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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002280-MR
NO. 1998-CA-000860-MR

JAMES W. COTTONGIM — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 1992-CI-00536

KATHY D. SANDERSON, ADMINISTRATRIX
OF THE ESTATE OF RUBY K. COTTONGIM;
MAX M. SMITH AND CARY KEMPER SMITH — APPELLEE

OPINION
AFFIRMING IN APPEAL NO. 1997-CA-002280;
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING IN APPEAL NO. 1998-CA-000860
** ** ** ** **

BEFORE: BUCKINGHAM, HUDDLESTON AND KNOPF, JUDGES.

KNOPF, JUDGE: These are consolidated appeals from a judgment dividing marital property in a dissolution action, and from post-judgment orders finding the appellant in contempt, assessing attorney's fees and allowing garnishment of the appellant's assets to satisfy the judgment. In the first appeal, we find that the trial court properly characterized the deferred compensation accounts as marital, and that it did not abuse its discretion in equally dividing the marital property. Hence, we

affirm. In the second appeal, we find that the trial court's imposition of civil contempt sanctions was within its discretion, and that the appellant failed to prove that certain funds were exempt from garnishment. However, we also find that the trial court's assessment of post-judgment attorney's fees incurred in the collection of the judgment may have included amounts which were not properly attributable to the appellant's conduct. Therefore, we affirm in part, reverse in part, and remand for a reconsideration of the amount of attorney's fees awarded.

The appellant, James W. Cottongim (James) and Ruby K. Cottongim (Ruby) were married in 1975. It was a second marriage for both James and Ruby, and each had grown children by previous marriages. No children were born of their marriage. In April 1992, Ruby filed a petition for dissolution of marriage. The trial court granted a bifurcated decree dissolving the marriage as of September 14, 1992, reserving the property division issues for later adjudication. Ruby died intestate on March 13, 1996. Her daughter, Kathy D. Sanderson, was appointed as administratrix of her estate. The trial court substituted the estate as a party to this action, and the action proceeded to a bench trial on the property division issues.

Following that bench trial, the court below entered findings of fact and conclusions of law on July 10, 1997, equally dividing all the marital property between James and the estate. The trial court subsequently denied James's motion to alter, amend or vacate the judgment pursuant to CR 59.05. Shortly thereafter, James filed a notice of appeal, seeking this Court's review of the property division issues.

However, James did not file a supersedeas bond to suspend enforcement of the judgment. After accounting for property in the possession of each party, the trial court determined that James owed Ruby's estate $114,277.48 to fully carry out the equal division of the marital property. The estate then asked the trial court to appoint an auctioneer and a realtor to sell the marital property to satisfy the judgment. On November 4, 1997, the trial court entered an order authorizing the appointment of an auctioneer and realtor to sell the marital property. The trial court also authorized the estate to attach, garnish or seize "all bank accounts, savings or checking accounts, retirement or deferred compensation accounts" owned by James to satisfy the judgment.

Eventually, the marital residence was sold, and the judgment was partially satisfied through the sale or attachment of other assets in James's possession. The estate requested that the trial court award it attorney's fees and costs incurred to collect the judgment. The estate also moved the trial court to hold James in contempt for removal of fixtures from the house prior to the sale. The trial court granted both motions, and ordered James to pay the estate $3,000.00 for attorney's fees incurred in the collection of the judgment, and $1,000.00 in civil contempt fines, representing the replacement cost of the fixtures removed from the house.

Finally, the estate moved the court to order a garnishee to release funds which James had directed be withheld for payment of taxes. The trial court determined that James was not entitled to have the amount withheld. Thereafter, James

filed a timely notice of appeal contesting these orders. These two (2) appeals were consolidated. We will consider the issues presented in the two (2) appeals separately.

Appeal No 1997-CA-002280-MR

The first appeal involves issues relating to the division of marital property. Most of the issues which James raises relate to the treatment of the deferred compensation plans accrued by James and Ruby during the marriage. From our review of the applicable law, we find that the trial court properly characterized the deferred compensation plans as marital property. We further conclude that the trial court's valuation of Ruby's plan was supported by substantial evidence. Lastly, although we agree with James that the trial court was not required to equally divide the plans, we cannot find that the trial court's equal division of the plans constituted an abuse of discretion.

I. DEFERRED COMPENSATION ISSUES

a. Whether Section 457 plan assets may be considered marital property under federal law.

