

ARKANSAS COURT OF APPEALS  
SARAH J. HEFFLEY, JUDGE  
NOT DESIGNATED FOR PUBLICATION  
DIVISION I

CA 06-1383

November 14, 2007

PHILLIP FUNDERBURG

APPELLANT

APPEAL FROM THE BRADLEY COUNTY  
CIRCUIT COURT  
[NO. DR2004-157-5]

V.

HONORABLE TED C. CAPEHEART,  
JUDGE

NANCY FUNDERBURG

APPELLEE

AFFIRMED

In this divorce case, the trial court made an unequal division of marital property. The issues raised on appeal challenge the trial court's decision. Finding no error, we affirm.

Appellant Phillip Funderburg and appellee Nancy Funderburg were married in April of 1961 when they were eighteen and sixteen years old, respectively. Nancy first filed for divorce in 1991, but she later dropped that action. She filed the present complaint for divorce in September 2004. The trial court entered a decree on August 20, 2006, granting Nancy a divorce on the ground that the parties had lived separate and apart from one another in excess of eighteen months without cohabitation. As per Nancy's request, the trial court divided the marital property unequally.

At the hearing in June 2005, it was established that Nancy's parents had put her through college and that she began working as a registered nurse at the Bradley County Medical Center in 1977. She was still working there at the time of the divorce. She participated in a 401k plan for her

retirement at work, which had accumulated \$120,000. Nancy also had an IRA containing \$16,000, and she had a savings account with a balance of \$2,200. She also had an insurance policy with a cash value of \$3,000.

Phillip operated a used-car sales lot and had a barber shop. He also sold antiques and had a pawn shop. More recently he had been selling portable carports. The antiques and collectibles from his businesses had an appraised value of \$84,332.09.

During the marriage, Nancy inherited property from her family. She and Phillip built the marital home on one such parcel located at 1004 Hankins Street in Warren, Arkansas. As of the time of the divorce, this property had been conveyed by the parties to one of their daughters with Nancy retaining a life estate in the property. Nancy also inherited another parcel located across the street at 1005 Hankins, which had a home on it. The parties had conveyed this parcel to their two daughters, and both parties had retained a life estate in this parcel. The parties also owned property at 302 North Myrtle that housed Phillip's barber shop, and another parcel of land at 1003 Hankins.

Although the initial mortgage for the construction of the marital residence at 1004 Hankins had been satisfied in 1988, this property was used as collateral for a \$70,000 loan obtained in 1996 in connection with Phillip's used-car business. This loan with Western Bank was not renewed in 2005, and Nancy paid off the outstanding balance of \$21,000 using money from her savings. The properties at 302 North Myrtle, 1003 and 1005 Hankins, and the antique collectibles were pledged as collateral for a \$216,000 loan for Phillip's business ventures. This loan was at Simmons Bank and was currently in default. Nancy had signed the original note but had not signed the last extension in 2004. The parties also had purchased a Kubota tractor in 1987 that Phillip used as collateral for a \$24,000 personal loan with the Arkansas Superior Credit Union.

The testimony established that both Nancy and Phillip resided in the marital home until 2004, when the trial court ordered Phillip to vacate the property after the temporary hearing. Afterwards, Phillip moved into the home across the street at 1005 Hankins. Nancy testified that, although they had resided together in the marital home, they had not lived as husband and wife since 1988, around the time when their first grandchild was born. Nancy explained that at that time she had asked Phillip about his relationship with his secretary, and that he put a gun to her neck and told her that she was not going to see the birth of their grandchild.

Nancy filed for divorce in 1991, but said she dismissed the complaint at Phillip's urging because he feared it would upset his mother who was ill. Nancy testified that she and Phillip did not share a bedroom or any of the household chores, such as laundry and cooking, and they did not see one another except on Saturdays. She said, "He went his way, and I went my way." Nancy stated that she was aware of a personal, intimate relationship Phillip had with another woman and said that Phillip spent a lot of time with his secretary. Nancy further maintained that she had been paying all of the utility bills for the house. She said she filed the present action for divorce after learning that Phillip had used the Kubota tractor as collateral for yet another loan.

