

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-001018-MR

TERRY LEE LEAR

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT  
HONORABLE WILLIAM T. CAIN, JUDGE  
ACTION NO. 96-CI-00235

SHEILA DEATHERAGE LEAR

APPELLEE

OPINION  
REVERSING AND REMANDING  
\* \* \* \* \*

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by Terry Lee Lear (Terry) from an order of the Rockcastle Circuit Court in the parties' dissolution of marriage action. At issue is the award of sole custody to appellee, Sheila Deatherage Lear (Sheila); child support; and the division of the parties' property and debts. After reviewing the arguments of the parties, the record, and the applicable authorities, we reverse the judgment of the trial court and remand.

The parties were married on September 12, 1986. The marriage produced one child, Justin Blaine Lear (Justin), who was seven at the time the dissolution action was commenced. On

October 3, 1996, Sheila filed a petition to dissolve the marriage. The petition sought, inter alia, sole custody of Justin. In his response, Terry sought joint custody of Justin with Sheila serving as the primary physical custodian. On October 29, 1996, an agreed order was entered granting the parties temporary joint custody of Justin, setting child support, and establishing visitation. Contested divorce depositions were conducted, following which the case was taken under submission by the trial court. Each party tendered a proposed decree. On January 23, 1998, the trial court entered the findings of fact, conclusions of law, and decree of dissolution tendered by Sheila. Thereafter, Terry filed a motion to alter, amend, or vacate, or in the alternative, to make additional findings or, in the alternative, for a new trial. The motion was overruled. This appeal followed.

We first address Terry's last enumerated argument wherein he alleges that the trial court committed reversible error by adopting in whole the factual findings and decree tendered by Sheila's trial counsel. Under the circumstances of this case, we agree.

Following a motion by Sheila for the trial court to take the case under submission, the trial court entered an order directing the parties to file proposed findings of fact and a proposed decree of dissolution. Sheila's trial counsel tendered his proposed finding of fact and decree on January 8, 1998. On January 23, 1998, without alteration, the trial court entered the

findings of fact, conclusions of law, and decree of dissolution tendered by Sheila's trial counsel.

The delegation of the clerical task of drafting proposed findings of fact and conclusions of law under the proper circumstances does not violate the trial court's fact-finding and decision-making responsibility. Bingham v. Bingham, Ky., 628 S.W.2d 628, 629 (1982). Bingham illustrates circumstances under which delegation of this function is proper. In Bingham, the record revealed that the trial court was thoroughly familiar with the proceedings and facts of the case and that it had prudently examined the proposed findings and conclusions. This was evidenced by the fact that the trial court made several additions and corrections to reflect its decision in the case. Id.

Unlike in the Bingham case, here the record does not disclose that the trial court had a thorough familiarity with the proceedings or that it made a prudent examination of the tendered findings and conclusions. This determination is supported by the following: (1) the case was tried by deposition and hence the trial court was not directly involved in the taking of evidence, either personally or through a domestic relations commissioner; (2) the trial court adopted the findings, conclusions, and decree tendered by Sheila's counsel exactly as prepared, without making any changes so as to evidence that it had made an independent and prudent review of the tendered document; and, (3) as noted hereinafter, the findings of fact and conclusions of law tendered by Sheila's trial counsel were deficient such that, in any event, remand on several of the individual issues is warranted. See

also Callahan v. Callahan, Ky. App., 579 S.W.2d 385 (1979) (the appellate courts of this state have universally condemned the practice of adopting findings of fact prepared by counsel); Kentucky Milk Marketing & Anti-Monopoly Commission v. Borden Co., Ky., 456 S.W.2d 831 (1969) (to the extent that the court delegates its power to make findings of fact and draw conclusions, this is not good practice); United States v. Forness, 125 F.2d 928 (1942) (requirement that the trial judge file findings of fact has important purpose of evoking care on the part of the trial judge in ascertaining the facts); Rule of Civil Procedure (CR) 52.01 (in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment).

The findings of fact and conclusions of law and decree, insofar as they relate to the issues on appeal, are accordingly vacated and the case is remanded for an independent evaluation of the issues by the trial court. In furtherance of the proceedings on remand, we will briefly consider and offer instructions regarding the individual issues raised by Terry in this appeal.

Terry alleges that the trial court erred in granting Sheila sole custody of Justin when the evidence submitted showed no lack of cooperation nor any reasonable basis for said ruling. In its judgment awarding sole custody of the parties' child to appellee, the trial court stated simply that, "[t]he parties are the parents of one infant child, Justin Blaine Lear, age 7 years. . . . [t]he best interests of said child will be served by

placing custody with the mother." In child custody cases, the trial court must consider all relevant factors including those specifically enumerated in KRS 403.270(1) in determining the "best interests of the child." McFarland v. McFarland, Ky. App., 804 S.W.2d 17, 18 (1991). In so doing, it is mandatory under CR 52.01 that the facts be found specifically. Id. On remand, the trial court should proceed pursuant to these principles.