During the marriage, both James and Ruby were employed by the Commonwealth of Kentucky. They each were vested in the state retirement system, and made contributions to the deferred compensation program available to state employees. Ruby retired in 1986; James continued to work until August, 1992. The trial court found that both deferred compensation plans were marital property, and divided them accordingly. James argues that the trial court erred by classifying his and Ruby's deferred

compensation plans as marital property. He asserts that the plans, which were established pursuant to 26 U.S.C. § 457, are exempt from consideration as marital property and cannot be divided as such by the trial court.

Section 457 plans were created by the Revenue Act of 1978 so that governmental employees (and employees of certain non-governmental organizations) may defer compensation for retirement. Deferrals made by employees to the plan are limited to $7,500.00 per year. Section 457 plan assets are held in trust by the employer until they are paid out to plan participants. Prior to 1996, § 457 plans could not offer loans to participants since there are no individual plan accounts against which a loan can be pledged or secured. For the same reason, deferrals made to a § 457 plan cannot be garnished or attached by the employee's creditors because the employee does not have an immediate property right to those assets. *See generally,* "Code Sec. 457 Deferred Compensation Plans for State and Local Governments and Tax-Exempt Employers", 1A Pension Plan Guide (CCH) ¶¶ 8000-8035 at 9911-9929-3 (Mar. 3, 1999).

An employee's eligible contributions to a § 457 plan are tax-exempt and become taxable only during the year in which compensation or other income is paid to the plan participant. § 457(a). Among other things, an eligible state plan must provide that:

> (6) . . .
> (a) all amounts of compensation deferred under the plan,
> (b) all property and rights purchased with such amounts, and

> (c) all income attributable to such amounts, property or rights,
> shall remain (until made available to the participant or other beneficiary) solely the property and rights of the employer (without being restricted to the provision of benefits under the plan), subject only to the claims of the employer's general creditors.

James argues that because plans established under § 457 are non-alienable, they also are not subject to division as marital property. In support of his position, he refers to Elkins v. Elkins, Ky. App., 854 S.W.2d 787 (1993), in which this Court held that disability annuity payments under the Federal Railroad Retirement Act were non-marital property and remained so after receipt so long as payments could be traced into identifiable assets. In reaching this conclusion, the Court in Elkins found that the non-alienability clause in 45 U.S.C. § 231m(a) pre-empted any contrary state law, including state law relating to classification of marital and non-marital property. James argues that the non-alienability clause in § 457(b)(6) is substantially similar to the clause in the Railroad Retirement Act and should be likewise interpreted.

We disagree. First, the non-alienability clause in the Railroad Retirement Act is significantly broader than the one in § 457(b)(6). The version of 45 U.S.C. § 231m in effect at the time Elkins was decided provided as follows:

> Notwithstanding any other law of the United States, or of any State, territory, or the District of Columbia, no annuity or supplemental annuity shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated . . .

By its own terms, this statute expressly preempts all contrary state laws. Furthermore, the statute prohibits attachment of annuity payments made under the Act. Thus, Congress intended to shield both the assets of the plan and all benefits received under the plan from any type of attachment. Hisquierdo v. Hisquierdo, 439 U.S. 572, 584, 59 L. Ed. 2d 1, 12, 99 S. Ct. 802 (1979). In contrast, the non-alienability clause in § 457((b)(6) merely prohibits attachment or garnishment of deferrals held by the employer. There is no indication that Congress intended to prohibit attachment of payments made from § 457 plans.

Moreover, the nature of payments under § 457 is substantially different from benefits paid under the Railroad Retirement Act. The basic component of railroad retirement benefits is designed to provide old age insurance benefit or disability insurance benefit in lieu of those provided under the Social Security Act. 45 U.S.C. § 231b(a).

> Like Social Security, and unlike most private pension plans, railroad retirement benefits are not contractual. Congress may alter, and even eliminate, them at any time. [Footnote omitted] This vulnerability to congressional edict contrasts strongly with the protection Congress has afforded recipients from creditors, taxgatherers, and all those who would "anticipate" the receipt of benefits . . .

Hisquierdo v. Hisquierdo, 439 U.S. at 575-76, 59 L.Ed.2d at 7.

Unlike Social Security benefits or railroad retirement benefits, § 457 plan benefits are simply deferrals of income. Contributions to a § 457 plan are encouraged through favorable tax treatment of deferrals. Although assets held in an

employee's § 457 account may not be attached by the employee's creditors, the employee has a right to expect payment from the plan when he or she retires. In addition, the amount received from a § 457 plan has a direct relation to the amount contributed. Considering the different natures of benefits under the Railroad Retirement Act and benefits paid from a § 457 plan, we do not agree with James that Congress intended to exempt contributions to a § 457 plan from consideration as marital property.

b. Whether section 457 assets may be considered marital property under state law.

