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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000499-MR

MICHELE R. MORGAN — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JERRY J. BOWLES, JUDGE
ACTION NO. 03-CI-500029

JAMES DANIEL LANHAM — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: This appeal arises from a judgment in a dissolution proceeding held in the Jefferson County Family Court, which awarded property during the dissolution of the marriage of Michele R. Morgan (Morgan), and James Daniel Lanham (Lanham). The four-day trial was spread out over the course of a ten-month period and the court entered Findings of Fact and Conclusions of Law nine months after the close of proof. The first issue before us involves the court's

award of monies earned by the parties from the sale of their farm and the allocation of that money as marital or nonmarital for the purposes of property division. The second issue is whether or not proper notice was given prior to the court conducting a *pendente lite* hearing as to the division of expenses between the parties during the pendency of the matter.

FACTS

The parties were married May 9, 1998, and a decree dissolving the marriage was entered November 21, 2003. Morgan and Lanham brought considerable assets to the marriage, including real property, commercial property, investments, retirement accounts and an airplane. Morgan had owned and operated a lighting business since 1986, and was its president and chief executive officer. Lanham was likewise the chief executive and sole shareholder in an insulation business operating since 1982. They maintained two joint bank accounts along with separate individual accounts as well as their various business accounts.

In 1997, five months prior to their marriage, Morgan and Lanham entered into a "Joint Ownership Agreement" (JOA), when they purchased two tracts of land for a horse farm. Under the terms of the JOA, Morgan and Lanham would each hold an undivided fifty percent interest in the farm as tenants in common. Morgan was the sole initial investment contributor and a loan taken by Morgan and Lanham made up the remainder of the purchase price. The JOA stated that any net profits from the sale or rental of the property would be equally divided

after the reimbursement of the equity contributions and loans. By its terms, the JOA terminated when the parties married.

Morgan and Lanham entered into a post-nuptial agreement (hereinafter PNA), one month after they married. Under the terms of the PNA, both parties waived any right to maintenance payments from the other in the event of a divorce. The PNA also established that any property owned at the time, or acquired thereafter, would be considered their individual property, and not marital property.

In September and November 1998, the parties purchased a third and fourth tract of land using monies from two separate joint checking accounts. They then began construction of a home on the farm, acting as their own general contractors. Construction took approximately two years during which time the parties took additional construction, equity and conventional loans. Simultaneously, the parties transferred money to and from their corporations and money from the sale of personal assets to their joint checking accounts. Construction costs and various living expenses were also paid from these accounts. The parties kept no contemporaneous records of the construction cost transactions. Additionally, the parties formed three limited liability companies (LLC), each holding a fifty percent membership interest in the LLCs.[1] Monies and assets from

[1] These companies are the subject of a separate lawsuit in Jefferson Circuit Court. The Jefferson Family Court declined to rule on matters pertaining to these companies, deferring to the Jefferson Circuit Court's judgment regarding their division. Thus, we will not discuss them further.

those LLCs were likewise used as a "piggy bank" for the construction costs and the upkeep of the farm.

During the trial, Morgan and Lanham acknowledged that each of them contributed nonmarital funds to the acquisition and construction of their residence. Inconsistencies came about due to the various numbers used by the parties to justify their ownership interests. Morgan's expert witness, Victoria D. Buster (Buster), a certified public accountant and attorney, prepared a report and thereafter testified to her calculations. These calculations were derived by the checks and deposit slips provided to her by Morgan. In one document, Morgan claimed that the parties expended $1,007,366.24 in nonmarital funds in the purchase and development of the farm, and that she contributed $828,300.32 or 82.24% and that Lanham contributed $179,065.92 or 17.76% of the nonmarital funds. However, in another document Morgan also claimed that Buster determined that the total cost to purchase and develop the property was actually $1,864,501.32 and that she had contributed $829,300.32 and Lanham had contributed $179,065.92, and the parties jointly had contributed $856,135.08. According to Morgan, the percentages reflected in the second set of numbers, makes Morgan's contribution 44.48% of the total and Lanham's 9.6% of the total and the joint contribution 45.92%.

Lanham calculated that the parties spent $1,577,046.80 to purchase and develop the farm and that he had contributed $206,550.00 or 13.10%. Lanham stated that Morgan contributed $420,496.80 or 26.66% to the total contribution.

