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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000939-MR
&
NO. 2008-CA-001007-MR

JUDITH ANN HOBBS CORBIN

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM ADAIR CIRCUIT COURT
v. HONORABLE JAMES G. WEDDLE, JUDGE
ACTION NO. 05-CI-00173

JERRY PLATO CORBIN

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: ACREE, CAPERTON AND THOMPSON, JUDGES.

CAPERTON, JUDGE: The Appellant and Cross-Appellee, Judith Ann Hobbs Corbin, appeals the findings of fact within the Decree of Dissolution of Marriage entered by the Adair Circuit Court on April 24, 2008. The Appellee and Cross-

Appellant, Jerry Plato Corbin, also appeals. Both parties agree that the antenuptial agreement was valid and enforceable, but dispute the court's division of assets. After a thorough review of the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part and remand for further proceedings.

The Corbins married in 1992 and separated in 2005. During the marriage, the parties acquired various martial assets, and both had acquired significant assets prior to the marriage. The parties entered into an antenuptial agreement on June 24, 1992, attached to which were exhibits listing the respective property of each. The signatures of both parties appear on the agreement.

In his arguments to the court below, Jerry asserted that the agreement was invalid, because he was not aware that he was signing an antenuptial agreement. Rather, Jerry asserted that at the time of signing, he believed the document to be a will. Nevertheless, Jerry agreed that the assets disclosed were, in fact, a true accounting of his assets prior to the marriage. The court below found no evidence of record to indicate that Jerry did not freely and voluntarily sign the agreement. Further, the trial court found it to be conscionable and enforceable. In his brief to this Court, Jerry concedes that this finding was supported by substantial evidence.

At the time the parties entered into the marriage, each had a separate bank account. Jerry had an account with the Communicating Arts Credit Union (CACU), and asserts that shortly after the marriage Judith set up a CACU account

in her name and transferred into it the money from her previous non-marital account. The parties also had various other accounts during their marriage, most of which were held jointly, and included a third CACU account, and an account at First National Bank in Columbia. Jerry contends that at some point in the marriage, Judith's name was added to his pre-marital CACU account, although his name was not added to hers. The parties concede that in August 2004, Judith's name was removed from Jerry's account. Jerry asserts that the parties primarily lived from money in his account, although marital money was also deposited into Judith's account during the marriage.¹

In addition to the aforementioned accounts, both parties also owned real estate at the time they were married. Judith owned a house and three apartments, while Jerry owned a duplex. All of these properties were sold during the marriage. Below, Judith asserted that she deposited the money from the sale of her apartments and one of her houses into the CACU account, although Jerry asserts that the bank records fail to indicate this. Jerry asserts that he took \$10,000.00 from the sale of his non-marital duplex and used it for a down payment on one of the pieces of marital real estate known as the "Knifely Farm". Judith apparently also inherited a piece of property from her mother, which she sold during the marriage. Below, Judith testified that she initially put the proceeds into a safe deposit box, later placing some in the bank, and using other portions for various purposes.

¹ Jerry asserts that specifically, the proceeds from the sale of two parcels of marital real estate were placed in the account, as well as numerous small deposits each month.

During the course of the marriage, the parties also purchased four parcels of marital real estate, only one of which they still owned at the time of the divorce. Testimony was provided below as to the amounts of the sales, and the manner in which the monies were deposited afterwards. In addition to these properties, the parties also held retirement accounts in their own names, as well as various items of marital personal property. As noted, on April 24, 2008, the trial court entered a decree dissolving the marriage, and dividing the assets of the party accordingly. It is from that decree that both parties now appeal to this Court.

In reviewing this matter, we note that the test to determine whether an antenuptial agreement is valid and enforceable is three-fold. First, the court must determine whether the agreement was obtained through fraud, duress, mistake, or through misrepresentation or non-disclosure of material facts. Secondly, the court must determine whether or not the agreement was unconscionable. Finally, it must determine whether the facts and circumstances since the time of the agreement have changed so as to render enforcement of the agreement unfair or unreasonable. *See Gentry v. Gentry*, 798 S.W.2d 928 (Ky. 1990). If the agreement is valid, our courts certainly recognize the right of parties to enter into antenuptial agreements which provide for a different division of property than that set forth in KRS 403.190. *Id.*

With respect to the disposition of marital and non-marital property, we note that absent provisions otherwise in an agreement of the parties, our courts are guided by KRS 403.190. This statute provides that the trial court shall divide

the marital property without regard to marital misconduct, and in just proportions, considering all relevant factors. As we have previously held in *Wood v. Wood*, 720 S.W.2d 934 (Ky.App. 1986), this does not require equal division, but instead, division which is in “just proportions.” The manner in which marital property is divided and valued is within the sound discretion of the trial court, and will not be reversed on appeal unless clearly erroneous. See *Cochran v. Cochran*, 746 S.W.2d 568 (Ky.App. 1988). We review this matter with these standards in mind.

