of the Waterline Drive property. The remaining escrow funds of \$ 3,697.04 will be divided in equal shares, with each party receiving \$ 1,848.52.

4. Item 4--Navy Federal Credit Union Savings Account [*8] No. 1791892-100

This account contains the proceeds of USAA Federal Savings Account No. 05-019-789. Mrs. Lynch withdrew \$ 11,736.75 from the USAA Federal Savings Account and subsequently used it for payment of her attorney's fees. As of December 31, 1996, the account had a balance of \$ 1,685.25. Of the \$ 11,736.75, each party is entitled to \$ 5868.38. However, Mr. Lynch's share is to be credited toward an award of Mrs. Lynch's attorneys fees. Of the \$ 1,685.25, each party will receive \$ 842.63.

5. Item 5--Navy Federal Credit Union Account No. 1791892-902

Navy Federal Credit Union Account No. 1791892-902 is titled in Mr. Lynch's name, but the parties agreed at the hearing that the account is classified as marital. As of March 31, 1997, the balance in this account was \$ 4,134.80. This account is to be split between the parties. Because the account is titled in Mr. Lynch's name, Mr. Lynch will pay Mrs. Lynch \$

2,067.40.

6. Item 6--Flagship Federal IRA Account No. 92-01471-1

This IRA is titled in Mr. Lynch's name and was established on June 10, 1983, in the amount of \$ 4,073.28, at a time prior to the parties' date of separation of April 18, 1996. At the hearing, the parties [*9] agreed that this account would be classified as marital. As of March 16, 1997, the balance in this account was \$ 4,640.60. This account is to be split between the parties. Because the account is titled in Mr. Lynch's name, Mr. Lynch will pay Mrs. Lynch \$ 2,320.30.

7. Item 8--Flagship Federal Checking Account No. 9200956-2

Flagship Federal Checking Account No. 9200956-2 was used by the property manager of the Cliquot Court property. Although the parties did not provide the Court with the balance of this account, the funds in this account as of the date of the hearing are to be split equally between the parties.

8. Item 8, 9, 10, and 11--Funds which Wife Claims as Separate Property

It was undisputed at trial that the following accounts are the separate property of Mrs. Lynch and will remain her separate property:

a. Flagship CD Acct No. 92005271 with a balance of \$ 15,620.40.

b. Flagship Federal IRA Account No. 92-015734 with a balance of \$ 19,015.43.

c. Franklin Templeton Growth IRA Account No. 101 1960 397112 with a balance of \$ 4,297.04.

d. USAA Growth IRA Account No. 41901161412 with a balance of \$ 9,344.30.

12. Item 12--Civil Service Retirement System [*10] Retirement Account

Although the Civil Service Retirement System Retirement account is titled in Mr. Lynch's name, the Court holds that it is marital property to the extent of the

definition of the marital share as defined in *Va. Code § 20-107.3(G)* (1995). The "marital share" is to be shared equally between the parties. The service computation date is June 16, 1968. The marital share was earned between June 20, 1984 and April 18, 1996. Thus, Mrs. Lynch is awarded one half of the marital share of this Civil Service Retirement System Retirement account. The parties will effect the award through a Court Order Acceptable for Processing (COAP).

13. Item 13--United States Army Reserve Pension

The United States Army Reserve Pension is titled in Mr. Lynch's name. This pension plan is to be divided in the same manner as the Civil Service Retirement System retirement plan. The Court directs the parties to calculate the applicable points, using the April 18, 1996, separation date. Mrs. Lynch is awarded one half of the pension earned during the marriage. The parties will effect the award through a Qualified Court Order (QCO).

14. Item 14--Thrift Savings Plan

This account is a tax [*11] deferred thrift savings plan, titled in Mr. Lynch's name. As of the date of the hearing, the account balance was \$ 33,276.04. This account is marital and is to be shared by the parties. Because the account is titled in Mr. Lynch's name, Mr. Lynch will transfer \$ 16,638.02 to Mrs. Lynch.

15. Item 15--Joint Tax Refund

The parties have a \$ 4,000 joint tax refund from 1995 which is marital property to be shared equally by Mr. and Mrs. Lynch. Each party will receive \$ 2,000.