James next argues that the trial court erred in classifying the § 457 plans as marital property under KRS 403.190. Again, we disagree. All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, unless excluded by statute or valid agreement. KRS 403.190(3). A vested pension plan is a form of deferred compensation earned during the marriage, and consequently, it is a marital asset and subject to division by the court. Brosick v. Brosick, Ky. App., 974 S.W.2d 498, 504 (1998). Although neither Ruby nor James directly contributed to the other's deferred compensation plan, each plan remains a marital asset to the extent that it was accrued through contributions of marital income.

Certain types of pension plans are specifically exempted from classification as marital property, such as

teacher's pension plans. KRS 161.700(2).[1] The version of KRS 403.190(4) in effect in 1992 provided that if the retirement benefits of one (1) spouse are excepted from classification as marital property, then the retirement benefits of the other spouse are also excepted.[2] James contends that KRS 403.190(4) prohibits consideration of both his and Ruby's retirement benefits, either in a division of marital property or as an economic circumstance.

The basis for James's argument is that the retirement benefits are exempt from consideration as marital property. However, as discussed above, there is no statutory exception for the § 457 plan benefits earned by the parties during the marriage. Moreover, the mere fact that the trial court found each party's retirement benefits to be their own does not create an exemption for the § 457 plans. Accordingly, the trial court properly included the deferred compensation plans in the calculation of the marital estate.

c. Valuation of section 457 plan.

Once the marital portion of retirement benefits has been calculated and the non-employee spouse's share of those benefits determined, the trial court has two (2) options for distributing the non-employee spouse's share. It may award

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[1] *See also*, Davis v. Davis, Ky. App., 777 S.W.2d 230 (1989); and West v. West, Ky. App., 736 S.W.2d 31 (1987) (Specific statutory provision excluding military disability benefits from consideration as marital property).

[2] The 1996 amendment to KRS 403.190(4) limits the amount of the other spouse's exception to the level of exception of the exempt spouse's pension.

either a deferred distribution, by means of a qualified domestic relations order (QDRO), or an immediate offset of the share against other assets in the marital estate. Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986) (deferred distribution); Combs v. Combs, Ky. App., 622 S.W.2d 679 (1981) (present offset). Throughout this litigation, the Department of Personnel has taken the position that a deferred compensation plan established pursuant to § 457 is not subject to a QDRO. Neither Ruby nor her estate contested this interpretation.[3] Yet even if a statute protects a retirement plan from garnishment, attachment or assignment, in the absence of a specific statute, a court is authorized to equitably divide the retirement plan as marital property. Glidewell v. Glidewell, Ky. App., 859 S.W.2d 675, 677 (1993). The trial court in this case undertook a present offset of other marital assets against Ruby's interest in James's deferred compensation plan.

James takes issue with the trial court's valuation of Ruby's deferred compensation plan in two (2) aspects. First, he argues that the expert testimony offered by the estate at trial was based upon improper evidence. Both parties stipulated that

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[3] However, there is authority which conflicts with this interpretation. In 1989, Congress amended 26 U.S.C. § 414(p) to add a new subsection (11). That subsection provides that a distribution or payment from a governmental plan shall be treated as made pursuant to a QDRO if it is made pursuant to a domestic relations order which creates an alternate payee's right to receive part or all of the benefits payable to a participant. Pub. Law 101-784 § 784(a)(2). § 414(p)(11). The definition of "governmental plan" in § 414(d) would seem to include a § 457 plan. Nonetheless, the question of when a QDRO will be recognized in such cases remains unsettled. 1A Pension Plan Guide (CCH) ¶ 8018 at 9926. Since the issue is not presented in this case, we need not address it.

the value of James's § 457 plan was $179,325.31. However, the Department of Personnel could not place a lump sum value on Ruby's deferred compensation plan at the time of the decree of dissolution because the annuity was already in pay status.

Prior to trial, the estate obtained a calculation of the value of Ruby's deferred compensation plan from Lance Schulz of the Jefferson Pilot Insurance Company. Schulz prepared a memorandum calculating the present value of Ruby's plan to be $47,794.82 as of the date of the decree of dissolution. However, due to company policies, Schulz was unable to appear as a witness. At trial, the estate called William Tozer, a retired actuary who most recently worked for Kentucky Central Insurance Company, to testify concerning the value of Ruby's § 457 plan.

Tozer testified that the estate provided the same documentation to him as was used by Schulz. He reviewed the memorandum and agreed with Schulz's valuation of Ruby's deferred compensation. However, he did not independently re-calculate the value of her plan. The trial court did not allow admission of the Schulz memorandum, but it did allow Tozer to testify regarding the value of Ruby's deferred compensation benefit.