On appeal, Judith now argues to this Court that the court below was correct in finding that the antenuptial agreement was valid and enforceable. Nevertheless, she now argues, first, that the lower court incorrectly ignored undisputed testimony and exhibits in dividing the marital and non-marital assets of the parties. Specifically, Judith argues that while the court correctly designated her Communicating Arts Credit Union account as non-marital property², it committed error in failing to award her various items of real and personal property which were purchased with funds from that account, including a timeshare in Pigeon Forge, Tennessee, to which Judith Corbin holds the title, and for which she paid all expenses, as well as a Massey-Ferguson tractor, a bushhog, a boom, a trailer, two wave-runners, and a 1957 Studebaker.³

² It is undisputed that prior to the marriage between the Corbins, Judith was a widow. While Jerry states that Judith created this account shortly after their marriage, Judith states that upon the passing of her former husband, she deposited funds in this account which were maintained separate and apart from any funds acquired during her marriage to Jerry Corbin.

³ With respect to the timeshare, our review of the record indicates that the trial court found the time share to be the non-marital property of Judith. Therefore, we consider the allegations otherwise in her brief to be a factual error, and we will not address that issue further herein.

In making this argument, Judith acknowledges that KRS 403.190 is dispositive of the determination of marital and non-marital property. She nevertheless states that according to subsection three of that provision, the “presumption of marital property is overcome by a showing that the property was acquired by subsection (2) of this section.” As Judith correctly notes, KRS 403.190(2) provides that excepted from marital property is all property acquired after the marriage by gift, bequest, devise, or descent, including the income derived therefrom. Judith asserts that she met her burden in proving that the aforementioned items were acquired solely with her non-marital funds.

In response, Jerry argues first, that the mere fact that Judith may have purchased these items with funds from her CACU account does not automatically make the items non-marital. Jerry asserts that the record clearly indicates that marital funds were placed into this account and co-mingled with non-marital funds, including, by Judith’s own concession, the proceeds from the sale of two parcels of marital real estate. Thus, Jerry argues that as Judith has failed to trace any assets which she had before the marriage into these items of personal property, she has failed in her burden of proving the items to be non-marital.

Secondly, Jerry argues that the antenuptial agreement specifically provides that:

The parties shall equitably divide all items of tangible personal property acquired subsequent to the date of the marriage, and in the event the parties fail to agree on any item or items constituting tangible personal property, said

items shall be sold and the net proceeds shall be divided equally between the parties.

Jerry argues that as all items to which Judith claims to be entitled are personal property, and therefore they are, marital property as set forth in the agreement and subject to equal division.

In reviewing this matter, we find no error by the trial court. Our review of the agreement between the parties indicates that they clearly, knowingly, and voluntarily committed to equally divide any items of personal property which remained in dispute. The trial court did so, and we find no error accordingly.

However, even if this were not so, our law is clear that when non-marital property is no longer held by parties at the time of dissolution, it is the burden of the party claiming the non-marital interest to trace the previously owned property into an existing asset. *See Sexton v. Sexton*, 125 S.W.3d 258, 266 (Ky. 2004). We have previously held in *Polley v. Allen*, 132 S.W.3d 223, 229 (Ky.App. 2004), a claimant cannot meet the tracing requirement simply by showing that he or she brought non-marital property into the marriage, without also showing that he or she has spent those non-marital assets in a traceable manner during the marriage. Our review of the record does not indicate that Judith met her burden of tracing the purchases of these items. Accordingly, we believe the court below was well within its discretion in its division of these assets.