16. Items 16 and 17--Automobiles

Pursuant to the parties' stipulation, Mr. Lynch will retain the 1979 Mercedes 450 SEL with a fair market value of \$ 775 and Mrs. Lynch will retain the 1988 Nissan Maxima SE with a fair market value of \$ 3,550.

SPOUSAL SUPPORT

Mrs. Lynch requests spousal support. Mrs. Lynch is currently employed in a full-time position at Companion Animal Hospital. Mrs. Lynch makes approximately \$ 18,000 per year, which includes a small share of an annuity payment from a previous marriage property asset, and approximately \$ 500 per year in unearned income. Mr. Lynch earns approximately \$ 77,640 per year. Mr.

Lynch contends that Mrs. Lynch is capable of earning more income that she [*12] presently earns. However, Mr. Lynch failed to produce evidence which would provide a basis for imputation of income to Mrs. Lynch.

After considering the evidence of the circumstances leading to the dissolution of the parties' marriage, the Court finds that Mrs. Lynch is entitled to a support award, pursuant to *Va. Code § 20-107.1* (1995). Under that section, certain factors must be considered in determining the amount of such an award. The Court finds that Mr. Lynch has greater earning capacity, training and financial resources than Mrs. Lynch, while Mrs. Lynch has greater needs than Mr. Lynch. Mrs. Lynch's income and expense statement made out a need for spousal support and the Court found the figures in that statement generally to be credible. In contrast, Mr. Lynch's income and expense statement is suspect on several grounds. For example, Mr. Lynch claims \$ 1,750 in monthly rent on a townhouse which he shares with a woman who had purchased the home within two months following the parties' separation. Mr. Lynch also testified that he pays the entire monthly cost of the utilities for the home which he shares with his roommate. Mr. Lynch also claims \$ 250 per month as a paper depreciation [*13] for his 1979 Mercedes, which he claims is worth approximately \$ 775. In addition, he claims another \$ 405 a month for gas and oil and repairs for the Mercedes.

During their marriage, the parties established a comfortable standard of living. While Mr. Lynch made significantly greater monetary contributions to the couple's well-being, Mrs. Lynch made significantly greater non-monetary contributions. Further, the Court has rejected Mr. Lynch's contention that Mrs. Lynch is underemployed, as her current position is consistent with her past employment. In addition, the Court anticipates that Mrs. Lynch will require a period of time in which to rehabilitate her employment ability which was lost while she focused her efforts on supporting the marriage.

Accordingly, after considering all of the factors enumerated in *Va. Code § 20-107.1* (1995), including distribution of the parties' assets under § 20-107.3 (1995), under the circumstances which currently exist, the Court awards Mrs. Lynch \$ 500 per month in spousal support.

ATTORNEYS FEES

The decision to award attorneys fees is a matter within the sound discretion of the trial court. *Ingram v.*

Ingram, 217 Va. 27, 225 S.E.2d 362 (1976); [*14] *Graves v. Graves*, 4 Va. App. 326, 357 S.E.2d 554 (1987). The key to a proper award of attorneys fees is reasonableness under all of the circumstances revealed by the record. *Lightburn v. Lightburn*, 22 Va. App. 612, 472 S.E.2d 281 (1996); *McGinnis v. McGinnis*, 1 Va. App. 272, 338 S.E.2d 159 (1985). After evaluating the facts and circumstances of this case, the Court finds that because the husband required the wife to trace and prove her separate funds, Mrs. Lynch is entitled to an award of some of her attorneys fees. Based upon the evidence of the parties' respective abilities to pay counsel fees, the Court also finds that Mr. Lynch has a greater ability to pay than Mrs. Lynch. *Caputo v. Caputo*, No. 0409-91-4 (Va. Ct. App. March 17, 1992) (determination of responsibility for attorneys fees may be made after a monetary award when the trial court has before it evidence of the parties' respective abilities to pay counsel

fees). Therefore, Mr. Lynch's share of Navy Federal Credit Union Savings Account No. 1791892-100 in the amount of \$ 5868.38 is credited toward payment of Mrs. Lynch's attorneys fees.