James did not present any expert testimony on the value of Ruby's § 457 plan. Rather, he testified himself that because Ruby received $461.22 per month pursuant to a life annuity with twenty (20) years guaranteed commencing September 1986, and her life expectancy at that time was 23.3 years, then her deferred compensation funds were worth $128,957.00 at the time she

retired. Subsequently, James amended his calculations to reduce this amount to a present value of $83,050.00[4]

James first argues that the trial court erroneously accepted Tozer's testimony because it was based upon assumptions and calculations in the memorandum prepared by another actuary who was not present to testify or be cross-examined. We find no error. The estate argues that an expert can rely on some inadmissible evidence when testifying to an otherwise admissible opinion, if the information is of the type which the expert customarily relies upon in the practice of his profession. Buckler v. Commonwealth, Ky., 541 S.W.2d 935 (1976). *See also,* KRE 703(a). However, there was no evidence that the Schultz memorandum was the type of information upon which experts in the field typically form conclusions.

Nonetheless, Tozer established his qualifications to place a value on Ruby's deferred compensation annuity. In addition, he testified that Schulz's calculations were consistent with his own conclusions, although he did not undertake to independently recalculate the value from the underlying information. Under the circumstances, we agree that Tozer's testimony was competent to establish the value of Ruby's deferred compensation plan.

James's second argument in this regard is that the trial court erred in accepting Tozer's testimony concerning the

[4] This reduction for present value was based upon a bank's "balloon loan disclosure" sheet, which set out the amount necessary to produce a payment of $461.22 per month for 23.3 years at a four percent (4%) interest rate.

value of Ruby's annuity as of September 1992. Rather, he urges that the trial court should have accepted his testimony concerning the present value of Ruby's expected payments from her annuity as of the date of the dissolution decree. He contends that in so doing the trial court substantially undervalued Ruby's deferred compensation benefits to his detriment.

Both James and Ruby's § 457 plans are defined contribution plans, in that the benefits are paid out of their voluntary contributions to the plans while they were working. *See*, L. Graham & J. Keller, 15 Kentucky Practice Domestic Relations Law, (2d ed., 1997), § 15.27, pp. 534-36. However, James and Ruby's respective elections affect the total amount of benefits received from each plan. When Ruby retired in 1986, she elected to receive payments from her deferred compensation program as a single life annuity with twenty (20) years guaranteed. When James retired in 1992, the available interest rate was substantially lower than in 1986. Consequently, he elected to receive a fixed benefit paid from his deferred compensation account until the fund is exhausted.

Since marital assets must be valued as of the date of the decree, the value of Ruby's deferred compensation plan must be calculated based upon her life expectancy in 1992.[5] In essence, James urges that because Ruby elected to receive payments from her § 457 plan as an annuity with a guaranteed amount and term of payment, then the value of her plan should be

[5] James's calculations are based upon Ruby's life expectancy in 1986, rather than in 1992.

calculated as if it were a defined benefit plan. *See,* L. Graham & J. Keller, 15 Kentucky Practice Domestic Relations Law, § 15.30, pp. 542-45; *See also,* Duncan v. Duncan, Ky. App., 724 S.W.2d 231 (1987). Therefore, he bases his calculations upon the value of Ruby's anticipated benefits, reduced to present value as of the date of the decree. By contrast, Tozer calculated the value of Ruby's deferred compensation plan based upon the same criteria used to calculate the amount of annuity in 1986, but adjusted to reflect Ruby's life expectancy in 1992.

The trial court acted within its discretion by accepting Tozer's valuation of Ruby's § 457 plan. There is no support for James's argument that Ruby's plan should be valued on a different basis than his plan. A defined contribution plan will not be converted into a defined benefit plan merely by the participant's election regarding a method of payment of benefits. The manner in which the benefits were acquired, rather than the manner in which the benefits are paid, determines the nature of the plan.

Moreover, a trial court's valuation in a divorce action will not be disturbed on appeal unless it is clearly contrary to the weight of the evidence. Underwood v. Underwood, Ky. App., 836 S.W.2d 439, 444 (1992). As an appellate court, we must give due regard to the opportunity of the trial court to judge the credibility of the witnesses. CR 52.01; Chalupa v. Chalupa, Ky. App., 830 S.W.2d 391, 393 (1992). The calculation of the value of a life annuity which has been partially paid out is a particularly difficult undertaking. The trial court chose to

believe the expert witness's conclusions over a lay witness's calculations. We are not persuaded that Tozer relied upon inappropriate criteria, or that he used an incorrect standard to place a value on Ruby's deferred compensation plan. As a result, we cannot find the trial court's valuation of the plans to be clearly erroneous.

d. Equal division of section 457 plan.