As her second basis for appeal, Judith argues that the lower court failed to properly allocate funds which she believes were due to her based on

fraudulent activities committed by Jerry. Specifically, Judith states that in Paragraph 26 of its findings, the lower court determined Jerry's sale of cattle, a marital asset of the couple, to be fraudulent, insofar as he failed to divide the proceeds with Judith. Accordingly, the court awarded Judith the sum of \$6,500, representing her share of the asset.

Nevertheless, Judith now argues that the lower court failed to award sums of money which she requested on account of similar activities in which Jerry allegedly engaged. More specifically, Judith asserts that following their separation, Jerry sold many other marital assets⁴, and also leased their jointly owned farm. Judith asserts that the sale of these assets produced proceeds of \$11,650.00, of which she received only \$500.00. Further, she asserts that Jerry leased the farm in 2006, for \$2,500.00. Finally, Judith asserts that Jerry fraudulently attempted to keep Judith's personal property from her rightful possession. Judith values those items at \$2,000.00. Accordingly, she asserts that in addition to the \$6,500.00 which the lower court previously awarded, she should also be awarded the additional sum of \$8,500.00.

In response, Jerry states that there is no evidence in the record to enable the trial court to make a factual determination as to when the items were sold, under what circumstances, whether or not they were marital property, or any other pertinent fact. Jerry does concede that the \$2,500.00 year lease payment was

⁴ These assets included a three-car carrier, a 1995 Dodge flat-bed truck, a 1994 Cougar, a 1987 Ford motor home, a 1994 Altima, a 1992 Oldsmobile, a Honda Civic, 50 rolls of hay, and a mower.

placed in his personal account, but notes that the court similarly allowed Judith to keep cash placed in her account. Moreover, Jerry asserts that Judith did not raise this issue to the court below. Accordingly, Jerry asserts that the trial court's refusal to award money to Judith for these items was within its discretion, and should be affirmed.

The manner in which marital property is divided and valued is within the sound discretion of the trial court, and will not be reversed on appeal unless clearly erroneous. *See Cochran v. Cochran*, 746 S.W.2d 568 (Ky.App. 1988). Certainly, in asserting entitlement to the proceeds from the sale of these various assets, the burden lies with Judith to establish when they were sold, under what circumstances they were sold, and where the proceeds were ultimately distributed. The evidence presented on these issues below was for the trial court to review. Our review of the record reveals that based upon the facts before it, the trial court was within its discretion to rule as it did, and reveals no evidence which would lead us to believe that the trial court acted erroneously in the manner in which it divided this property. Accordingly, we affirm.

As her final basis of appeal, Judith argues that the lower court failed to divide the retirement accounts of the parties in accordance with applicable law. The court below ordered that each party keep their retirement account as separate property.⁵ Judith now argues that this is contrary to both the antenuptial agreement

⁵ In its order, the court set forth Jerry Corbin's retirement account as "American Funds IRA and Cincinnati Enquirer 401K" at a total value of \$8,700.00, and Judith's account as "Square D IRA", valued at \$3,095.73.

and the law. Judith states that after her marriage to Jerry in 1992, she did not work outside the home, although he continued to do so until his retirement in 2001. She further states that during the time that Jerry continued to work, the parties continued to fund his retirement accounts with earned marital income. Thus, she submits that the parties should each receive the non-marital portion of their retirement accounts, with the remaining marital portion to be divided between them.

In support of that argument, Judith cites our decision in *Vanover-May v. Marsh*, 793 S.W.2d 852 (Ky.App. 1990), in which we addressed a similar situation, wherein a husband's retirement account was earned in part prior to the marriage, and in part after the marriage. Our Court determined that the wife was entitled to a marital share of that portion which was earned during the marriage. Judith also relies upon KRS 403.190⁶ in support of her arguments in this regard.

In response, Jerry asserts that in making her arguments, Judith ignores the antenuptial agreement itself, which states:

It is expressly understood by the parties that any real estate or intangible personal property acquired by either party subsequent to the date of the marriage shall be the sole property of the party who holds legal title in any such real estate so acquired, or the party in whose name any intangible personal property is held, free and clear of all claims whatsoever from the opposite party.

⁶ This provision provides that, "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 spouse in some form of co-ownership."

Jerry asserts that the retirement account is clearly intangible personal property, which was held solely in his name, and which therefore is clearly governed by this portion of the antenuptial agreement.