Mr. Carlson will please prepare [*15] an order consistent with this opinion and forward it to Mr. Watson for his approval as to form and for submission to the Court for entry. The Court has scheduled this case for its 10:00 a.m. civil motions docket for Friday, December 19, 1997, for entry of the final order if an agreed order is not received in chambers prior to that date.

Sincerely,

David T. Stitt

ATTACHMENT A

ITEM	ASSET	TITLE	OWNER	VALUE
SHIP				
Accounts:				
1	Navy Federal Credit Union Account No. 1791892-001 (Proceeds from sale of Cliquot Court Property in Poway, CA)	H	Marital	\$ 126,074.12
2	Kalsow Note	H & W	Marital	\$ 10,000
3	Proceeds from sale of Waterline Drive Property in Burke, VA	H & W	Marital	\$ 3,697.04
4	Navy Federal Credit Union Savings Account No. 1791892-100. Wife transferred \$ 11,736.75 into this account from USAA Federal Savings Account No. 05-019-789 and subsequently used it for attorneys fees.	W	Marital	\$ 1,685.25 as of 12/31/96
5	Navy Federal Credit Union IRA Account No. 1791892-902	H	Marital	\$ 4,134.80 as of 3/31/97
6	Flagship Federal IRA Account No. 92-01471-1	H	Marital	\$ 4,640.60 as of

				3/16/97
7	Flagship Federal Checking Account	H & W	Marital	not provided
	No. 9200956-2 (account used by			
	property manager of Cliquot Court			
	property)			
Wife Claims as Separate Property:				
8	Flagship CD Account No. 92005271	W	Separate	\$ 15,620.40
9	Flagship Federal IRA Account No.	W	Separate	\$ 19,015.43
	92-015734			
10	Franklin Templeton Growth IRA	W	Separate	\$ 4,297.04
	Account No. 101 1960 397112			
11	USAA Growth IRA Account No.	W	Separate	\$ 9,344.30
	41901161412			
Retirement, Pension and Thrift Savings Accounts:				
12	Civil Service Retirement System	H	Part	Service
	Retirement		Separate,	computation
			Part	date 6/16/68
			Marital	
				with marital
				share earned
				between
				6/20/84 and
				4/18/96
13	U.S. Army Reserve Pension	H	Part	Retirement
			Separate,	points to be
			Part	calculated
			Marital	
				from
				6/20/84-
				4/18/96
14	Thrift Savings Plan	H	Marital	\$ 33,276.04
				as of
				10/31/96
Miscellaneous:				
15	Joint Tax Refund	H & W	Marital	\$ 4,000
Automobiles:				
16	1979 Mercedes	H & W	Marital	\$ 775

17	1988 Nissan Maxima	H & W	Marital	\$ 3,550
TOTAL MONETARY AWARD: \$ 25,748				
TOTAL NET MONETARY AWARD TO MRS. LYNCH: \$ 24,906				

[*16]

ITEM	DISTRIBUTION		MONETARY AWARD	
	MRS. LYNCH	MR. LYNCH	MRS. LYNCH	MR. LYNCH
Accounts:				
1	\$ 48,913.08	\$ 77,161.06		
2		100%	\$ 3,880	
3	\$ 1,848.52	\$ 1,848.52		
4	\$ 842.63	\$ 842.63		\$ 843
5	50%	50%	\$ 2,067	
6	50%	50%	\$ 2,320	
7	50%	50%		
Wife Claims as Separate Property:				
8	100%			
9	100%			
10	100%			
11	100%			
Retirement, Pension and Thrift Savings Accounts:				
12	50% of the			
	marital share			
13	50% of the			
	marital share			
14	50%	50%	\$ 16,638.02	
Miscellaneous:				
15	50%	50%		
Automobiles:				
16		Mr. Lynch will		
		receive this car		
		by agreement of		
		the parties		
17	Mrs. Lynch will			

receive this car
by agreement of
the parties
TOTAL MONETARY AWARD: \$ 25,748
TOTAL NET MONETARY AWARD TO MRS. LYNCH: \$ 24,906