James next asserts that the trial court failed to divide the parties' marital property in just proportions. Much of his argument relates to his assertion that the trial court erred by including the deferred compensation plans in the marital estate. Since we have previously rejected this argument, we need not address this contention further. James also complains that the trial court's findings regarding Ruby's contributions to the marriage were not supported by substantial evidence. Primarily, however, James asserts that the trial court failed to consider the economic circumstances of each spouse at the time "the division of property was to become effective . . ." as required by KRS 403.190(1)(d). James contends that the court failed to take into account Ruby's death in 1996 when making the division of property, and in particular, including the deferred compensation plans in the calculation of the marital estate.

There is no presumption or requirement that marital property be equally divided in a dissolution of marriage action. Marital property must be distributed in accord with KRS 403.190. Pursuant to this provision, the court must assign each spouse his or her non-marital property and then divide the couple's marital property in "just proportions," without regard to marital

misconduct and in light of the following factors: each spouse's contribution to the acquisition of marital assets, including homemaking duties; the value of each spouse's non-marital property; the duration of the marriage; and the economic circumstances of each spouse at the time of distribution. KRS 403.190(1)(a)-(d). The standard of review of a division of marital property is abuse of discretion. Herron v. Herron, Ky., 573 S.W.2d 342, 344 (1978); Russell v. Russell, Ky. App., 878 S.W.2d 24, 25 (1994).

As noted by the trial court, James and Ruby were married for seventeen (17) years. Both parties worked and supported each other until 1986, when Ruby retired and rendered homemaker services until the dissolution of the marriage in 1992. Although James takes issue with the trial court's conclusion regarding Ruby's contribution to the marriage as a homemaker, we note that Ruby began drawing benefits from her pension and from her deferred compensation plans in 1986. This income was wholly marital in nature. Furthermore, we agree with the trial court that Ruby owned an equitable interest in the marital residence which was not extinguished by her death.

Therefore, the main issue presented to this Court is what effect Ruby's death in 1996 (and the substitution of her estate as a party) should have on the division of marital property. James argues that since Ruby died in 1996, she could reap no economic benefit from any division of marital property at the time the division of property became effective. He points out that Ruby has no need for an equal division to support herself after the divorce through her retirement. Instead, James

asserts that the trial court should have given greater weight to his economic circumstances at the time the division became effective. James also contends that the inclusion of his § 457 plan as marital property further skewed the property division toward the estate because the trial court had to offset a considerable amount of other marital property to equalize Ruby's interest in his deferred compensation plan.

Essentially, James asserts that the rationale behind KRS 403.190(1)(d) is that property division should be utilized as a means of providing future support for an economically dependent spouse. To a certain extent, we agree. The statute specifically mentions that the trial court should consider "the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children." Thus, KRS 403.190(1) gives the trial court great flexibility and authority to divide the marital property so as to accommodate the needs of the parties upon dissolution.

The purpose of any deferred compensation plan is to allow an individual to set aside present income to guarantee a steady stream of future income during retirement. The fact that Ruby died prior to the division of marital property may be a relevant factor in the trial court's consideration of how to divide these plans. Likewise, the fact that a § 457 plan is not subject to attachment, thereby necessitating a present offset of other assets, is a legitimate consideration in determining how to divide the marital property. Furthermore, a trial court is not required to divide all marital assets on the same basis. Consequently, the trial court could have chosen to divide the

deferred compensation plans using a lower percentage basis than it used for the rest of the marital property.

However, there is no formula respecting the weight to be given to the relevant factors which a court may consider. Based upon the record as a whole, we find that the trial court acted within its discretion by equally dividing all the marital property. As a practical matter, the five (5) year delay between the entry of the dissolution decree and the division of property was a source of prejudice both to James and to Ruby's estate. The marital assets must be valued as of 1992, even though the circumstances in 1997 were much different. We appreciate that the effect of such a division may work some hardship upon James.

At the same time, we do not believe that the estate should be deprived of Ruby's interest in the marital property simply because the property division is difficult. Even if James was not entirely at fault for the delay in bringing these issues to trial, neither is he entitled to benefit from the delay or from Ruby's death. If the property division issues had been resolved sooner, then Ruby's share of the marital property would have passed to her estate upon her death.

We conclude that Ruby's death in 1996, by itself, is not a controlling factor in how the property should be divided. A just division of marital property will not always require an equal division of property. However in the present case, we cannot say that the equal division of the marital property was unjust. Therefore, we find no abuse of discretion.

II. PROPERTY DIVISION ISSUES.

a. Non-marital contribution in marital residence.