The remaining amount of $950,000.00 (60.24%), came from money borrowed by the parties. Lanham's position was that the parties paid down the mortgage during the marriage by $69,784.51. That figure should be divided equally, once subtracted from the total net proceeds from the sale of the farm of $513,682.89 and the remaining $443,898.38 divided by each party's nonmarital contributions. Lanham put forward that the parties contributed $627,046.80 of their nonmarital property to the project with Morgan contributing $420,496.80 (67%), and Lanham contributing $206,550.00 (33%). Under Lanham's theory, Morgan would be entitled to $297,411.92 (67%), and he would be entitled to $146,486.46 (33%).

The family court was not persuaded by either Morgan or Lanham's calculations tracing the nonmarital contributions. The court found that the parties were unable to agree on the costs of the land, construction and improvements made to the farm as well as their individual contributions. The court found that both parties offered only copies of checks written from the various accounts and spreadsheets derived from the bank accounts as evidence of their figures and did not submit bills or invoices that would support the checks. Further, the court found that the parties treated their own closely held corporations, construction loans, and personal assets as a piggy bank from which to draw in order to complete and maintain the farm.

Notwithstanding the failure of tracing proof persuasive to the court, it divided the property pursuant to each party's acknowledgment of the other's nonmarital interest. Thus, Morgan was awarded 26.66% interest and Lanham was

awarded 9.60% interest, with the remaining 63.74% declared to be marital property to be divided equally by the parties.

Morgan appeals the property division, alleging that the court: (1) erred when it found that Morgan did not satisfy her burden of proof in terms of tracing of the nonmarital claim; (2) erred by basing the division of property upon their acknowledgements after finding the proof insufficient; and (3) that the court abused its discretion when overruling Morgan's Kentucky Rules of Civil Procedure (CR) 59.07 motion to take further proof of tracing documents. Additionally, Morgan states that she was given insufficient notice of a hearing dividing the expenses of the farm during the pendency of the dissolution.

STANDARD OF PROOF

In dissolution actions, appellate review is constrained by procedural rules, statute, and case law. Reversal is only appropriate if the family court has abused its considerable discretion. Kentucky Rules of Civil Procedure (CR) 52.01, states that we must defer to the family court's findings of fact unless they are clearly erroneous, *i.e.*, not supported by credible evidence. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). A factual finding is not clearly erroneous if it is supported by substantial evidence.

'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002).

As to the division of property within a dissolution proceeding, the trial court likewise must apply the facts to the law of the case. "The property may very well have been divided or valued differently; however, how it actually was divided and valued [is] within the sound discretion of the trial court." *Cochran v. Cochran*, 746 S.W.2d 568, 570 (Ky. App. 1988) (citation omitted). Moreover, family courts have very broad discretion to fashion a fair and appropriate remedy, in accord with the statutory scheme, which is specific to the particular action as no two dissolution actions are alike. *Id.* at 570; and *Herron v. Herron*, 573 S.W.2d 342, 344 (Ky. 1978). Accordingly, this Court, as an appellate court, exists to correct errors of law made by lower courts, not to provide the parties with a trial *de novo*.

Whether an item is marital or nonmarital is reviewed under a two-tiered scrutiny in which the factual findings made by the court are reviewed under the clearly erroneous standard and the ultimate legal conclusion denominating the item as marital or nonmarital is reviewed *de novo*. *Smith v. Smith*, 235 S.W.3d 1, 6 (Ky. App. 2006).

ANALYSIS

Morgan asserts that the family court erred when it found that she had not satisfied her burden of proof when tracing her nonmarital property interest in the farm. Moreover, she asserts that once the proof was found insufficient, the

court erred when it divided the property according to the parties' admissions. Morgan did not seek to admit bills or invoices showing where the actual amounts she claimed were expended. However, Morgan now argues that bank statements, bills, invoices, receipts, and witness testimony have all been admitted in family courts in the Commonwealth to prove nonmarital claims, although not all forms of such proof have been required in all cases. *Smith v. Smith*, 235 S.W.3d 1 (Ky. App. 2006), is cited by Morgan as standing for the proposition that a check was sufficient proof to trace a nonmarital claim. Morgan then goes on to cite to other published and unpublished[2] cases holding checks or bank statements as sufficient proof.

We agree with Morgan that *Smith* discusses the issue of tracing when property contains both marital and nonmarital components:

> In such situations, 'a trial court must determine the parties' separate nonmarital and marital shares or interests in the property on the basis of the evidence before the court. Kentucky courts have typically applied the 'source of funds' rule to characterize property or to determine parties' nonmarital and marital interests in such property.' The "source of funds" rule 'simply means that the character of the property, i.e., whether it is marital, nonmarital, or both, is determined by the source of the funds used to acquire property.'

