



LEXSEE 2006 VA CIR LEXIS 176

Margaret Anne Thomas v. Jeffrey David Wiese**CH-2003-185175****CIRCUIT COURT OF FAIRFAX COUNTY, VIRGINIA***2006 Va. Cir. LEXIS 176***September 28, 2006, Decided**

COUNSEL: [*1] Susan Massie Hicks, Attorney at Law,
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JUDGES: Michael P. McWeeny.

OPINION BY: Michael P. McWeeny

OPINION

OPINION LETTER

This cause came before the Court on September 12, 2006, upon remand from the Court of Appeals for re-determination of Equitable Distribution and upon Ms. Thomas' prayer for spousal support. At the conclusion of the evidence, the Court took the ruling under advisement.

Stipulations

Two sets of Stipulations were presented, including many of the figures which will be used in this opinion. Of great importance, the parties have waived presentation of evidence on "factors and circumstances" and grounds for divorce as well as any and all "negative non-monetary contributions" related to the well-being of the parties' family. Accordingly, these issues will not be addressed.

Issue on Remand

In the prior proceeding, the Honorable J. Howe

Brown, Judge Designate, found that the real property located at 12645 Thunder Chase Drive, Reston, Virginia, had been transmuted entirely to marital property as the result of two refinances, reserving [*2] consideration of Mr. Wiese's separate contribution to the nature of the final distribution. The Court of Appeals reversed, finding the Thunder Chase property was hybrid and that Mr. Wiese had traced his separate property contribution of \$ 35,097. The case was remanded "for equitable distribution under either *Brandenburg* or similar analysis."

The complicating factor in any such analysis is that prior to the decision on appeal and pursuant to Judge Brown's initial ruling, the Thunder Chase property was transferred to Ms. Thomas in her sole name by Quit Claim Deed, the property was refinanced by Ms. Thomas, and Mr. Wiese was paid \$ 166,040 for "his share" under Judge Brown's analysis. Although, Ms. Thomas asserted that this transfer of title made the remand moot (citing *Utsch v. Utsch*, 266 Va. 124, 581 S.E.2d 507 (2003)), the Motion to Dismiss was denied as the transfer was neither a gift nor "voluntary" and while title had changed the classification of the property for equitable distribution had not.

Brandenburg or Similar Analysis

Mr. Wiese proposes a *Brandenburg* approach, and offers the testimony of John H. Crockett, Jr., PhD, CFA in support thereof. Ms. Thomas [*3] opposes a *Brandenburg* analysis and offers alternatively computations under *Keeling v. Keeling*, 47 Va. App. 484, 624 S.E.2d 687 (2006), or pursuant to a "risk free rate of

return" analysis supported by Rick R. Gaskins, MBA, CPA.

While the Court rejects the "risk free" analysis attempting to equate investment in residential real estate to a one-year Treasury Bond, Mr. Gaskins makes telling arguments as to the weakness of the *Brandenburg* approach, at least under the facts of this case. *Brandenburg* is limited to consideration of reduction in the mortgage principle without consideration of the "holding costs" including interest and taxes. As this property has been held since 1990, the holding costs have been substantial. In addition, Mr. Gaskins points to the failure of *Brandenburg* to recognize the time value of money.

In a case. . . in which (1) hybrid property is obtained by means of *both* (a) a significant down payment of separate property and (b) a significant joint mortgage; (2) the equity in the property increases significantly due primarily to market forces; and (3) no evidence establishes that either the separate down payment or the marital loan contributed [*4] disproportionately to the couple's ability to acquire and hold the property, a court does not abuse its discretion in concluding that a strict application of the *Brandenburg* formula would yield an unfair result. *Keeling, supra 491*.

Here, as in *Keeling*, strict application of the *Brandenburg* formula would be inappropriate. Yet, this does not lead automatically to the use of the formula in *Keeling*. In fact, when the current fair market value and the current first trust mortgage figures are applied, the *Keeling* formula results in an even lower return than that of the "risk free" analysis of Mr. Gaskins even though residential real estate had a greater rate of return than the one year Treasury Bond.

This is a unique case as the property must be valued as of the date of the hearing, yet the nature of the investment, including debt, have changed substantially. Mr. Wiese has received proceeds exceeding half of the 2004 equity (thus raising the debt) and Ms. Thomas has been required to maintain the property with her separate funds for one and one-half years (although these holding

costs did nothing to decrease the debt).

