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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000498-MR

MARY LYNNE (SLONE) MINIX — APPELLANT

v.

APPEAL FROM JOHNSON FAMILY COURT
HONORABLE LARRY E. THOMPSON, JUDGE
ACTION NO. 02-CI-00186

MARCUS STEPHEN MINIX, SR. — APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, THOMPSON AND WINE, JUDGES.

THOMPSON, JUDGE: Mary Lynne (Slone) Minix appeals from the Johnson Family Court's amended findings of fact, conclusions of law, and final decree of dissolution adjudicating issues as to property, maintenance, and attorney's fees. For the reasons stated below, we affirm in part, reverse in part, and remand.

Mary and Marcus Stephen Minix, Sr. were married on March 17, 1990. One child, who has reached majority, was born of the marriage. Prior to the marriage, Marcus filed for Chapter 7 bankruptcy protection and divorced his previous wife. During the early period of the marriage, Marcus expended marital funds to pay expenses related to his bankruptcy, divorce, and past due taxes.

On February 7, 2002, the parties separated, Marcus left the marital residence, and Mary filed a petition for divorce. A bifurcated decree of divorce was entered on August 21, 2003, reserving other issues for further adjudication. In August 2005, Mary filed for Chapter 7 bankruptcy protection, which resulted in her receiving $15,300 as a homestead exemption after the sale of the parties' marital residence.

On January 2, 2008, the family court issued its findings of fact, conclusions of law, and amended decree of dissolution. Mary filed a motion to alter and amend and a hearing was conducted on February 6, 2008, wherein the family court addressed every individual claim in Mary's motion. After the family court granted some of her requests and denied others, it issued its final decision on February 11, 2008. This appeal followed.

Mary's first argument is that the family court erred by failing to award her a one-half marital interest in the individual retirement account (IRA) listed in Marcus's name. Citing KRS 403.190, Mary argues that the family court abused its discretion when it failed to divide a portion of the IRA as marital property. We agree.

In divorce proceedings where property division is an issue, a family court first classifies each individual's property as marital or non-marital. *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky.App. 2006). The family court then assigns each party their respective non-marital property before dividing the parties' marital property between them in "just proportions." *Id*. The review of a family court's division of marital property is limited to abuse of discretion. *Overstreet v. Overstreet*, 144 S.W.3d 834, 838 (Ky.App. 2003). The family court's decision will not be disturbed unless erroneous factual findings or the misapplication of law form the basis of its ruling. *Id*.

At the hearing on Mary's motion, the family court stated that Mary was not awarded a portion of the IRA because the record reflected that the account was previously divided at an earlier hearing. However, a review of the hearing on June 25, 2005, reveals that Marcus stated that his IRA was worth approximately $30,000, and Mary stated that the marital portion was $24,012. At this hearing, Mary agreed to permit Marcus to withdraw $10,000 of the IRA in order to keep two businesses financially viable, but she reserved her claim on her marital share of the asset.

From a review of the record of the hearing, we conclude that the family court abused its discretion when it failed to consider the distribution of a share of the marital interest of the IRA to Mary. While family courts have broad discretion in dividing marital property, it must divide marital property in "just proportions." *Jones v. Jones*, 245 S.W.3d 815, 817 (Ky.App. 2008). In this case,

the family court erroneously believed that the IRA was previously divided and, thus, refused to consider distributing any portion to Mary. Because the record reflects otherwise, the family court erred by not considering the just division of the marital portion of Marcus's IRA.

Mary next argues that the family court erred in failing to award her one-half of all of the money expended to pay for Marcus's pre-marital expenses, including his back taxes and fees for his divorce and bankruptcy attorneys. Stating that Marcus expended their marital funds to pay for his pre-marital expenses, Mary argues that the family court was required to refund half of these expenditures to her because Marcus was the sole beneficiary of the proceeds. We disagree.

Although Mary does not use the legal term, her legal argument is a claim for dissipation of marital assets against Marcus. However, dissipation is established only when "marital property is expended (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." *Brosick v. Brosick*, 974 S.W.2d 498, 500 (Ky.App. 1998). Because Mary has not established these conditions, we conclude that the family court did not err in denying her request.

Mary next argues that the family court erred by awarding Marcus one-half of the homestead exemption that she received in bankruptcy. Arguing that Marcus was ineligible to receive a share of the homestead exemption because he did not reside in the marital residence during the relevant period, Mary contends

that the family court abused its discretion by awarding him any marital property from the proceeds of her homestead exemption. We disagree.