James next turns his attention to the trial court's rulings on specific items of marital property. He contends that the trial court erred by refusing to give him credit for a contribution of non-marital assets which he made toward the purchase of the marital residence. James presented evidence at trial that there was an $8,500.00 deposit to Ruby's checking account three (3) days before they were married. On the same day, the parties made an $8,500.00 down payment on the marital residence out of their joint checking account. James alleges that his $8,500.00 contribution to the purchase of the marital residence was derived from the proceeds of a settlement from an eye injury he suffered prior to the marriage. The trial court found that James failed to present substantial evidence to trace these funds into the funds used to put a down payment on the house.

Marital property is defined, in part, as "all property acquired by either spouse subsequent to the marriage except: . . . (b) Property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent." KRS 403.190(2)(b). Subsection (3) of KRS 403.190 creates a presumption that all property acquired during the marriage is marital property, but permits this presumption to be overcome by proof that the property was acquired in one of the ways specified in subsection (2) of the statute. Therefore, non-marital assets must be traced into assets owned at the time of dissolution, although absolute precision in tracing assets is not required. Chenault v. Chenault, Ky., 799 S.W.2d 575, 579 (1990).

Although James presented evidence that an $8,500.00 deposit was made into Ruby's checking account three (3) days before the wedding, he did not present any evidence, other than his own testimony, regarding the source of that deposit. Indeed, he was unable to present any documentation regarding the eye injury settlement from which he alleges the funds came. While the trial court could have accepted James's testimony, and drawn a reasonable inference that the down payment on the marital residence came from these funds, we cannot say the evidence was so strong that the trial court was compelled to do so. Consequently, the trial court's finding that James failed to adequately trace his non-marital contribution into the marital residence is not clearly erroneous.

b. Accounting for specific items of marital property.

James next contends that the estate failed to properly account for items of marital and non-marital property which were missing from the marital residence when he took possession of the house in 1996. He alleges that the trial court failed to make findings concerning the missing property. In addition, he alleges that he was prejudiced by the inclusion of this missing property in the value of the marital property to be divided.

However, the trial court specifically found that "there is not sufficient evidence regarding the claim of numerous items missing from the [marital] residence for this Court to make an award." If James believed that this finding was insufficient, then he should have requested that the trial court make specific findings to account for each of these items of property. Because

he did not ask the trial court to do so, any error has been waived. CR 52.01; Underwood v. Underwood, 836 S.W.2d at 445.

c. Method of division of marital property.

James's final contention in the first appeal is that the trial court's manner of disposition of the marital property was erroneous. In the order entered July 10, 1997, the trial court found that the parties had martial property totaling $421,519.99. The court directed each party to receive an equal share of this total, or $210,759.99. The court further stated: "Each party is to receive his/her share [of the marital property] to be accomplished either by: 1) the distribution of assets with the remainder being paid to the party entitled or 2) the sale of the assets at public auction with the remainder to be paid to the party entitled by the other party less any amounts determined mathematically from the Findings of Fact."

James argues that this disposition was improper because it makes him liable for a deficiency judgment in the event the sale of real property does not bring an amount equal to the value of the marital estate as determined by the trial court. We agree that such an outcome is a possibility. However, we do not believe that this issue is ripe for review at this time. In any case, this ground of error was not presented to the trial court, and is therefore not preserved for review.

Appeal No. 1998-CA-000860

I. CONTEMPT ORDER.

James brings this appeal from three post-judgment orders relating to the satisfaction of the judgment. The first

issue presented in this appeal involves the trial court's finding James in contempt for his removal of fixtures from the marital residence prior to the judicial sale. Following Ruby's death in 1996, the trial court gave possession of the marital residence to James. Subsequently, the trial court ordered the marital residence sold to satisfy the judgment for the estate. The master commissioner conducted a public auction selling the marital residence on February 2, 1998. The property sold for $69,600.00, which after deduction of fees and taxes, resulted in a net balance of $66,212.34 toward the outstanding judgment. Shortly thereafter, the estate moved to hold James in contempt because he removed an expensive crystal chandelier and a Westminster doorbell installation from the residence.

James asserts that the trial court's order of January 29, 1998, authorized him to "remove all personal items and possessions of any type and any kind" from the property. We disagree. The trial court's authorization for James to remove *personalty* from the residence did not thereby allow him to remove *fixtures*. There are three (3) factors which must be examined when determining whether an article is a fixture: First, annexation to realty, either actual or constructive; second, adaptation or application to the use or purpose that the part of the realty to which it is connected is appropriated; and, third, the intention of the parties to make the article a permanent accession to the freehold with title to the article in the one owning the freehold. Tarter v. Turpin, Ky., 291 S.W.2d 547, 548 (1956).