Terry claims that the trial court erred in not following the statutory guidelines in calculating his child support obligation by not giving him credit for health insurance paid; by not considering prior court ordered child support; and by failing to make findings as to the parties' respective incomes.

Sheila acknowledges that the calculation of Terry's child support obligation fails to include a credit for the cost of the child's health insurance and that Terry is entitled to have his child support obligation recalculated since the original calculation excluded this deduction. KRS 403.212(2)(g)[1.] excludes from the combined gross incomes of both parents the cost of health insurance coverage for the child. On remand, the trial court should factor this into its child support calculations.

KRS 403.212(2)(g)[1.] & [2.] require a credit for child support to a prior born child. The computation in the record corresponding to the calculated weekly obligation of \$63.39 fails to account for child support payments made by Terry for the support of his prior born child by a previous marriage. On

remand, the trial court should calculate Terry's child support so as to consider this obligation. Any deviation from the guidelines should be accompanied by a written finding or specific finding on the record by the court, specifying the reason for the deviation. KRS 403.211(2).

Terry contends that the trial court erred in awarding Sheila an interest in the marital residence merely by relying on a figure testified to by Sheila without any supporting evidence. Sheila's testimony relating to this issue was as follows:

Q. [by John E. Clontz, attorney for appellee] Now he owned the residence that you all occupied while you were married, before you got married?

A. Yes.

Q. But it had a debt on it and that debt was paid while you were married?

A. We paid on it some. I am not sure that it was even . . . he told me that it wasn't on the house, that it was a personal loan.

Q. Are you making a claim to any amount of money that was paid to reduce the principle amount for the debt while you were married?

A. Just some things that I had done to the house that we had worked on and stuff to make the house a little better.

Q. Describe those changes to the court.

A. Like the inside, a lot of painting, a lot of papering. The outside, there was painting of the trim and everything, the upkeep of the house.

Q. How much have you valued those improvements to be?

A. Right now, I have no idea.

Q. Well, how much money are you claiming that he owes you then if he keeps that property?

A. Around \$800.00.

. . . . .

Q. [by Debra H. Lambert, attorney for appellant] You testified that during the time that you lived in the house that you all did some painting and papering, just general upkeep of the house. Is that correct?

A. Yes.

Q. Did you all add on to the house or do anything other than repairs and upkeep?

A. No.

Q. And you mentioned earlier in your testimony that you had no idea the value of the improvements but mentioned the figure of \$800.00. Is that an amount of money that you think Mr. Lear owes you or that Terry owes you?

A. Approximately.

Q. How did you come up with that amount?

A. Because I tried to think of how much the paint was. I tried to think of how much the wallpaper and there was some blinds and different things that we had put up that cost.

The trial court made the finding that "during the marriage the parties made payments on the non-marital debt owed by respondent and the debt was reduced by approximately \$3,600.00. Further the parties made improvements to respondent's non-marital land." Based upon this finding, the trial court awarded Sheila "\$800.00 as her share of the marital reduction of respondent's non-marital debt and improvements to his non-marital land."

As used in KRS 403.190 in referring to restoration of the property of each spouse, the word "property" means equity. Robinson v. Robinson, Ky. App., 569 S.W.2d 178, 181 (1977) overruled on other grounds by Brandenburg v. Brandenburg, Ky. App., 617 S.W.2d 871 (1981). Brandenburg sets forth a methodology for separating out marital and non-marital equity in a home owned by one of the parties at the time of marriage. Here, Sheila was awarded \$800.00 based upon her estimation of the cost of wallpaper, paint, and blinds. There is no claim that the funds used to finance these improvements were her non-marital property, and there is no evidence appearing in the record regarding the equity in the home at the time of the marriage or upon separation. The fact that the parties expended \$800.00 on home improvements over the course of their ten-year marriage, absent proof that the funds were non-marital and absent an equity analysis under Brandenburg, does not support the \$800.00 awarded to Sheila. On remand, the trial court should make an award of the marital portion of the equity in the home pursuant to the principles set forth in Brandenburg.<sup>1</sup>

Terry next argues that the trial court erred in failing to assign the marital debt owed to Terry's parents. Terry testified that during the period that he was on strike against his employer, Gibson Greeting Cards, he borrowed various sums of

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<sup>1</sup> The Brandenburg formula is not mandatory; however, any alternative procedures utilized must establish the relationship between the contributions of the parties. Brandenburg, 617 S.W.2d at 872.



money from his parents. He further testified that he had paid back \$3,000 of the debt and that, as of December 1997, he still owed his parents \$17,000 on the debt. In its findings of fact, the trial court stated,

Respondent's testimony concerning a marital debt owed to respondent's mother was not sufficient to establish the existence of a debt. There was no proof on the amount owed at separation, whether the initial \$1,000.00 had been paid, the dates and times other credit was extended or the amount that would be a non-marital debt (used by respondent to pay child support from prior marriage). Further, any transactions after August 15, 1988[,] between respondent and his mother would have been credit on an open account and the right [] to sue for any amount is now time barred by KRS 413.120.