Nancy also testified that she had been excluded from Phillip's businesses since 1988, when Phillip told her to "stay out of it," and that she had not been inside the barber shop in over twenty years. She said that she and Phillip kept separate bank accounts and that her accounts were funded with her earnings from work. Nancy testified that she and Phillip once shared a money market account that contained \$9,000, but Phillip cashed it out and kept all of the money. According to Nancy, at the time of the temporary hearing Phillip owned a Harley Davidson motorcycle that he had bought in 2002 for \$20,000. She had seen him riding another motorcycle since that hearing.

Nancy testified that her furniture, clothes, and pets remained at the marital home, but she had been spending the night with her boyfriend since December. She said her daughters encouraged her to stay there because of threats made by Phillip.

Phillip testified that he and Nancy had spent evenings together in the past five years, and they also ate meals and spent weekends together. He recalled, however, that he had testified at the temporary hearing that they had lived separate lives since 1991 and they had kept their finances separate, except when he was in financial trouble.

Phillip testified that the used-car lot was his primary business, but he did not make much money in any of his endeavors. Phillip stated that he bought the cars to sell through a floor plan at the bank using a \$100,000 line of credit. He further testified he had to obtain the \$70,000 loan because he was “in trouble” with the bank and “out of trust with the floor plan.” He maintained that his ever-increasing debt arose because he often co-signed the notes with his purchasers and was required to pay the notes when his purchasers defaulted or filed bankruptcy. Concerning the \$70,000 loan, Phillip said it was a balloon note and that he had made the monthly payments but was not able to pay the lump sum when it became due. He admitted that Nancy had made one or two payments toward the end and that “finally somebody had to pay it,” because he could not. He had tried to get an extension but his daughters were required to co-sign, and they refused.

Phillip further testified that he reported winnings from gambling to the IRS in the years 2000, 2001, and 2002, but he did not know how much money he had lost gambling in the past ten years. He also stated that Nancy had loaned him \$4,000 in 2003 for a credit card debt, and said he was not certain whether he had paid any of that back. He was one payment behind on the personal loan secured by the Kubota tractor. Phillip testified that he had less than \$100 in the bank and less

than \$50 in his pocket.

Phillip also testified that he had a relationship with a woman that began in 1995 and that it had lasted four or five years. He said that he did not presently own a motorcycle but that he rode one owned by his cousin.

Brenda Young, the parties' daughter, testified that she saw a mark on Nancy's neck after the gun incident in 1988. She said that the incident had been mentioned in Phillip's presence and he had never denied it. Brenda said she had been concerned about her mother staying in the marital home and had asked her not to stay there at night. She said she had seen weapons in the house across the street where Phillip had been living and that Phillip had cameras posted outside the house pointed in the direction of the marital home. According to Brenda, Phillip had harassed Nancy by recording her phone calls and had threatened that he better not see a certain person at the marital home.

Brenda testified that in 1988 her mother began sleeping in her sister's bedroom and that her parents had not had a relationship in years. She had not seen them together on weekends and Phillip was not usually home in the evenings. Brenda testified that Nancy paid the bills and would not ask Phillip for help with the bills because she was afraid of him.

Brenda said it was pretty obvious that Phillip was involved in a relationship with another woman. She had seen him and a Brenda Sipes driving around on a Harley Davidson motorcycle. She said that Phillip used to frequent casinos until he lost a lot of money several years ago and had slowed down.

The trial court issued its decision dividing the marital property in a letter opinion that formed the basis of the decree. The court found that the parties had lived separate lives and had behaved

as if they were divorced since 1991, even though they had lived under the same roof. The court also found that since 1991 they had maintained separate banking accounts and had separate bedrooms, and that they had carried on little conversation after this separation. In addition, the trial court found that Nancy had paid the household bills without contribution from Phillip. The trial court also specifically found that Phillip was less than a credible witness.