Smith v. Smith, 235 S.W.3d 1, 5 (Ky. App. 2006)(footnotes omitted).

[2] Morgan is in violation of CR 76.28 as she did not attach copies in her brief of the unpublished opinions on which she relies. Furthermore, unpublished opinions may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Such is not the case herein.

What *Smith* or the other cases cited, do not do, is create a bright line test as to what constitutes sufficient proof to overcome the presumption that the property is marital property. In fact, *Smith* states,

> [g]iven the fact that the trial court is unquestionably in the best position to judge the weight and credibility of the evidence, we believe that the factual findings underpinning the determination of whether an item is marital or nonmarital are entitled to deference and, consequently, should be reviewed under the clearly erroneous standard.

Smith v. Smith, 235 S.W.3d 1, 6-7 (Ky. App. 2006).

When finding that Morgan and Lanham had not satisfied their respective burdens of proof in terms of tracing their nonmarital interests in the farm, the family court cited *Terwilliger v. Terwilliger*, 64 S.W.3d 816 (Ky. 2002). *Terwilliger* discussed the standard set in *Chenault v. Chenault,* 799 S.W.2d 575 (Ky. 1990):

> In *Chenault,* this Court recognized that tracing to a mathematical certainty is not always possible, noting that: "While such precise requirements for nonmarital asset-tracing may be appropriate for skilled business persons who maintain comprehensive records of their financial affairs, such may not be appropriate for persons of lesser business skill or persons who are imprecise in their record-keeping abilities." [*Chenault*] at 578.
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> In the case of the Terwilligers, Tom was an experienced business person, juggling the assets and liabilities of a number of corporations and orchestrating complex business deals. As such, he would be expected and/or required to keep detailed and accurate records, and it is certainly reasonable to require him to maintain and to

> produce records to establish his claims of nonmarital property being injected into the business, beyond backdated notes and unexplained deposit slips for varying amounts. Mr. Terwilliger is clearly a skilled business person with extensive record keeping experience. As such, it does not appear that he is the sort of person that the Court sought to protect in *Chenault* from excessively stringent tracing requirements. *Additionally, while the Chenaults had no other likely source for the funds claimed by Ruby Chenault as nonmarital, Tom Terwilliger had money flowing in and out of his various corporations from any number of sources.*

Terwilliger v. Terwilliger, 64 S.W.3d 816, 820-21 (Ky. 2002)(emphasis added).

As we review the family court's determination in the instant case, we note that the disposition of property in a dissolution of marriage action is governed by statute. Kentucky Revised Statute (KRS) 403.190(3), in relevant part, provides for a presumption in favor of describing property acquired after marriage as marital property: "All property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. . . ." In addition, a three-step process is required during a trial court's division of the property: (1) the property is catagorized as marital or nonmarital; (2) each party is assigned his or her nonmarital property; and (3) then the court equitably divides the remaining marital property in just proportions between the parties. *Travis v. Travis,* 59 S.W.3d 904, 909 (Ky. 2001)(footnotes omitted).

Herein, the family court was not persuaded by the amounts evidenced only by the checks and the bank statements. The court found that the expert witness had merely incorporated Morgan's figures into the spreadsheet and had not actually reviewed the supporting invoices or bills. Similarly, the court noted that there was testimony that nonmarital funds from Morgan and Lanham were used both to construct the home and to pay living expenses. Further, the court found that both parties were sophisticated business persons who had entered into a written joint ownership agreement and a post-nuptial agreement, as well as detailed agreements to own and operate three limited liability companies. Finally, the court found that the evidence showed that the parties moved funds between their corporations, their LLCs, their personal accounts and their joint accounts with little to no regard to segregating the costs and expenses related to the construction of the farm or retaining the nonmarital status of the source.

Given the failure of Morgan to provide precise documentation, the movement of the funds, and the inability to reconcile the various business and personal accounts in an intelligible manner, we conclude that the family court divided the proceeds from the sale of the farm in the only just proportions and manner available. There was no abuse of discretion on the part of the family court in taking the position that detailed and accurate recordkeeping is a reasonable requisite to overcoming the presumption in favor of marital property in this particular case. When placing the parties' haphazard accounting into the context of their normal business *modi operandi*, we can only assume that their intent was to

entirely co-mingle their separate funds in order to construct the farm. The family court acted well within its considerable discretion to base its classification of property on admissions made by the parties.