KRS 413.120(6) requires that an action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated in KRS 413.120, be commenced within five years after the cause of action accrued. This provision became effective on August 15, 1988. We disagree that an action for "any transactions" between Terry and his mother after August 15, 1988, would necessarily be time-barred by the statute of limitations.

Debts accrued during a marriage are presumed to be marital debt. Daniels v. Daniels, Ky. App., 726 S.W.2d 705, 706 (1986). On remand, the trial court should undertake an independent review of the evidence and determine if any of the amounts allegedly borrowed by Terry from his mother represent a legitimate marital debt subject to division between the parties.

Terry contends that the trial court erred in awarding Terry's non-marital grill to Sheila. The opinion of the trial

court does not include a finding as to whether the grill is the non-marital property of Terry. On remand the trial court should make a finding as to whether the grill is non-marital. If it is, the grill should be awarded to Terry as his non-marital property.

Terry maintains that the trial court erred in ordering the parties to file a joint income tax return for 1997. The trial court's finding states merely that "[t]he parties should be ordered to file a joint income tax return for the 1997 tax year," and the decree then implements this finding. Terry argues that he should not be required to file a joint return with Sheila because the parties lived separate and apart for all of 1997 and because he is entitled to various deductions and withholdings exclusive to himself. Sheila argues that the ordering of joint returns was appropriate because she is entitled to a half-share of a National Labor Relations Board back wages award to Terry and, "[t]he court's decision to require a joint income tax return for 1997 enables Sheila to receive her share of this marital property. . . . [t]o do anything else would allow Terry to receive a windfall from the excessive amounts withheld by his employer."

The joint-return requirement was made in conjunction with the awarding of one-half of the NLRB award to Terry. We disagree with Sheila that the failure of the parties to file joint returns "would allow Terry to receive a windfall." It is not necessary for the parties to file joint returns in order for Sheila to receive her distribution of her share of the NLRB

award. Terry can be ordered to pay Sheila's share of the refund without the additional step of filing joint returns.

A trial court has authority regarding tax issues. Shmitz v. Shmitz, Ky. App., 801 S.W.2d 333, 336 (1990) (decision to require parties to file joint tax return rests within the discretion of the trial court). This authority should be exercised so as to maximize the amount available for the care of the children. See Hart v. Hart, Ky. App., 774 S.W.2d 455 (1989) (trial court should allocate income tax exemption for dependent children among divorced spouses so as to maximize amount available for care of children). On remand, the trial court should ascertain and make appropriate findings regarding whether the filing of a joint return will result in an overall tax advantage to the parties. The trial court should exercise its authority to require Terry to file a joint return only if it is ascertained that a joint return will result in an overall advantage to the parties so as to maximize the amount of funds available for the care of the child.

Terry contends that the trial court erred in failing to assign the marital interest in the parties' respective retirement accounts. Terry argues that each party is entitled to 50% of the equity in the other's retirement account. Sheila argues that the trial court properly awarded each party his or her individual retirement account in its general award in which "[e]ach spouse is assigned his or her personal effects and any other property now standing in the name of said spouse not disposed of in this decree." Pension benefits earned in the course of the marriage

are marital property subject to division. See Owens v. Owens, Ky. App., 672 S.W.2d 67 (1984) (vested pension benefits divisible marital property); Poe v. Poe, Ky. App., 711 S.W.2d 849 (1986) (nonvested benefits subject to distribution). On remand, the trial court should treat the pension benefits earned in the marriage as marital property and make an equitable division of those pension benefits, which may include awarding each party his or her individual account.

Terry asserts that the trial court erred in failing to address the credit card debts owed by the parties. Sheila maintains that the decree did properly assign the credit card debts to her in that portion of the decree which states that, "[e]ach spouse is assigned his or her personal effects and any other property now standing in the name of said spouse not disposed of in this decree." We disagree that this residual property disposition adequately assigns the credit card debts to Sheila. On remand, the trial court should more specifically assign these debts to Sheila.

For the foregoing reasons, the judgment of the trial court is reversed and remanded for further proceedings consistent with this opinion.

KNOPF, JUDGE, CONCURS IN RESULT ONLY.

EMBERTON, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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