Based on these considerations, the trial court ruled that Nancy would have the sole use and enjoyment of the marital home during her lifetime. The court also found that it would be impossible for the parties to live across the street from one another, so if Nancy decided to live in the marital home, the property across the street would be leased and the rents divided equally between them. If Nancy decided not to live in the marital home, Phillip would be allowed to live in the house across the street and would pay Nancy an amount equal to one-half of monthly rental value.

The remaining real properties, as well as the antiques and collectibles, were to be sold with the proceeds to be applied to the debt at Simmons Bank. The court ruled that, if this debt arose before 1991, the parties were to equally divide any surplus from the sale. If the debt had been incurred after 1991, Phillip was awarded the surplus. He was also to be responsible for any deficiency.

The trial court required Phillip to reimburse Nancy the \$21,000 that she paid out of her savings to extinguish the \$70,000 loan at Western Bank and ordered this reimbursement to be taken out of his share of Nancy's retirement account. The court found this to be equitable because Phillip continued to make poor business decisions and had directed Nancy to stay out of his business, and because he continued to sell cars when he was out of trust with the bank.

The court found that Phillip had used the Kubota tractor as collateral for a personal loan that

was obtained without Nancy's knowledge. The court ruled that Phillip was to be solely responsible for this debt. The court also found that the tractor had a present value of \$10,000 and that Phillip was to pay Nancy \$5,000 out of his share of Nancy's retirement account.

The trial court ordered that each was to retain sole ownership of their individual checking and savings accounts and certificates of deposit. The court found that this was equitable because they had maintained separate lives since 1991 and that they viewed each other's income as "his" and "hers."

The court further found that the cash value of a life insurance policy with New York Life was \$3,000. The court observed that there had been no testimony as to when the policy had been purchased. The court ordered Nancy to pay Phillip one-half the cash value accruing between the date of the marriage and the filing of the first divorce complaint in 1991.

As for Nancy's 401k, Phillip was awarded one-half of the account that accrued between its inception and the filing of the divorce complaint in 1991. The court found this division to be fair and equitable because it had been accumulated by Nancy without any contribution from Phillip; because Phillip had benefitted from her income even though they had led separate lives; because Phillip had dwindled the estate by continuing to sell cars; and because Nancy worked and saved while Phillip worked part-time and found a lot of time for recreation that depleted the marital estate, namely gambling, motorcycles, and women.

Phillip challenges several aspects of the trial court's decision to divide the marital property unequally. Each point is considered under the following standard of review. On appeal, divorce cases are reviewed de novo. *Farrell v. Farrell*, 365 Ark. 465, \_\_\_ S.W.3d \_\_\_ (2006). With respect to the division of property, we review the trial court's findings of fact and affirm them unless they

are clearly erroneous or clearly against the preponderance of the evidence. *Id.* A finding is clearly erroneous when the reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been made. *Id.* We give due deference to the trial court's superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Id.*

Phillip first argues that the trial court erred in determining that the property acquired by the parties after 1991 when the first complaint for divorce was filed was not marital property. Phillip is correct in asserting that "marital property" means all property acquired by either spouse subsequent to the marriage unless it falls into one of the exceptions enumerated in our property division statute. Ark. Code Ann. § 9-12-315(b) (Repl. 2002). The statute also commands that all marital property is to be divided one-half to each party, unless the trial court finds that such a division is inequitable, after taking into consideration a number of factors. Ark. Code Ann. § 9-12-315(a)(1)(A). One of those factors is the "[c]ontribution of each party in [the] acquisition, preservation, or appreciation of marital property, including services as a homemaker." Ark. Code Ann. § 9-12-315(a)(1)(A)(vii).