Both the chandelier and the door chimes were physically attached to the ceiling or wall of the marital residence. Furthermore, the record shows that they were installed and operating in the usual capacities (as a light fixture and doorbell). Finally, these items were not separately awarded in the division of marital property. Accordingly, we conclude that the trial court and the parties intended the chandelier and the doorbell chimes to pass to the owner of the realty.

James also argues that the trial court's imposition of a $1,000.00 fine exceeded the scope of civil contempt. We disagree with this assertion. It has been long recognized that courts have the inherent power to enforce their processes and orders and so attain the ends of their creation and existence. Crook v. Schumann, Ky., 292 Ky. 750, 167 S.W.2d 836, 840 (1942). "(A) civil contempt occurs when a party fails to comply with a court order for the benefit of the opposing party, while criminal contempt is committed by conduct against the dignity and authority of the court." Smith v. City of Loyall, Ky. App., 702 S.W.2d 838, 839 (1986)(citing, Tucker v. Commonwealth, 299 Ky. 820, 187 S.W.2d 291 (1945)). A court's contempt powers exist to permit the court to enforce its orders. The contempt power is used only to further another court order, it has no independent existence. Commonwealth ex rel. Morris v. Morris, Ky., 984 S.W.2d 840, 845 (1998).

Where a contempt proceeding is instituted by the plaintiffs, is solely in aid of their rights, and the contempt judgment is intended as a coercive measure to enforce the order theretofore entered in their favor, the proceeding is civil in

its nature. Campbell v. Schroering, Ky.App., 763 S.W.2d 145, 148, n. 5 (1988) (citing, Allen v. Black Bus Lines, 291 Ky. 278, 164 S.W.2d 483 (1942)). The enforcement of the court's orders rests in the sound discretion of the trial judge. Roper v. Roper, Ky., 242 Ky. 658, 47 S.W.2d 517, 519 (1932). Accordingly, an order of civil contempt will only be reversed if it exceeds the legitimate scope of civil contempt, or if it constitutes an abuse of discretion. Smith v. City of Loyall, 702 S.W.2d at 839.

Under the circumstances presented in this case, we cannot find that the trial court either exceeded its authority or abused its discretion by imposing civil contempt and requiring James to pay the estate $1,000.00. James knowingly removed fixtures from the marital residence prior to the judicial sale without a right to do so. The estate established the value of those fixtures and the fact that the residence sold for substantially less than the commissioner's appraisal. The trial court's order that James pay the estate $1,000.00 was not a punishment for his failure to abide by the court's order, but rather sought to make the estate whole. Considering that the imposition of civil contempt may serve both remedial and coercive purposes, we conclude that the trial court acted within its discretion by imposing civil contempt sanctions on James. *See,* White v. Sullivan, Ky. App., 667 S.W.2d 385, 387 (1983).

II. POST-JUDGMENT ATTORNEY'S FEES.

The second issue presented in this appeal involves the trial court's assessment of attorney's fees against James. After

collection of its judgment, the estate moved the trial court to assess James for attorney's fees and costs which it expended to collect the judgment. In an order entered on March 6, 1998, the trial court granted the motion and ordered James to pay the estate $3,000.00. James argues that the trial court abused its discretion by ordering him to pay these costs.

The trial court awarded attorney's fees to the estate pursuant to KRS 403.220. That statute authorizes a court, after considering the financial resources of both parties, to order a party to pay the other party a reasonable amount for the cost to the other party of maintaining or defending any proceeding. The amount of an award of attorney's fees is committed to the sound discretion of the trial court because that court is in the best position to observe conduct and tactics which waste the court's and attorneys' time. Consequently, the trial court must be given wide latitude to sanction or discourage such conduct. Gentry v. Gentry, Ky., 798 S.W.2d 928, 938 (1990). The trial court found that James "continuously attempted to thwart [the estate's] various lawful collection efforts, notwithstanding [James's] failure to post a proper supersedeas [sic] bond."

James strongly complains that the trial court's order entered on November 4, 1997, authorizing sale of the marital residence and attachment or garnishment of his assets to satisfy the judgment, was entered by the court *ex parte*. KRS 425.501 authorizes a judgment creditor to obtain a garnishment order. If it appears from the facts shown by the supporting affidavit that delay for a hearing would irreparably injure the judgment

creditor, the trial court is authorized to issue the order on an *ex parte* basis. KRS 425.308(1).