It is the law of this Commonwealth that any increase during the marriage in the value of a retirement account is subject to division as marital property, to the extent that such increase was from contributions made during the marriage. *See Armstrong v. Armstrong*, 34 S.W.3d 83 (Ky.App. 2000). However, we are in agreement that the antenuptial agreement, into which Judith entered voluntarily, and which she herself argues is valid and enforceable, controls. Our review of the agreement reveals that it is clear and unequivocal with respect to the disposition of intangible personal property. Having so found, we affirm the trial court on this issue.

Having addressed the issues raised on appeal by Judith, we now turn to the issues raised by Jerry on cross-appeal. As his first basis for cross-appeal, while conceding that the antenuptial agreement was valid and enforceable, Jerry nevertheless argues that the trial court erred in awarding Judith any portion of the bank account in his name, and in awarding Judith a portion of the proceeds from the aforementioned sale of cattle jointly owned by the parties.

With respect to his bank account, Jerry argues that the trial court misunderstood the testimony with respect to the account, which he testified belonged to him long before the parties were married. Jerry notes that during the marriage, Judith's name was placed on the account, but was later removed from the

account in August of 2004, when, at Jerry's request, Judith signed a document requesting the bank to do so. Jerry acknowledges that approximately two weeks later, a total of \$13,000.00 was deposited in that account from two separate sales of cattle.

A review of the order issued by the trial court reveals that it found that the account was a "joint account" prior to the parties separation, and that accordingly, it should be divided equally among the parties. Further, it found that Jerry removed Judith from the account "without her permission," which the court described as "fraudulent behavior". Accordingly, the court found that the proceeds from the sale of the cattle, which had been deposited into the account, should be divided equally amongst the parties, with Judith to receive \$6,500.00.

Jerry now argues that the court's order results in a double recovery for Judith, by awarding her half of the value of the account, and then separately awarding her half of the proceeds themselves. Upon review, we are compelled to agree. In issuing its decision on this issue, we believe the trial court made a simple factual error in concluding that Judith had not provided permission for her name to be removed from the account. Indeed, our review of Judith's deposition reveals the following testimony:

Q: Did you subsequently learn that Mr. Corbin had removed your name from that account?

A: He removed it in 2004.

Q: So you found out –

A: August.

Q: -- that your name was taken off of that account?

A: He requested that I sign a paper to take my name off.

Q: And did you do that?

A: Yes, I did.

See August 16, 2007 Deposition of Judith Ann Hobbs Corbin, p. 20.

Having reviewed Judith's testimony in this regard, we simply cannot conclude that Jerry removed her name without her permission, or that he did so fraudulently. Further, our review of the agreement reveals that it clearly provides that each party is entitled to personal, real, and "all other" forms of property which he or she owned prior to the marriage. It is undisputed that Jerry owned this account prior to the marriage. It is undisputed that at the time of dissolution, his was the sole name on the account. As we have stated, it is our belief that Judith voluntarily and willingly removed her name from the account. Accordingly, just as we have concurred with the trial court's determination that Judith be entitled to all monies in the account held solely in her name, we believe Jerry to be entitled to all monies in the account held solely in his name.

Having so found, we reverse the trial court's award of \$6,500 to Judith for the sale of cattle owned by the parties. While it is clear that the cattle were in fact marital property, we find this situation to be no different than other instances during the marriage in which marital property was sold, and the proceeds deposited into Judith's account.⁷ Clearly, the sale of the cattle took place well before the separation of the parties. Accordingly, our law is clear that a party seeking to recover for marital assets which were sold or disposed of during the

⁷ See specifically, our discussion of the division of proceeds from the sale of the Harrison House and Glens Fork properties, *infra*.

marriage must prove a dissipation of those assets. As we have set forth in *Brosick v. Brosick*, 974 S.W.2d 498 (Ky.App. 1998), this would require that the money was expended for a non-marital purpose, that it was done in anticipation of divorce, and that it was done for the purpose of depriving the other party of his or her interest.

Our review of the record reveals that none of these facts were proven by Judith, and further, she makes no response to Jerry's arguments in this regard. Having so found, we cannot find that in selling the cattle and depositing the proceeds into his account, that Jerry intended to dissipate marital assets anymore than Judith intended to do when she took similar actions with respect to other items of marital property. As the account was clearly in Jerry's name at the time of dissolution, and as Judith willingly agreed to allow the account to be held solely in Jerry's name, we cannot find that she is now entitled to remove monies from that account on the basis of the sale of the cattle. Accordingly, we hereby reverse the trial court's order in this regard.