The trial court in this instance made an unequal distribution of the parties' marital property based on this factor and upon finding that the parties had behaved as if they were divorced and had maintained separate finances since 1991. We cannot say that this finding is clearly erroneous, and an unequal division based on this finding is consistent with the decision in *Cavin v. Cavin*, 308 Ark. 109, 823 S.W.2d 843 (1992). In that case, the supreme court affirmed an unequal division based on the parties' individual contributions where they had been separated for a long period of time. We find no error on this point.



Phillip next argues that the trial court's ruling runs counter to our decision in *Baxley v. Baxley*, 86 Ark. App. 200, 167 S.W.3d 158 (2004). There, we reversed and remanded the trial court's unequal division of an investment account because the trial court merely listed the statutory factors supporting an unequal division but did not explain why the factors warranted an unequal division. Here, the trial court did not simply list the factors. Rather, the trial court explained its decision in some detail throughout the letter opinion. The court explained that it was making an unequal division of the marital property because the parties had been living separately and had treated one another's money as "his" and "hers." The court explained further that Nancy had been working and saving, while Phillip worked part time, accumulated substantial debts, and squandered money on gambling, expensive motorcycles, and his paramour. We are unable to say that the trial court's explanation was in any way deficient.

As his third argument, Phillip contends that the failure of his used-car business was a deciding factor in the trial court's decision and that it was error for the trial court to do so when there was no evidence of an intent to defraud. Appellant cites *Skokos v. Skokos*, 332 Ark. 520, 535, 968 S.W.2d 26, 34 (1998), where it was said that in a divorce action a spouse may recover his or her interest in marital property that the other spouse has transferred if the latter made the transfer for the purpose of defrauding the former of his or her interest in the property. In *Skokos*, the wife was seeking to recover monies the husband had placed in trust for their children during the pendency of the divorce. The supreme court affirmed the trial court's decision denying the wife's request based on this rule of law because there was no evidence of an intent to defraud. In this case, there was no transfer of property and no money that Nancy was trying to recover. We thus find no application for this rule of law here.

Phillip also contends that the trial court's decision was designed to punish him for making poor business decisions, gambling, having an affair, and purchasing a motorcycle. He argues that fault is not a proper consideration when dividing marital property. As we observed in *Keathley v. Keathley*, 76 Ark. App. 150, 61 S.W.3d 219 (2001), there is a difference between fault and equity. The trial court in this case determined that it would be inequitable to make an equal division of the marital property because of the parties' long separation, their maintenance of separate finances, and because Nancy had worked and saved while Phillip did not work steadily, incurred debt, and otherwise depleted the marital estate. In *Keathley*, we affirmed an unequal division of marital property where the husband gambled and fraudulently obtained credit cards on which he charged over \$100,000. See also *Stover v. Stover*, 287 Ark. 116, 696 S.W.2d 750 (1985) (affirming unequal division where wife attempted to have her husband killed); *Forsgren v. Forsgren*, 4 Ark. App. 286, 630 S.W.2d 64 (1982) (affirming unequal distribution of stock where wife excessively consumed alcohol and drugs resulting in massive medical bills). We find no merit in this argument.

Phillip's last argument is that the trial court erred when it made an unequal division of the marital property without making findings as to their value. Phillip complains that there was no evidence assigning the value of the life estates held by the parties in the residences at 1004 and 1005 Hankins and no evidence as to what portion of Nancy's 401k accrued since 1991. Appellant argues that the lack of evidence renders appellate review of the decision impossible, like the situation faced by this court in *Copeland v. Copeland*, 84 Ark. App. 303, 139 S.W.3d 145 (2003). We disagree. In *Copeland*, the trial court purported to make an equal division of marital property, but the record was unclear as to whether the trial court had accomplished that goal. The record in this case is developed sufficiently for us to determine that the trial court made an unequal division of the marital

property. Thus, appellant's argument provides no basis for reversal.

Affirmed.

GLADWIN and BIRD, JJ., agree.