We are disturbed that the record does not contain an affidavit by the estate or its attorney supporting the entry of an *ex parte* order. However, James does not directly raise this issue on appeal, and it appears that subsequently he was given a full opportunity to present his exceptions to the garnishment order. Nonetheless, we believe that the validity of this order may directly affect the amount of attorney's fees to which the estate is entitled. Therefore, we conclude that the trial court may have abused its discretion in determining the amount of attorney's fees to award. On remand, the trial court shall reconsider the amount of its award of attorney's fees to the estate, considering in particular the expenses incurred by both parties in response to the *ex parte* order.

III. DENIAL OF GARNISHMENT EXCEPTION.

Since James did not challenge the validity of the garnishment order itself, enforcement of the garnishment order is not at issue in this appeal. The third issue presented in this appeal involves the trial court's order directing the garnishee to pay withheld funds to the estate. As noted above, the trial court's November 4, 1997, order authorized the estate to attach or garnish any of James's assets to collect the judgment. Shortly after entry of that order, the estate discovered that James had an individual retirement account (IRA) in the amount of $17,306.69 at the brokerage firm of Raymond James and Associates,

Inc., in St. Petersburg, Florida. The trial court issued a garnishment order attaching those assets.

At James's request, Raymond James withheld $6,745.62 from the assets it tendered to the court in response to the garnishment order. Of that amount, $1,730.30 was for a ten percent (10%) early withdrawal penalty, and was not contested by the estate. James directed that the remaining $5,015.32 be withheld for taxes incurred as a result of the transfer. In response, the estate submitted a letter opinion by Thomas T. Lewis, an attorney from Lexington specializing in tax law. Lewis was of the opinion that James would not incur a tax liability as a result of the transfer, and therefore he was not entitled to direct that the $5,015.32 be withheld from the garnishment. The trial court found this opinion to be convincing, and directed that the amount be paid to the estate to satisfy the judgment.

We agree with James that a letter opinion by a tax attorney was not a sufficient basis to find that James would not incur a tax liability from the transfer of the assets. The letter was not given under oath, nor was Lewis subject to cross-examination on the basis for his opinion. Furthermore, the letter does not unequivocally state that James would not owe taxes, only that "he *may* not incur an additional tax liability due to the distribution of his IRA." *(Emphasis added).* Consequently, we do not believe that this letter was competent or sufficiently reliable evidence on which the trial court could base a conclusion.

Nonetheless, we find that the trial court acted properly in allowing attachment of the assets. James was not asserting a statutory exemption from garnishment, but rather, an equitable exception. Yet in either case, the party opposing attachment of property has the burden to show that the property is not subject to garnishment. Lawson v. First Nat.Bank, 225 Ky. 58, 7 S.W.2d 495, 496 (1928); Daugherty v. Bell National Bank, 175 Ky. 513, 194 S. W. 545, 546 (1917). James did not present any evidence that he would actually incur a tax liability due to the distribution of his IRA. Therefore, even disregarding the tax attorney's opinion letter, James failed to establish that these assets were not subject to garnishment

We agree that a trial court should take note of a party's tax liability resulting from a forced disposition of assets pursuant to an order dividing marital property. Otherwise, the tax liability may negate that party's legitimate share of other marital property. *See*, Perrine v. Christine, Ky., 833 S.W.2d 825 (1992). In the present case, the trial court did take proper notice of the tax ramifications of its garnishment order. Because James failed to prove that he was subject to a tax liability from the forced distribution of his IRA, the trial court acted within its authority by allowing garnishment of the withheld funds.

IV. RULE 11 SANCTIONS.

Lastly, the estate filed a motion before this Court requesting that we sanction James pursuant to CR 11 and CR 73.02(4) on the ground that his second appeal is totally lacking

in merit and was taken in bad faith. Having found at least one (1) of James's grounds of error to have some potential merit, we cannot reach this conclusion. Moreover, appellate review of a trial court's discretionary rulings is a vital component of due process, even though the scope of our review is limited. Unless the appellant's grounds of error are so patently without merit as to be totally frivolous and strongly to suggest that the appeal was brought in bad faith, we do not regard the imposition of sanctions to be appropriate.

V. CONCLUSION.

Accordingly, the judgment of the Franklin Circuit Court entered on July 10, 1997, is affirmed. The trial court's orders of March 5, 1998 (directing the garnishee to pay $5,072.00 to the estate), and of March 6, 1998 (finding James in contempt and ordering him to pay the estate $1,000.00) are affirmed. The trial court's order of March 6, 1998, awarding attorney's fees and costs incurred during the collection of judgment, is reversed, and this matter is remanded to the trial court with directions to reconsider the amount of attorney's fees awarded as stated in this opinion.

ALL CONCUR.

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