As his second basis for cross-appeal, Jerry argues that the trial court erred in failing to restore his \$10,000.00 non-marital down payment toward the Knifely Farm, which was the marital residence of the couple. Jerry testified that the Knifely Farm has been sold and the net proceeds are in escrow. Further, he argues that it is undisputed that he made a \$10,000.00 down payment on this property, consisting of non-marital funds coming directly from the sale of his duplex. Below, Judith confirmed that Jerry made the \$10,000.00 down payment, and testified that she did not know where the funds came from. The trial court

ordered the proceeds from the sale of the farm to be divided equally between the parties. Jerry now asserts that this was error, and that he should be awarded his \$10,000.00 non-marital interest prior to the balance being divided as marital property.

Our review of the record reveals that Jerry indeed testified that the \$10,000 deposit which he placed on the Knifely Farm property came from the sale of his non-marital duplex. Further, the record reveals that Judith conceded that Jerry made such a down-payment. While she was unaware as to where the funds for that down-payment originated, Judith did not dispute, and certainly did not rebut Jerry's assertion that they came from the sale of his non-marital property. Accordingly, we believe Jerry to have sufficiently traced the origin of these funds in accordance with KRS 403.190. Therefore, we believe he should have been awarded this sum prior to the division of the proceeds from the sale of the property. Accordingly, we reverse the trial court's order in this regard, and direct that Jerry be awarded his \$10,000 non-marital interest prior to the balance being divided as marital property.

As his final basis for cross-appeal, Jerry asserts that the trial court erred in allowing Judith to benefit from the sale of two pieces of marital real estate, namely, the "Harrison House", with net proceeds of \$97,000.00, and the "Glens Fork" property for \$52,500.00. Jerry asserts that the proceeds from the sale of these two properties were placed in Judith's personal account, without regard to the non-marital investments of the properties. Specifically, Jerry states that Judith

claims a \$30,000 non-marital down payment on the Harrison House, and that he made an \$8,000 non-marital contribution, from the sale of his duplex, for concrete and excavation work on the Glens Fork property. Jerry asserts that undisputed testimony establishes that the money for the Harrison House was paid by a check made out to both parties, which was initially deposited in a joint account, and subsequently transferred to Judith's account without Jerry's knowledge.

Accordingly, Jerry now argues that the trial court's award of these monies solely to Judith should be reversed. Specifically, he asserts that Judith should receive her \$30,000 down payment on the Harrison House property, that he should receive his \$8,000 non-marital contribution to the Glens Fork property, and that the remainder of \$111,500 should be divided equally between the parties. Having reviewed the record and the applicable law, we simply cannot agree.

Without dispute, both the Harrison House and the Glens Fork real estate were marital property. However, in contrast to the argument he made with respect to the cattle, namely, that he was entitled to the proceeds as they were placed in his account, Jerry now argues that Judith should not be entitled to proceeds from the sale of marital property which were placed in her account. Respectfully, this Court is of the opinion that the parties cannot have it both ways.

While Jerry asserts that Judith transferred these proceeds fraudulently, our review of the record does not reveal any substantial evidence to establish in support of his argument. As we have noted previously herein, the manner in which marital property is divided and valued is within the sound discretion of the trial

court, and will not be reversed on appeal unless clearly erroneous. *See Cochran v. Cochran*, 746 S.W.2d 568 (Ky.App. 1988). Our review of the record indicates that the trial court's assessment of the evidence and division of the assets in this instance was not clearly erroneous. Accordingly, we affirm this point.

For the foregoing reasons, we hereby affirm in part, reverse in part, and remand to the court below for: (1) reversal of its previous order dividing Jerry's CACU jointly between the parties, and for entry of a new order awarding the monies in that account solely to Jerry, (2) for reversal of its previous order awarding Judith \$6,500 for the sale of the aforementioned cattle (3) for entry of an order awarding Jerry \$10,000 for his non-marital share of the Knifely Farm and dividing the remainder of the balance equally between the parties, and lastly, for any other additional proceedings not inconsistent with this opinion.

ALL CONCUR.

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BRIEF FOR APPELLEE/CROSS
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