It is important to remember [*5] that the goal is a fair and reasonable return rather than the application of a particular mathematic formulation. Comparison of the results of a *Brandenburg* and *Keeling* reflect proposed returns to Mr. Wiese of \$ 199,961 and \$ 42,144 respectively. Neither is reasonable under the facts of this case. Considering the conflicting expert testimony (and the persuasive points in each), the various formula available for the usual case, the pre- and post-separation refinances and distribution, fourteen-plus years of mutual contributions to the holding costs, and most especially the true marital partnership for the acquisition and maintenance of the marital property, I find a reasonable return for Mr. Wiese's \$ 35,097 separate investment to be \$ 122,000.

Unlike Mr. Wiese's separate investment, Ms. Thomas' separate investment was *de minimus* and short term. Under *Brandenburg* she would have the benefit of that formula's failure to consider the time value of money, while under *Keeling* she receives a small return. Considering all of the above points, I find a reasonable return for Ms. Thomas on this short investment to be \$ 1,900 in separate equity.

Classification and [*6] *Value*

The Thunder Chase property already has been classified as hybrid property, that is part separate, and Mr. Wiese's separate contribution has been fixed at \$ 35,097. By Stipulation, Ms. Thomas' separate contribution was \$ 1,685. The current fair market value is \$ 572,500 and the present first mortgage is \$ 326,459. The property is titled in Ms. Thomas' sole name.

It is suggested that the equity in this property should be based upon the current fair market value and the amount of the mortgage at the time of the separation. The Court does not agree. Although this is an unusual situation where there has been a change of title and a new first mortgage loan, the property must be *valued* as of the date of the hearing, and in the case of this real property the value to be distributed is the present equity. The present equity of this hybrid property is \$ 246,041. Of that, the parties' separate equity is as stated in the previous section, leaving the marital portion of \$ 122,141.

The remainder of the marital property has been

distributed and there are no prayers to reexamine these items. From the testimony, however, the Court is able to find "equalization" of these assets and [*7] determine the prior distribution does not affect analysis of equitable distribution of the one remaining piece of property.

Distribution

The evidence has been reviewed in light of the requirements of *Va. Code § 20-107.3*. This case involves a marriage of approximately fifteen years during which time each party contributed their financial resources and made equivalent non-monetary contributions, both to the acquisition and care of marital assets and to the well-being of the family. The parties are both in generally good health. No other factors are of significance.

As the sole item for distribution is the equity in the property titled in Ms. Thomas' name, a monetary award is required. Each is entitled to his or her separate portion and then the marital equity is divided. The Court deems a 50/50 division to be appropriate on the facts of this case. Mr. Wiese, therefore, is entitled to receive \$ 122,000 (his separate portion) plus \$ 61,070 (his half of the marital portion) less \$ 166,040 (Ms. Thomas' credit for her earlier payment toward Mr. Wiese's share). Ms. Thomas shall pay Mr. Wiese \$ 17,030 as a monetary award pursuant to *Va. Code § 20-107.3(D)* [*8] .

Spousal Support

Pursuant to paragraph 14 (p. 19) of the Final Decree of Divorce dated August 26, 2004, Ms. Thomas was awarded a reservation of spousal support. In order to

grant Ms. Thomas' Motion for Spousal Support the Court must find a change in circumstances since August 26, 2004 warranting such an award. Comparing the income levels of parties at the time of the Final Decree (paragraph 12(C) page 19) with the testimony at the present hearing reflects Ms. Thomas' income has increased 9.8% and Mr. Wiese's income has increased 9.5%.

Va. Code § 20-107.1(E)(8) required that at the time spousal support was set (here, a reservation) the Court had to consider the provisions for division of marital property. There has been a change in that distribution; however, the vast majority of the assets remained as previously distributed. Ms. Thomas' increased expenses were anticipated with the original right to purchase Mr. Wiese's interest in the Thunder Chase property, and the current distribution increases her share in the marital equity from 45% to 50%.

The Court does not find a material change in circumstances. The Motion for Spousal Support is [*9] denied.

Attorney's Fees

By agreement with counsel the issue of attorney's fees is reserved for a further hearing. In lieu thereof, the Court invites a five page submission with attachments, noting that each side has prevailed on some issues but not others.

Michael P. McWeeny