Morgan then states that the court erred when it denied her CR 59.07 motion to allow her to supplement the proof with actual bills and invoices after the close of the trial and after the court had entered its twenty-two page judgment. Morgan argues that as neither party could reasonably have anticipated that checks and deposit slips would not have been sufficient proof for the court to trace the nonmarital funds, it was an abuse of discretion not to permit her to later supply the information. Morgan points out that the record was left open for nine months for a deposition to be taken by Lanham, when she could have provided the court with the documents without need for any further explanation.

Kentucky Rules of Civil Procedure (CR) Rule 59.07 states in pertinent part: "On motion . . . the court may . . . open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment." The Kentucky Supreme Court explained the boundaries of the rule in this way: "CR 59.07 is a broad and sweeping grant of power to the trial court to grant a new trial or, alternately, to enter new findings, conclusions and judgment where the dictates of justice require, if, as occurred here, the action was tried without a jury." *Carpenter v. Evans,* 363 S.W.2d 108, 109-10 (Ky. 1962).

The court herein denied the motion to supplement due to the amount of time Morgan had already been allowed to put on her proof and the time required for the parties to submit their proposed findings of facts and conclusions of law. Furthermore, Lanham's deposition was concluded prior to the court's entry of judgment. As the litigation was extensive and the legal issues clear, the court reasoned that Morgan had not supplied satisfactory grounds to further delay finality in the matter. We agree.

Morgan has not provided this Court with any explanation or detailed analysis of what documents would have been proffered and what they would have proven. The proof required to trace non-marital funds is not a mysterious formula that could not have been foreseen prior to trial. Furthermore, Morgan has not alleged that these documents were not available at the time of trial. We hold that there was no error in the denial of the motion, nor abuse of the discretion of the trial court.

> It has always been the aim of the courts to expedite the disposition of litigation and at the same time give the litigant his 'day in court,' so to speak, and reasonable time and opportunity to present his case. In these days of congestion in the courts, it is proper and appropriate that the court limit litigants to the traditional rights above enumerated.

Walsh v. Kennedy, 463 S.W.2d 318, 321 (Ky. 1971).

Morgan's final claim of error involves whether or not the court erred in conducting a *pendente lite* hearing regarding the division of expenses of the farm. An order was issued in November 2003, allocating the interim expenses of

the mortgage, property taxes, homeowner's insurance, Lanham's rent, renter's insurance and moving expenses, prior to the resolution of the dissolution. Morgan asserts that she was denied adequate notice of the hearing and that if she had had more time to prepare, she would have been able to prove that Lanham's income was greater than hers. Morgan claims the temporary order allocating the expenses 60% to her and 40% to Lanham prejudiced her in the amount of $5,471.00. Lanham had also objected to the division of expenses, arguing at the time, that Morgan was awarded sole possession of the farm in May, and that he is owed monies he expended from May to October when the expenses were equally divided.

Morgan cites us to the hearing that took place October 17, 2003, as proof of preservation of the issue of lack of notice. However, the designation of record on appeal consists only of the trial record. The motion filed with the court by Morgan after the ruling in question does not mention any objection due to a lack of notice. In such an instance, we cannot find that the issue of notice was heard by the trial court.

> The record discloses that evidence was heard on the question of temporary alimony, but that evidence has not been brought to this court. All that we have before us are the pleadings, and they are sufficient to sustain the ruling of the circuit court. Where evidence is heard by the circuit court, and that evidence is not brought to this court on appeal, it will be presumed that the evidence supports the finding of the trial court.

Brandenburg v. Brandenburg, 246 Ky. 546, 55 S.W.2d 351, 351-52 (1932).

In general, absent palpable error "[t]he Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Matthews v. Ward,* 350 S.W.2d 500 (Ky. 1961); *Combs v. Knott Co. Fiscal Court,* 283 Ky. 456, 141 S.W.2d 859 (1940); *Tipton v. Brown,* 273 Ky. 496, 117 S.W.2d 217 (1938); *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989). Nevertheless, we note that the court based its decision upon the respective income of the parties and the expenses they were continuing to incur. In its order, the court reserved the right to re-allocate the expenses based upon the presentation of future evidence. At the close of the trial, the court did not deem it necessary to change the allocation, given the evidence presented. As Morgan was allowed to remain in the home, exclusively, the court acted properly when allocating the slight majority of the expense to Morgan. Furthermore, as the court ultimately awarded Morgan with substantially more equity in the farm, we deem it just that she be required to shoulder a greater portion of the expenses. Thus we find no indication of any abuse of discretion.

The judgment of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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