While Mary correctly asserts that Marcus could not obtain a homestead exemption in bankruptcy court because he was not a permanent resident of the subject property as stated in *In re Jordan*, 16 B.R. 590 (Bkrtcy.Ky. 1981), the family court's discretion to divide the parties' marital property in "just proportions" using all relevant factors remained untainted by this fact. KRS 403.190. As the family court reasoned from the bench, it believed that Marcus was entitled to an offset as a simple matter of fairness. Thus, we cannot conclude that the family court abused its discretion in its application of KRS 403.190.

Mary next argues that the family court abused its discretion by not awarding her attorney's fees. Citing KRS 403.220, Mary contends that the family court failed to properly consider their disparate financial positions and Marcus's numerous tactics to delay proceedings in their divorce and her bankruptcy action. We disagree.

"The allocation of court costs and attorney fees is entirely within the discretion of the trial court." *Tucker v. Hill*, 763 S.W.2d 144, 145 (Ky.App. 1988). Further, "[a]ll that is expressly required is that the trial court consider the financial resources of the parties when ordering a party to pay a reasonable amount in attorney's fees." *Poe v. Poe*, 711 S.W.2d 849, 852 (Ky.App. 1986). The family court is afforded great deference in determining if attorney's fees should be

awarded for improper conduct and legal tactics. *Gentry v. Gentry*, 798 S.W.2d 928, 938 (Ky. 1990).

From a review of the record, we conclude that the family court did not abuse its discretion when it denied Mary's request for attorney's fees. In its amended findings of fact, the family court found that Mary had obtained a four-year accounting degree but had "made minimal attempts to find employment although she [was] clearly capable..." of obtaining employment. Further, during the final hearing, the family court stated that neither side had filed frivolous motions nor engaged in conduct warranting sanctions. Accordingly, the family court properly considered the relevant factors and did not abuse its discretion.

Mary next argues that the family court abused its discretion by not properly considering expert testimony on the value of the parties' corporations and by awarding her a percentage of the corporations rather than a specific monetary amount. We disagree.

It is well-settled that a family court must be given an opportunity to decide an issue if it is to be considered on appeal, and the failure of a party to bring an alleged error to the family court's attention is fatal to that argument on appeal. *Baker v. Weinberg*, 266 S.W.3d 827, 835 (Ky.App. 2008). In this case, Mary's claim was never brought to the family court's attention and, thus, the family court was not given an opportunity to correct its alleged mistake. Thus, Mary's claim is not preserved for the purpose of appellate review.

Mary next argues that the family court erred by not awarding her additional maintenance. She argues that the family court did not properly consider her lack of sufficient property, lack of employment, time needed for her education and training, and her standard of living established during the marriage in reaching its decision on an award of additional maintenance. We disagree.

An award for maintenance is within the sound discretion of the family court and cannot be disturbed absent a showing of an abuse of discretion. *Powell v. Powell*, 107 S.W.3d 222, 224 (Ky. 2003). A central consideration is the determination of whether a party seeking maintenance will be able to meet his or her reasonable needs. *Id*. at 226. In this case, the family court awarded Mary temporary maintenance in the amount of $175 per month from January 15, 2008, until April 15, 2008. This amount was in addition to Mary's temporary maintenance award which she had received for the preceding four years totaling $69,400.

Therefore, the family court awarded her approximately $70,000 in total temporary maintenance over a period of four years. The family court further noted that Mary obtained an accounting degree during this period but made minimal attempts to obtain employment. Considering these facts and the family court's division of the parties' marital property, we conclude that the family court did not abuse its discretion by denying Mary's request for additional maintenance.

Mary next argues that the family court erred by awarding the parties' coin collection to their son rather than dividing the property as a marital asset.

Contending that no credible evidence was given that the coin collection belonged to their son, Mary argues that the property should have been divided between the couple as provided by KRS 403.190. We disagree.

During the proceedings below, Marcus testified that the couple purchased coins during their marriage and gifted the collection to their son. While Mary disputes this testimony and disagrees with the family court's finding, the family court, as the finder of fact, had broad discretion in determining the credibility of testimony and in choosing which party to believe. *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky.App. 2007). Accordingly, we conclude that the family court's finding that the coin collection belonged to the son, not the parties, was not erroneous.

For the foregoing reasons, the Johnson Family Court's amended findings of fact, conclusions of law, and final decree of dissolution is affirmed in part, reversed in part, and remanded for the consideration of the just division of the martial portion of the IRA listed in Marcus's name.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Mary Lynne (Slone) Minix, *Pro Se*
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Marcus S. Minix, Sr., *Pro Se*
Paintsville, Kentucky